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 II

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on the bench all morning. I'd like to take a 5-minute recess.

MR. KNOTTS: Okay.

THE COURT: And it's for my comfort. So thank you for that indulgence.

[Recess taken from 11:52 a.m., until 11:57 a.m.]

THE COURT: Please remain seated. And thank you for your professional courtesy.

Mr. Lutz, your argument, please.

MR. LUTZ: Thank you for giving us the time. We're very happy to.

THE COURT: Well, I'm going to -- for your -- that Summary Judgment Motion, I'm going to move that to the afternoon. But we'll deal with that later.

MR. LUTZ: Sure.

THE COURT: Yeah. Go ahead, please.

MR. LUTZ: Just to respond directly to a couple of the points that you raised on the trial schedule, for example.

I mean, there's a hundred percent certainty that if you grant the Motion for Leave to Amend, the trial schedule gets moved. At a minimum, I would think six to nine months. There's going to be additional discovery, which I'll get into briefly today. There's going to be new Motions for Summary Judgment, obviously, because there's going to be a new pleading. There's going to be a Motion to Dismiss by Mr. Cargile who still has his 12(b)(5) rights. There's going to be another Motion on Rescissory Damages Claim, the

prayer for relief. There -- a hundred percent certainty that the trial date gets moved.

I mean, we've been litigating this case, as Your Honor noted, for three and a half years now. It's going to be four years before we go to trial. It's too long.

Let me just jump right in. And I want to focus on the two issues that are really central on the new pleading, and that's the rescissory damages and the addition of Mr. Cargile.

There are limits to Rule 15. And this is a classic case of undue delay, particularly as to those two issues.

Mr. Knotts noted that we're really focused on undue delay and not bad faith, and he gave us credit for that. Look, I don't make bad faith kinds of arguments, and I wouldn't do it in this case. I think we have many grounds to focus on. Undue delay is just such an obvious ground on which to move, I think there's plenty there for Your Honor to deny the motion.

Let me start with rescissory damages. And if I may, Your Honor, I have a brief set of demonstratives that I think will be helpful in going through.

THE COURT: Have you provided us that?

MR. LUTZ: I'm going to right now.

THE COURT: Is it Mr. Knotts? I called you Mr. Knott. Did I --

MR. KNOTTS: It's K-N-O-T-T-S, Knotts.

THE COURT: I'm sorry, Mr. Knotts. I try to get the names

correct.

MR. KNOTTS: Sure. Thank you.

THE COURT: Approach with that, please.

MR. LUTZ: I have a couple. Do you want more than one?

THE COURT: Nope.

MR. LUTZ: So let me -- and I want to use this to talk through rescissory damages. And I assume rescissory damages is a new one for Your Honor. It's a new one in Nevada.

THE COURT: It is.

MR. LUTZ: There's never been a case that's ever awarded rescissory damages.

THE COURT: It is. But I can figure it out.

MR. LUTZ: Of course. Of course, you can. It's just a new concept, generally.

THE COURT: Right.

MR. LUTZ: There's been two decided cases in the history of law that have awarded rescissory damages in a merger case. This is not a common topic.

I want to just focus on the two kinds of damages that are sort of at issue here. Compensatory damages, which is sort of the normal 99 percent of the time that's what's at issue in a merger case; and then rescissory damages.

And this slide identifies sort of the purpose of each set of damages, of how they're measured and the evidence that's necessary.

Compensatory damages are normal damages, out-of-pocket damages that you see in virtually every merger case. And measures damages -- and the purpose of it is to award the plaintiff out-of-pocket damages for the harm they suffered at the time of the merger. The way that it's measured is to look at what was the deal price, and then compare that to what is the, quote, unquote, fair price? It's all focused at the time of the merger.

And the evidence, of course, that's needed for purposes of compensatory damages is what is the current -- what is the operative reality of the company at the time of the merger? And there's a battle about what the fair price is and how it relates to the merger price -- all focused on the day of the merger; okay?

Rescissory damages is a completely different paradigm. You see it -- in the limited cases where you see it, it's in a squeeze-out merger, meaning there's a controlling stockholder who owns typically more than 50 percent of the stock. He or she or it, if it's an entity, acquires the rest of the company. And there's a claim that says you paid an unfair price for that stock, for the rest of the stock. That's why --

And that goes to really what is the purpose of rescissory damages. In those cases, it's to disgorge the profits that that controller obtained. And how do you do that? You look at over time. So it's not -- unlike compensatory damages, which is focused on the day of the merger, right, that's how they're measured. Rescissory damages focus on -- it focuses on some date long after

the merger.

In this case, if, you know, you permitted this to proceed, it would be the day of judgment in this case. So like four and a half, five years after the merger. That's why the evidence that's needed is so critical here -- and which I'll talk about.

The evidence in a rescissory damages context is about after the merger. It's all about the period after the merger, which in this case will now be, like, a 4- or 5-year period, as opposed to compensatory damages where the evidence and the discovery is focused on the day of the merger, what was the company worth? So in a rescissory damages -- and I'm now in the last box there for the evidence needed --

THE COURT: Right.

MR. LUTZ: It's evidence that -- about how the company performed over that 4-year period. How -- what were the macro economic factors? What were the market factors? How did the company change, if at all? Why did it change? All of the stuff that's in that long period afterwards. Okay? It's fundamentally different than compensatory damages. This is a significant fundamental change in the case, if rescissory damages is allowed.

This is not -- they say in their brief, on page 3, that this is just an additional detail. This is not an additional detail. This is a fundamental alteration of what this case is and about all the discovery that would need to be performed in that 4- or 5-year period after the day of the transaction.

Now, let me tell you why rescissory --

THE COURT: So but they've already disclosed rescissory damages.

MR. LUTZ: No. And I'll get there.

THE COURT: Okay.

MR. LUTZ: They disclosed it after fact discovery. Okay? And let -- and actually, this goes right to the next slide. This is the timeline we've anticipated. This is the timeline that shows the rescissory damages issue in this case. So if you look at the far left --

THE COURT: Right.

MR. LUTZ: -- at the very outset of this case --

THE COURT: From the complaint to the first amended complaint.

MR. LUTZ: Exactly. So they filed the initial complaints in this case in March of 2016; sought rescission and rescissory damages. They withdrew their motion for preliminary injunction. Those complaints went away. And then, of course, they filed after expedited discovery, the first real complaint -- the first amended complaint in this case, consolidated complaint. They -- no claim -- no prayer for relief or rescission -- or rescissory damages. That motion -- our Motion to Dismiss was granted.

They filed a Second Amended Complaint. Again -- and that's now the operative complaint in this case -- no prayer for rescission, no prayer for rescissory damages.

They filed, and this is critical, and I'll talk about this, they

filed their initial -- served their initial disclosures on May 15th, 2018, two years into this case.

Now, Rule 16.1, which they are bound by, requires the disclosure of the computation and category of damages that a plaintiff is seeking. No mention whatsoever of rescissory damages in their Rule 16 disclosures.

Fact discovery finishes on May 10th. They didn't serve a single document request asking for documents related to the post-closing performance of Newport.

So rescissory damages is not in the case for three -- three plus years, not at all. Only after fact discovery is closed, and they -- do they issue their first expert report. And then, only then, do they disclose, in seven pages, that they're seeking -- that rescissory damages is one of the measures of damages that they're going to seek in this case. That is the first time, after fact discovery is already over. After more a year after they serve their initial disclosures, when they were obligated to identify the category of damages they're seeking, they -- that's when they do it.

Of course, their expert is going to respond and say, well, there -- that -- from what you put in here, that doesn't amount to rescissory damages. But there's been no discovery on it; right?

And then we see in their proposed amended complaint in August, you know, two months ago, that they now have a prayer -- a real prayer for relief that specifically mentions rescissory damages.

Now, the key point is this, we never had notice at all

during the three and a half years of active litigation that they were seeking rescissory damages, whatsoever.

This was not a footfall. This was not a simple thing. This was a clear violation of Rule 16.1 of the Nevada Rules of Civil Procedure. That's the initial disclosures requirement.

Rule 16.1(a)(1)(a), which is the main part about initial disclosures, says -- it says this, quote, a party must without awaiting discovery provide to the other parties -- and it includes, quote, a computation of each category of damages claimed by the disclosing party.

Plaintiffs indisputably did not do this. They did not include rescissory damages in their Rule 16.1 disclosures. And it's remarkable what they say in their reply brief and what Mr. Knotts argued today. He says, Well, we covered it in our expert report. Okay? He said, There's another provision of 16.1 that says, This is what you have to do for expert reports.

That doesn't absolve them of their initial disclosure requirement to identify the category of damages that you're seeking. Of course, the whole point of Rule 16.1 and this provision is to let the -- give the defendants notice of what damages are being sought so that -- why? So that they can take discovery to identify evidence that disputes or negates or attacks the damages. That's what the whole point of Rule 16.1 is.

And even if you go on to read the rest of 16.1, there's the second part, 16.1(a)(1)(b), which is just the next one down. It says, well, there's certain categories of cases for which Rule 16.1 initial

disclosures don't make sense. Of course, this is not among those 10; right? There are things that have nothing to do with these kinds of cases.

And even the provision that they point to about expert disclosures, they say, well, we can just put it in our expert disclosures. That provision, which is 16.1(a)(2) says -- it starts like this -- and it starts by saying, In addition to the disclosures required by Rule 16(a)(1), the initial disclosures requirement, this is what you have to do for expert disclosures. Okay.

So there's just absolutely no question that they did not comply with Rule 16.1 by -- and they didn't provide us rescissory damages on time in this case. That is like clear undue delay right there as a violation of 16.1.

THE COURT: Well, if I allowed them to amend their -- that would reopen all of their --

MR. LUTZ: Yeah. And then we're going to be here for another year; right? It's -- it's too late. They didn't comply with Rule 16.1 during the period of time when they were supposed to.

THE COURT: And I don't buy that because the first and second amended complaints don't have that cause of action.

MR. LUTZ: That prayer for relief.

THE COURT: Right.

MR. LUTZ: Right. So how -- so the obvious implication of that is that's not in the case; right? Which is why we wouldn't have taken discovery on it. If it were to be in the case, they should have

said it in the complaints and they should have said it in the Rule 16.1 disclosure, so that we would take discovery on it.

Now, obviously it's enormously prejudicial to us, and it really goes to the discovery question; right? Plaintiffs didn't disclose that they were seeking this until after fact discovery had already closed.

And this goes to what is the -- so what's the big deal? What is the discovery that you need? And this goes to that 4-year period that I described. Rescissory damages requires proof regarding the company's performance in the years after the transaction at issue -- market conditions, changes to the company, how did it perform, why did it perform, who left, who came? What was the business climate at the time? All that stuff is absolutely relevant. And you don't have to take my word for it.

This is what plaintiffs say in their reply brief. They say on page 14, To proof rescissory damages, you, quote, postmerger performance is crucial. That's their words. Okay?

The whole point, as I said, of 16.1 is to give us notice of what we need to prove in discovery or disprove, as it were, for rescissory damages. We had no notice during fact discovery whatsoever that this fundamental change in the case was going to happen three and a half years into it.

Let me turn to Mr. Cargile, unless you have questions on rescissory damages.

THE COURT: No.

MR. LUTZ: This, again, I think, is a classic example of undue delay and would be deeply prejudicial to Mr. Cargile to be added as a defendant, you know, almost four years into this case, particularly given what's transpired and all the discovery that was given from him. And I'm going to go through some of it with you.

The -- these facts are clear -- and I'll show you some of this. More than three years ago, there's a three-year statute of limitations for breach of fiduciary claims. So the three-year period is critical here. More than three years before they filed their proposed amended pleading, this is -- the plaintiffs knew who Mr. Cargile was. They knew that he was the chief financial officer of Newport. They knew that he prepared the projections -- this is a projections case -- that he prepared the projections at issue. They knew at the --

They knew him so well that when you granted expedited discovery more than three years ago now, what did they do, they asked for Mr. Phillippy's e-mails; they asked for Mr. Potashner's e-mails; and they asked for Mr. -- who is the chairman of the board; and they asked for Mr. Cargile's e-mails. They knew who he was.

We produced, again, more than three years ago -- and I'll get into some of the details -- almost 4000 e-mails from Mr. Cargile's personal files. They had his e-mails. They produce -- they had them all more than three years ago. And indeed, they made numerous arguments in their pleadings, more than three years ago, about Mr. Cargile's involvement in the transaction. This was not a secret. Okay?

Two issues for him, undue delay and then the futility in the statute of limitations.

The next slide I'm not going to go through. But this shows a similar timeline with respect to Mr. Cargile's involvement or what they knew about him throughout 2016, again, more than three years before they filed their proposed amended pleading.

I don't want to waste the Court's time and spend time on that, when I can jump into the more important issue which is, well, what did they know? What specifically did they know about him? And that's the next slide.

There really is no credible argument that plaintiffs didn't have all that they needed in order to discover, or at least through reasonable diligence realize that they had a potential claim against Mr. Cargile. That is the discovery rule. It's not that they had every single detail.

And I'll talk about the text messages that they say sort of magically triggered their awareness, which I think is just not credible.

The question on the discovery rule is did the plaintiffs have -- if they exercised reasonable diligence, have sufficient information to investigate whether there was a claim, a potential claim here? I mean, they didn't -- they had easily enough information for that.

And so how do you do that? How do you know that? And what we've done here on this slide is say, well, what do they now

allege in the proposed amended pleading? What are the core allegations against Mr. Cargile?

And we can show for each of these that they had plain information relating to exactly those issues. First, they say, well, Mr. Phillippy and Mr. Cargile developed the base case projections which were used in the transaction, which they criticize. They had in the production of Mr. Cargile's e-mails, more than three years ago, e-mails showing Mr. Phillippy and Mr. Cargile discussing and putting together the base case projections. Okay?

Number two, the second bias. They say, well, Mr. Cargile engaged in fraud and intentional misconduct when he told JP Morgan to rely on the base case projections. But what did they have? They had e-mails showing Mr. Cargile approving the projections and personally sending them to JP Morgan. These are in the e-mails that they had more than three years ago.

The next box, they say, Mr. Cargile did -- and Phillippy had a power struggle, and there was a dispute between them. Well, what did they have? They had, in Mr. Cargile's e-mails that we gave them, a memo that Mr. Cargile wrote talking about that Bob Phillippy, quote, informed me that he didn't trust me anymore and I should leave Newport.

Next, they say, well, there's -- their newest theory in the shifting theory in this case is this reorganization plan. They say, well, Newport had a reorganization plan that they didn't disclose to share -- it wasn't adopted, but they didn't disclose to shareholders.

That's the newest theory.

Well, what do they have in the production more than three years ago? E-mails between Cargile and Phillippy exchanging versions of the proposed reorganization plan, the purported reorganization plan.

And then finally they say, Well, Mr. Cargile engaged in intentional misconduct when he pursued self-interested transaction-related compensation. He basically asked for more information -- more compensation at the end of the deal.

Well, when they deposed Mr. Potashner more than three years ago, during expedited discovery, he testified that Mr. Cargile told him he would stay at Newport, quote, until we play out the transaction possibilities, but that Mr. Cargile would like to get something for it.

All of the core allegations that are in the proposed amended complaint, they had that information more than three years ago. And what do they say to that? They say two things. One is, we got additional details in the text messages.

Your Honor, they -- the additional details is not the test. And the additional details that they point to, they don't even talk about them specifically. What do they -- what are they? That Mr. Phillippy and Mr. Cargile had a dispute between them, a personal dispute.

Guess what, they knew that already.

And two, that Mr. Cargile had asked for compensation at

the end of the deal. Mr. Potashner testified to that. The additional details means nothing about the discovery -- for the purposes of the discovery rule and the statute of limitations.

And then what's the other thing they say? They say in their amended complaint, in the proposed amended complaint, paragraph 280, it was -- we were surprised by it. They said, Yes, we had these documents more than three years ago. They anticipate and sort of acknowledge that they've got a real statute of limitations problem. They say, yes, we got all these documents. But we didn't conduct a, quote, full review, unquote, of them until later. That is not an excuse. That does not toll the statute of limitations because they hadn't looked at all these documents that they had.

This is not like every case that they've cited and that probably you've seen before on statute of limitations and whether the discovery rule applies, where it's some article in the Internet that whether -- and the question is always whether the plaintiffs, through the exercise of reasonable diligence, could have discovered that information that allowed them to plead a claim. That's -- I mean, at least when I've dealt with this issue before.

THE COURT: Or should have.

MR. LUTZ: Or should -- right.

THE COURT: [Indiscernible.]

MR. LUTZ: Should -- knew that they could have had a claim or should have looked in that place. And it's -- did they look in the 10K and it was hard to find? All those issues.

This is fundamentally different. There were almost 4000 e-mails showing what Mr. Cargile did literally every single day of the transaction that go directly to the allegations that they now plead in the proposed amended complaint. They had those literally produced in this case, more than three and a half years ago -- more than three years ago, which is therefore barred by the statute of limitations. This is -- I mean, candidly in my view -- and I know I'm an advocate -- this is not even a close case. The statute of limitations totally bars a claim against Mr. Cargile here.

So I'm trying to be sensitive to your time. And look, I don't think I need to go through prejudice. I mean, it would be enormously prejudicial to bring him into this case three and a half years into it. He hasn't been involved in the case other than receiving a subpoena a couple months ago. He was deposed at a time when he wasn't a defendant in the case. They didn't tell him that he might be a defendant in the case. Indeed, they told him the opposite during his deposition. And they said, look, there's only one nondirector defendant in this case, and that's Mr. Phillippy.

Then they deposed him. They had these text messages, that according to them you can take -- believe it or not, I have my serious doubts about it -- that the text messages were supposedly the magic trigger. They had these text messages before they deposed him, and they still didn't tell him.

It would be enormously prejudicial to bring him into this case now, particularly when these -- there are these massive statute

of limitations problems to doing so.

So look, we think that there is an absolute clear case of undue delay here. There's futility with respect, in particular, to Mr. Cargile. Don't -- Mr. Knotts says, look, the plaintiff -- defendants are not contesting that we've adequately pled a claim. That is absolutely not true. If, for some reason, the complaint goes -- the proposed amended complaint goes forward, of course, Mr. Cargile is going to file a motion -- a 12(b)(5) motion. He doesn't need to right now. This complaint doesn't exist yet.

So there's a clear case of undue delay, particularly as it relates to rescissory damages, which would require more discovery to -- depositions of MKS, in particular, on this posttransaction time frame.

Witnesses who were there, who left, who can testify as to what was changed from the Newport business when it was then moved into the MKS business. All -- that is absolute necessary discovery.

Our expert would have to put in a new -- we would have to, in defending our clients, have a new expert report based on that new evidence demonstrating the complete lack of rescissory damages here.

There would be motions on the inability of them to show the availability of rescissory damages, given that it only applies in this squeeze-out controller context.

The point is, if you grant this motion, there is going to be

another 8 -- 6 to 12 months, I would say, I'm just guessing, we'd have to figure it out -- but there's going to be an abundant -- there's going to be a lot more time that's going to be needed for this case. There's no doubt that the trial gets moved until much later. It is fundamentally unfair. It's undue delay. It's prejudicial. And it should be denied.

THE COURT: Thank you.

All right. Mr. Knotts, your reply, please.

MR. KNOTTS: Pardon me?

THE COURT: Your reply, please.

MR. KNOTTS: Okay. Thank you, Your Honor.

So I want to start with -- we'll start kind of in reverse order from what Mr. Lutz was talking about with respect to Mr. Cargile. And then we'll go on.

Look, you know, this notion that we are -- we're making an argument that all of this was because of a delay in reviewing documents, that's a mischaracterization.

THE COURT: I've already told you I don't believe you lack diligence in this case.

MR. KNOTTS: Yeah. And it's also a mischaracterization of what we actually alleged in the pleading.

The statute of limitations allegations against Mr. Cargile are clearly based on the late production of text messages, which all of a sudden caused an additional -- caused serious concern on our part that wasn't there earlier.

So Mr. Lutz talked about -- we had 4000 e-mails showing what Mr. Cargile did every day.

Well, here's what we didn't have -- and they also say that in expedited discovery defendants provided e-mails from Mr. Cargile and Mr. Phillippy.

You know what they didn't provide, when Mr. Phillippy knew that he had exchanged highly relevant text messages, they didn't disclose -- if we're going to talk about disclosure obligations -- they didn't disclose those text messages as a source of ESI until we moved to compel.

Mr. Lutz says, Well, Mr. Cargile, we knew who he was. We knew he participated in preparing projections, and we had e-mailed showing that he -- what he did.

Well, here's what we didn't have until we filed a Motion to Compel and won. Here's one of the text messages -- and again, this evidence -- this is more than just a personal dispute. This is evidence of an intentional misconduct in connection with the merger.

Here's what one of the texts said, The fact that Chuck Cargile would even ask for special comp treatment beyond others, even in the more lucrative change in control scenario, which he doesn't deserve, is outrageous and insulting.

This is in the text messages that came in after we moved to compel the defendants that didn't exist.

Frankly, the next message goes on from Mr. Phillippy:

Frankly, even the concept makes my blood boil.

Again, Mr. Coyne and Mr. Potashner -- Mr. Potashner produced additional texts, saying Chuck was asking for comp for just hanging around. Ridiculous -- redic, was the words -- or was the word used in the text.

That's not just a personal dispute, as Mr. Lutz says. So he tries to say that we had evidence of a personal dispute earlier, and that the text messages just showed personal dispute, therefore, we had all of it earlier. That's not a personal dispute.

That's asking for personal payments in connection with a merger at the same time, according to one witness, at the very end of the fact discovery period said you were instructing -- that Mr. Cargile was instructing him to rely only upon these base case projections. Again, at that point in time, the document said do not use Willam -- or vice versa.

These text messages were a game changer, and we also needed to find out what they meant in depositions.

So I think the notion -- and I have no doubt that if we would have pled a claim just based on Mr. Phillippy knowing who he was and just on the fact that he helped prepare projections, we would have been dismissed.

We've been dismissed once in this case. Your Honor granted the leave to amend. We were able to -- we were able to move the case forward, so we are sensitive to that.

And if we had moved to name Cargile before evidence of

his illicit misconduct or his illicit conduct came in, we would have been dismissed with prejudice.

The class is now free to file an additional complaint against Mr. Cargile -- if it's not allowed in this particular case. But had we tried to file too early, there'd be no shot, and we'd be at trial where the defendants are pointing, just as they did at the tail end of the fact discovery period, to someone who isn't in the courtroom.

On the rescissory damages point -- as I think we both agree, rescissory damages is a measure of damages for breach of fiduciary duty. It doesn't change the underlying breach. The underlying misconduct is still what it is. But it's based on essentially the performance of the merged entity -- of the sold entity after the close.

So rescissory damages are not ripe, at least from the plaintiff's perspective, until the company -- until it's known that the company's actually doing well after the close.

And I'll add that Newport's performance is publicly disclosed, and that's alleged throughout the complaint. The MKS, the acquirer, publicly reports Newport as a standalone division. So defendants had access to this evidence.

We asked on late April, again, I think, MKS's corporate witness about the post-closed performance of Newport, which again is publicly disclosed. We introduced exhibits on that. Defense counsel, Mr. Davis, asked five or six -- we quoted them in the briefs -- very good questions, about Newport's post-closed performance. So

we were all aware of this issue and we conducted some fact discovery on this issue.

And the other point I think that's important that Mr. Lutz makes that -- and it's six to nine months, and then he said, I think six to twelve months, and all this discovery. Again, they don't actually say what party they're going to subpoena. But let's -- because they don't identify that, they don't identify documents.

But let's say, for instance, that it's MKS, the acquirer -- there's one problem with that. We sent a subpoena to MKS in connection with discovery. We asked for, you know, all of their analysis, their communications with the defendants, and then they're internal documents. MKS objected, and we Moved to Compel where MKS is based out in Massachusetts. Flew out to Boston, argued the Motion to Compel.

And the judge ruled that we were entitled to MKS' documents -- talking about the individuals. We got some interesting stuff about that. But that you're not entitled to MKS' internal valuation analysis and internal financial information.

So I think -- they don't say it -- but I think the discovery that the defendants are asking for, which we're now talking about post-close evidence, we sought preclose, and the judge out in Boston said that the preclose financial evidence, which is arguably far more relevant than anything post-close internal -- we weren't entitled to it. So I don't know -- you know, if they can convince MKS or the judge out in Massachusetts to change his mind, internal

financial information is not discoverable preclose, but it is post-close. I mean, good luck, because we tried preclose, and we couldn't get it.

So again, I'm having to assume that that's the additional discovery that they seek, because they didn't actually identify it. But even in that scenario, based on what's happened thus far, they're going to run into a brick wall.

But again, this is just another argument that can be made by any defendant using additional discovery as a threat and weaponizing additional discovery when it's not actually specified what it is.

And with regard to 16.1, just like we have in every merger case, especially in this court, computation of damages pursuant to 16.1(a)(1)(c). In a complex case like this, the calculation of damages requires expert testimony. That's exactly what we said in our initial disclosures back in 2018. We said plaintiffs responded to calculation of damages of this type of action requires expert testimony. Plaintiffs will supplement pursuant to NRCP 16.1(a)(2) under the scheduling order, which will presumably, and it did, require plaintiffs to provide their opening expert reports and provide all materials relied upon by experts and not produced previously by the parties.

Defendants never had a problem with that. That's the way it's done in these sorts of cases. You provide the specific calculation and measure of damages in the expert reports. Defendants had no objection to that. They never said we think your disclosures are too

vague. We provided them in expert discovery, just as contemplated under the schedule.

And again, I'll come back to the final point that we hit the deadline for amended complaints. If that wasn't really the deadline, then we should have been informed of that. If there was some other earlier deadline for amendments, we should have been informed. And I think it results in significant prejudice to the class to have some other previous deadline out there that wasn't what the parties had agreed upon and wasn't what was in a Court order.

We hit the deadline. We included evidence that wasn't available until recently and would have -- and had we pled or tried to plead a complaint before that evidence was available, we would have been dismissed or Mr. Cargile would have been dismissed with prejudice.

Now, the class can still bring a claim based on that late uncovered evidence in some of the text messages. Like I said, you know, again, the fact that Chuck would ask for special comp beyond others is outrageous and insulting. And that's powerful evidence that we did not have earlier.

So we request that the Court grant leave to amend.

Is there any other questions that Your Honor has?

THE COURT: No. Thank you all.

MR. KNOTTS: Thank you.

MR. LUTZ: Your Honor, may I have one minute?

THE COURT: You may, but Mr. Knotts, it's his motion,

he'll get the chance to reply.

MR. LUTZ: Sure. Just literally one minute, and three points.

One, Mr. Knotts himself said, he's -- except for Mr. Cargile -- these are the same causes of action. These are the same causes of action. They can go to trial on the operative complaint. It's the same causes of action. Okay?

Two, he said we had to go ask -- we haven't identified the evidence we need. Yes, we have. It's all of the post-close performance evidence that we need that was never part of this case.

He said, well, we asked five questions. They asked one witness about post-close, Mr. -- an MKS representative. They spent a couple of minutes asking a couple of questions. We asked a couple of follow up. It wasn't in the case. Why would we have taken discovery on something that wasn't in the case.

We, of course, need discovery during that post-close period about MKS' performance, not just what was publicly available. It's all of the changes in the business. It's the macroeconomic conditions. It's about that entire four or five or however many year period from transaction date to judgment day. That's what's relevant. And they know that. Mr. Knotts knows the discovery that we need.

Finally on the initial disclosures. Oh, by the way, plaintiffs didn't ask MKS for post-close performance documents. They didn't ask them. They didn't request them. So he says I went out there

and we're fighting about this. They didn't request post-close performance documents from MKS.

The -- this issue was not in the case for three and a half years. Initial disclosures -- they acknowledge that they didn't answer -- they didn't provide the category of damages under Rule 16.1. Okay? They said, Well, we did it in our expert report.

THE COURT: All right. You've already argued that.

MR. LUTZ: But the critical point that Mr. Knotts doesn't acknowledge, and why what they've done is improper, is because it wasn't pled in the complaint. If they pled rescissory damages, we wouldn't have needed it in the Rule 16.1. The entire case went by and then rescissory damages is part of it. That's all.

THE COURT: Mr. Knotts, it was your motion, you get the final word.

MR. KNOTTS: Okay. Thanks, Your Honor. I appreciate that.

Discovery -- Mr. Lutz talks about, well, why would we have taken discovery if they had disclosed the measure of damages?

Defendants didn't take any discovery in this case. They took two depositions of the plaintiffs who are outside stockholders. And, of course, they -- and they were cashed out. They don't have anything post-close.

They didn't -- they didn't take any discovery so far at all on the existing claims, on the existing measure of damages, which is the intrinsic valuation of Newport. They didn't take any discovery on

that.

And now all of a sudden they're going to arise from their slumber, based on this purported -- or based on the requested amendment and conduct all of this discovery when they haven't done anything so far. I think that's a transparent attempt just to avoid an additional measure of damages.

And again, you know, I'll reiterate that, you know, Mr. Lutz talks about, well, we have to look into macroeconomic conditions and things like that. Macroeconomic conditions are publicly available. Newport's post-close performance is publicly available. That's where we got the documents from.

So again, you know, the notion of getting discovery about macroeconomic evidence and things like that, I don't even know what that means. But defendants haven't conducted discovery on anything else so far. And you know, the notion that it's just going to push everything out is just a transparent tactic to delay -- or not necessarily delay -- but avoid this measure of damages that we probably disclosed under the expert report schedule, and was pursuant to an amendment that we filed on time and on schedule.

And I think if it were prejudice to the class to all of a sudden hold plaintiffs to some different earlier schedule that we had no idea about because we hit the schedule that exists in this case.

THE COURT: Thank you both.

This is the Plaintiff's Motion for Leave to Amend the Seconded Amended Complaint. And after careful consideration, I

am going to deny the motion.

I do make some findings, though.

One, I find the motion is timely. And I -- but this is a case where the plaintiff can already obtain complete relief the way that the complaint is pled, so I don't find that justice requires the amendment.

I find that the amendment would cause undue delay to the resolution of the case, and that it would be prejudicial to Mr. Cargile, as well as to the defendant, by bringing in new causes of action and new parties.

I make no finding with regard to the futility argument. I'm doing it on other merits.

I haven't considered the statute of limitations, although the argument was appealing to me that there was a statute of limitations issue.

Cargile's not a necessary party. This would require a new Rule 16.1, new scheduling order, and new expert reports, probably on both sides, because the defendant hasn't had the ability to even develop the evidence at this point with regard to the post-close operations. It would expand the case unnecessarily.

And again, you know, if you -- but -- and this is the thing that you're going to hate hearing, because I've already ruled against you -- but if, in June when you completed that deposition or May, you had asked for an extension of the deadline to consider, I probably would have granted that, just so you know.

MR. KNOTTS: Which -- which deadline?

THE COURT: When you got the texts and you took the Cargile deposition, if, in May, you had asked to extend the deadline to amend, I probably would have considered that at that time.

MR. KNOTTS: Which deadline, Your Honor?

THE COURT: Well, in May, you had a discovery cutoff on May 10th. And you had just, in March, gotten those texts. And you just completed the deposition of Cargile in April, May; correct? April?

MR. KNOTTS: Yeah.

THE COURT: If then you had moved to extend the deadline to move to -- to amend your pleading, I probably would have looked on it very favorably.

MR. KNOTTS: But, Your Honor, we hit the deadline.

THE COURT: You met the deadline. And I've made a finding.

This result might be different, if I had known about it sooner. That's all I'm going to say.

MR. KNOTTS: Okay.

THE COURT: Now, you --

MR. LUTZ: Thank you.

THE COURT: And the motion was timely. I made that finding.

So Mr. Lutz to prepare the order. Mr. Knotts to review and approve the form of that. Involve your local counsel, as you deem

appropriate.

And were there any questions? Or I just confused you at the end.

MR. KNOTTS: No.

THE COURT: I didn't mean to. Mr. Knotts, you're giving me that look that says --

MR. LUTZ: Well, yeah.

MR. KNOTTS: No, no, no. I --

THE COURT: -- what is she thinking?

MR. DAVIS: She said Mr. Knotts.

MR. LUTZ: Oh, sorry.

THE COURT: Not you. Mr. Knotts.

MR. KNOTTS: No. I just had -- I had a question with respect to the finding that plaintiffs are --

THE COURT: If you said in May at the end of the discovery cutoff, Hey, Judge, we're considering possibly bringing in Cargile, or possibly bringing in a new cause of action for rescissory damages to bring back that original claim we had. We want more time to evaluate that, more time within which to seek to amend the complaint --

MR. KNOTTS: Okay, Your Honor.

I guess I did have a question. Your Honor's finding that the current pleading allows the plaintiffs to obtain complete relief?

THE COURT: That's correct.

MR. KNOTTS: Rescissory damages in this case are more

than --

THE COURT: Because the --

MR. KNOTTS: -- the [indiscernible].

THE COURT: But it was also an abandoned claim until close of discovery, fact discovery --

MR. KNOTTS: Okay.

THE COURT: -- and Cargile was an employee. So --

MR. KNOTTS: Okay. Yeah. I won't reargue the motion. I was just -- I just, I guess, wanted clarification as to whether the finding that plaintiffs can still seek or obtain complete relief under the existing pleading means that all available remedies are open; or it's just that the amended -- the damages remedies under the existing pleading are what's available?

THE COURT: I meant to say that it was an abandoned claim until this late effort.

MR. KNOTTS: Okay.

THE COURT: You were timely. But it was late -- late in the life of the case.

Now, you guys will be back on November 21. Defendants filed a Summary Judgment Motion. I haven't looked at it yet, so don't assume that I'm going to rule one way or another.

I want unredacted briefs by disk or drive --

MR. LUTZ: Okay.

THE COURT: -- to me a week before, because they are so hard to read. I prefer to read them online.

MR. LUTZ: Okay.

THE COURT: Okay? I don't need paper copies. And I think the law clerk likes them.

And I'm going to move that hearing to 1:30, unless you think you can argue it in half an hour.

MR. KNOTTS: 1:30 it is, Your Honor.

THE COURT: Okay.

MR. DAVIS: Your Honor.

THE COURT: Yes.

MR. DAVIS: Do you want electronic copies of the exhibits as well?

THE COURT: Yes.

MR. DAVIS: Okay.

THE COURT: Yes. Everything electronically, because I can read it faster that way.

MR. DAVIS: Understood.

THE COURT: Good. All right. And anything else from today? When you guys come in on November 21st, depending on how the Summary Judgment Motion goes, bring with you your availability. Because you're set on a trial stack on January 21st, but it's a stack.

There's one thing ahead of you. It's a bench trial. That can be scheduled anyway, and it doesn't need to be consecutive days. I want to make sure that this case gets scheduled on consecutive days. So even if I grant the summary judgment, come

in with your availability for trial.

MR. LUTZ: Sure.

THE COURT: Because if I deny it, we'll set date certain that day.

MR. LUTZ: Understood.

MR. KNOTTS: And one other point -- scheduling issue that Mr. O'Mara reminded me of. I think we were -- it was kind of hard to schedule a date for just all the parties' availability for the Motion for Summary Judgment. And I -- I think Mr. O'Mara may have informed the clerk or someone that we are currently in a trial stack in Judge Gonzalez' courtroom, starting on November 18th or November 19th.

THE COURT: The same parties? Or the same lawyers?

MR. O'MARA: Just us.

MR. KNOTTS: Just us.

THE COURT: Justice you guys, okay.

MR. KNOTTS: And so as soon as we have clarity on that, if it so happens that we're first up on the stack and that we're in trial on the 21st, we'll notify the Court as soon as --

THE COURT: Notify your opposing counsel. See if you can agree to new days. If you can't, convene a telephonic, and I'll make that determination for you. You don't need to file motions and orders shortening time. Those are scheduling issues. We can do those with a telephonic.

MR. KNOTTS: Okay.

THE COURT: Okay?

MR. KNOTTS: And hopefully, we'll -- you know, we'll all be here and see you again on the 21st.

THE COURT: Good enough.

MR. LUTZ: Thank you.

THE COURT: Thank you, everybody.

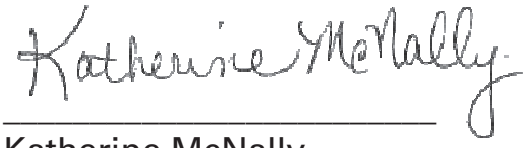
MR. LUTZ: Thank you, Your Honor.

MR. KNOTTS: Thank you, Your Honor.

[Proceeding concluded at 12:43 p.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.



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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	CASE NO.: A-16-733154-B (Consolidated with Case No. A-16-734039-B) CLASS ACTION
This Document Relates To: ALL ACTIONS.	**MOTION TO STRIKE; *EX PARTE* APPLICATION FOR ORDER SHORTENING TIME**

Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone (collectively, "Defendants"), by and through their counsel of record, hereby move the Court to strike Plaintiffs' 84-page "Separate Statement of Material Facts and Evidence in Support of Their Opposition to Defendants' Motion for Summary Judgment" (the "Separate Statement"). In plain violation of EDCR 2.20(a), Plaintiffs filed both a 30-page Opposition to Defendants' Motion for Summary Judgment (the "Opposition") ***and*** the

84-page Separate Statement, the end result being that Plaintiffs filed ***114 pages*** of papers in opposition to Defendants' Motion for Summary Judgment. Plaintiffs' filings are procedurally improper, and therefore, Defendants seek to strike the Separate Statement.

This Motion to Strike is made and based upon the following Memorandum of Points and Authorities, all pleadings and papers on file herein, and any oral argument at the time of hearing.

DATED this 6th day of November, 2019.

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ORDER SHORTENING TIME

Good cause appearing therefore, IT IS HEREBY ORDERED that the **MOTION TO STRIKE** shall be heard on shortened time on the 21st day of November, 2019, at 1:30 a.m./p.m. before the above entitled Court located at Regional Justice Center, Courtroom 3A, 200 Lewis Ave., Las Vegas, NV 89155.

DATED this 7 day of November, 2019.

Nancy L ALLF

NANCY L. ALLF, DISTRICT COURT JUDGE

Submitted by:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____

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DECLARATION OF MAXIMILIEN D.FETAZ, ESQ. IN SUPPORT OF MOTION TO STRIKE; *EX PARTE* APPLICATION FOR ORDER SHORTENING TIME

I, Maximilien D. Fetaz, Esq., hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Nevada and an attorney with the law firm of Brownstein Hyatt Farber Schreck, LLP, counsel for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone in this matter.

2. I make this declaration in support of Defendants' Motion to Strike; *Ex Parte* Application for Order Shortening Time (the "Motion to Strike").

3. I have personal knowledge of the matters set forth in this declaration and, if called as a witness, could and would competently testify thereto.

4. On October 7, 2019, Plaintiffs filed their Opposition to Defendants' Motion for Summary Judgment ("Opposition"). The Opposition consists of a 30-page brief exclusive of the caption page, table of contents, table of authorities, and exhibits. The Opposition includes an introduction, statement of facts, legal standard, analysis of triable issues of fact, and conclusion.

5. Concurrently with filing their Opposition, Plaintiffs filed a separate, additional document titled "Plaintiffs' Separate Statement of Material Facts and Evidence in Support of Their Opposition to Defendants' Motion for Summary Judgment" ("Separate Statement"). The Separate Statement is 84 pages long and consists of 241 paragraphs of purported facts in support of the Opposition.

6. Prior to filing the Separate Statement, Plaintiffs did not request or receive leave from the Court to exceed the page limit set forth in EDCR 2.20(a).

7. On October 11, 2109, my co-counsel contacted Plaintiffs' counsel advising that the Separate Statement violates EDCR 2.20(a) and requested that Plaintiffs bring their opposition papers into compliance with the local rules.

8. Plaintiffs' counsel responded the following business day declining to bring their opposition papers into compliance with the rules. Instead, Plaintiffs claimed that the Separate

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Statement was helpful to the Court and complied with "local practice guides." Plaintiffs did not address their lack of compliance with EDCR 2.20(a).

9. Defendants seek to strike the Separate Statement as it exceeds the 30 page limit set forth in EDCR 2.20(a).

10. This request is made in good faith and without dilatory motive

11. This matter cannot be heard in the ordinary course because the hearing on Defendants' Motion for Summary Judgment is set for November 21, 2019. If this Motion to Strike is set in the ordinary course, it will be heard *after* the hearing on Defendants' Motion for Summary Judgment. Thus, there is good cause to hear this Motion to Strike on shortened time.

12. The undersigned requests that the Court set this Motion to Strike for hearing at the same time as the hearing on Defendants' Motion for Summary Judgment, which is set for November 21, 2019, at 1:30 p.m.

13. Concurrently with sending the Motion to Strike to chambers for consideration, I caused a copy to be emailed to Plaintiffs' counsel.

I declare under penalty of perjury under the laws of the State of Nevada that the forgoing is true and correct.

DATED: November 6, 2019 at Clark County, Nevada.

MAXIMILIEN D. FETAZ

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

EDCR 2.20(a) is crystal clear: "Unless otherwise ordered by the court, papers submitted in support of pretrial and post-trial briefs ***shall be limited to 30 pages***, excluding exhibits." (Emphasis added). Plaintiffs violated this rule by filing a whopping ***114 pages*** of papers in support of their opposition to Defendants' Motion for Summary Judgment—a 30-page opposition brief ("Opposition") and a separate ***84-page*** "Separate Statement of Material Facts and Evidence," consisting of ***241 paragraphs*** of supposed facts in support of the Opposition ("Separate Statement"). Plaintiffs did not ask the Court for permission to submit such an oversized filing, let alone obtain permission. Accordingly, Plaintiffs' filing of an 84-page Separate Statement unquestionably violates EDCR 2.20(a), and the Court should enter an order striking the Separate Statement from the record.

II. RELEVANT FACTUAL BACKGROUND

On August 23, 2019, Defendants filed their Motion for Summary Judgment. In accordance with the Nevada Rules of Civil Procedure and the Court's local rules, Defendants' summary judgment filing consisted of a memorandum of points and authorities "citing to particular parts of materials in the record" and "showing that the materials cited do not establish the ... presence of a genuine dispute"; an authenticating declaration; and exhibits.[1] NRCP 56(c).

On October 7, 2019, Plaintiffs filed their Opposition, consisting of a 30-page memorandum of points and authorities, exclusive of the caption page, table of contents, table of authorities, and exhibits. Concurrently with the filing of Plaintiffs' Opposition, Plaintiffs filed an additional unpermitted document titled "Plaintiffs' Separate Statement of Material Facts and Evidence in Support of Their Opposition to Defendants' Motion for Summary Judgment" (*i.e.*,

[1] As a result of a software compatibility issue between Defendants' co-counsel, Defendants' Motion for Summary Judgment as initially filed exceeded EDCR 2.20(a)'s 30-page limit by eight lines and one footnote. Defendants have since rectified this issue by filing an Errata to their Motion for Summary Judgment attaching a corrected version of the Motion with the identical words, typeface, type size, and word count as the version filed on August 23, 2019, but within the 30-page limit under EDCR 2.20(a). *See* Errata to Defs.' Mot. for Summary Judgment (filed Nov. 5, 2019), on file herein.

the Separate Statement). The Separate Statement is ***84 pages*** long and consists of ***241 paragraphs*** of "facts" in alleged support of the Opposition. Prior to filing the Separate Statement, Plaintiffs did not seek—let alone receive—leave from the Court to exceed the 30-page limit set forth in EDCR 2.20(a).

On October 11, 2109, Defendants' counsel contacted Plaintiffs' counsel advising that the Separate Statement violates EDCR 2.20(a) and requested that Plaintiffs bring their opposition papers into compliance with the local rules. Plaintiffs' counsel responded the following business day declining to bring their opposition papers into compliance with the rules. Instead, Plaintiffs claimed that the Separate Statement was helpful to the Court and complied with "local practice guides." Plaintiffs failed to address their lack of compliance with EDCR 2.20(a).

III. DISCUSSION

A. Legal Standard.

The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. NRCP 12(f). The Nevada Supreme Court also recognizes and allows motions to strike oppositions. *See, e.g.*, *Dickerson v. Downey Brand LLP*, No. 67768, 2017 WL 6316552, at *4 (Nev. 2017) (unpublished table decision) (finding "no abuse of discretion" by district court in granting motion to strike opposition).

B. Plaintiffs' Separate Statement Violates EDCR 2.20(a)'s 30-Page Limit.

EDCR 2.20(a) expressly limits all "papers submitted in support of pretrial and post-trial briefs" to 30 pages, excluding exhibits, unless leave of the Court is sought and obtained to exceed the 30-page limit. *See* EDCR 2.20(a) ("Unless otherwise ordered by the court, papers submitted in support of pretrial and post-trial briefs shall be limited to 30 pages, excluding exhibits.").

Here, Plaintiffs plainly violated EDCR 2.20(a) by filing ***114 pages*** of papers in support of their Opposition. There is no question that Plaintiffs' 84-page Separate Statement is part of the "papers submitted in support" of their Opposition. Indeed, Plaintiffs cite to the Separate Statement throughout their Opposition and rely on it purportedly to demonstrate the existence of a triable issue of material fact. Plaintiffs did not seek leave of Court to file an oversized opposition,

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nor was leave granted. Accordingly, the Separate Statement violates EDCR 2.20(a) and must be stricken it is entirety.

Plaintiffs' only response is to claim that they can circumvent EDCR 2.20(a)'s 30-page limit because the Nevada Civil Practice Manual supports their oversized filing. Of course, a practice guide is not binding authority and cannot be relied on as a basis to violate the Court's rules. Regardless, Plaintiffs' argument ignores what the manual actually says:

> There is an issue of whether the concise statement must be a document separate from the motion and points and authorities. In view of the fact that Rule 56, in some jurisdictions, expressly requires the concise statement to be in a separate document..., ***it appears that the Nevada rules do not require a separate document***. That is also true with respect to the federal rule.

1 Nev. Civ. Prac. Man. ¶ 19.15[2] (2019) (internal citations omitted and emphasis added). Thus, Plaintiffs' claim that a local practice guide permits the Separate Statement is unfounded.

Moreover, even if a separate statement were permitted, EDCR 2.20(a) ***only*** excludes exhibits from the 30-page limit; therefore, any separately filed statement of facts that a party submits in support of an opposition unambiguously falls within EDCR 2.20(a) 30-page limit. The 30-page limit is ***inclusive of*** any statement of facts. *See Rimini St., Inc. v. Oracle Int'l Corp.*, Case No. 2:14-cv-01699-LRH-CWH, 2019 WL 2358389, at *3 (D. Nev. June 4, 2019) (addressing a similar local rule and stating that responses to motions for summary judgment should not exceed the 30-page limit, including the statement of facts). Plaintiffs may not evade EDCR 2.20(a)'s 30-page limit by filing their statement of facts in a separate document. *See Magdaluyo v. MGM Grand Hotel, LLC*, Case No. 2:14-cv-01806-APG-GWF, 2017 WL 736875, at *6 (D. Nev. Feb. 24, 2017) (striking supplemental documents filed by the plaintiffs because they were "improper attempts to evade the page limits for argument")

Even more fatal to Plaintiffs' argument is the fact that, although NRCP 56(f) recently was amended to mirror its federal counterpart, "the 'concise statement' requirement ... persists." 1 Nev. Civ. Prac. Man. ¶ 19.15[2]. As explained in Nevada's Civil Practice Manual:

> [T]he ... requirement [that a motion for summary judgment set forth a concise statement of undisputed facts] is more than a procedural nicety. ***Its purpose is to conserve judicial time and***

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> ***resources by assisting the trial judge in ruling upon a summary judgment motion by eliminating the need for the trial judge to search the entire record for a genuine issue of material fact.*** The trial judge is not pig 'hunting for truffles buried in briefs.' Rather, the trial judge need only look at the portions of the record cited by the parties in the concise statement and Opposition to quickly and effectively identify the disputed and undisputed facts.

1 Nev. Civ. Prac. Man. ¶ 19.15[2] (internal citations omitted and emphasis added). A separately filed 84-page statement of facts consisting of 241 paragraphs hardly can be characterized as a "concise statement." *See, e.g., Hayes v. Superior Ct. of Cal.*, Case No. CV 10-1818-GW(RCx), 2010 WL 11549761, at *7 (C.D. Cal. Nov. 8, 2010) (describing as "improper" plaintiffs' submission "of 479 purported 'disputed' facts comprising a total of 109 pages" and concluding that plaintiffs either "intended 'to create the illusion that there is a dispute requiring the denial'" of summary judgment or "were simply trying to avoid the 25 page limit set out in" the local rules). Contrary to Plaintiffs' claim that the Separate Statement would be helpful to the Court, judicial economy compels the opposite conclusion—that Plaintiffs' lengthy, procedurally improper Separate Statement should be rejected. *See Dornbach v. Tenth Jud. Dist. Ct.*, 130 Nev. 305, 312, 324 P.3d 369, 373 (2014) (recognizing "the inherent power of the judiciary to economically and fairly manage litigation."). The Separate Statement should be struck in its entirety.

. . .

. . .

. . .

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IV. CONCLUSION

Defendants respectfully requests that the Court grant their Motion to Strike Plaintiffs' Separate Statement pursuant to EDCR 2.20(a).

DATED this 6th day of November, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **MOTION TO STRIKE; *EX PARTE* APPLICATION FOR ORDER SHORTENING TIME** to be submitted electronically to all parties currently on the electronic service list on November 12, 2019.

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

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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.	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' SEPARATE STATEMENT OF MATERIAL FACTS AND EVIDENCE

I. INTRODUCTION

Plaintiffs' Separate Statement of Material Facts and Evidence in Support of Their Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Separate Statement of Facts") is proper and is supported by the Nevada Civil Practice Manual, as well as the federal authority relied upon by Defendants. That federal authority indicates that "***legal argument***" in a separate statement is disallowed, but recitations of fact, quotes, and citations to evidence are permitted. Plaintiffs' Separate Statement of Facts contains no legal argument and instead properly contains facts, quotes, and cites to the record evidence in this case. *See* NRCP 56(c)(1)(A).

Plaintiffs also believe that, as explained in the Nevada Civil Practice Manual, Plaintiffs' Separate Statement of Facts will aid the Court in adjudicating the pending motion for summary judgment. Nevertheless, if the Court prefers to bypass Plaintiffs' Separate Statement of Facts and review the evidence described in Plaintiffs' brief without that additional statement, Exhibit A hereto includes an index that matches Plaintiffs' exhibits to the corresponding paragraphs in Plaintiffs' Separate Statement of Facts. This index will allow the Court to identify evidence cited in the brief without utilizing Plaintiffs' Separate Statement of Facts, if that is the Court's preference.

Finally, Defendants' Motion to Strike is procedurally improper and should be denied because it does not seek to strike the content of a pleading. Nor does it identify any facts from Plaintiffs' Separate Statement of Facts that involve a "redundant, immaterial, impertinent, or scandalous matter." *See* NRCP 12(f). In sum, Defendants' Motion to Strike is procedurally and substantially flawed and should be denied.

II. ARGUMENT

A. A Separate Statement of Facts When Opposing a Motion for Summary Judgment Is Permitted

The Nevada Civil Practice Manual section regarding the "Form and Content of a [Summary Judgment] Motion" states that while the NRCP omitted the "concise statement" of facts language in its March 1, 2019 amendment of Rule 56, "it is not believed that this amendment was intended to eliminate the 'concise statement' requirement. . . . Rather, it is believed that the requirement

persists." 1 Nev. Civ. Prac. Man. §19.15[2].[1] A factual statement is useful because it "conserve[s] judicial time and resources by assisting the trial judge in ruling upon a summary judgment motion by eliminating the need for the trial judge to search for the entire record for a genuine issue of material fact. . . . Rather, the trial judge need only look at the portions of the record cited by the parties in the concise statement and Opposition to quickly and effectively identify the disputed and undisputed facts." *Id.* The Practice Manual then states:

> There is an issue of whether the concise statement must be a document separate from the motion and points and authorities. In view of the fact that Rule 56, in some jurisdictions, expressly requires the concise statement to be in a separate document, *see Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998), it appears that the Nevada rules do not require a separate document. . . .

Id.

That Nevada courts do not ***require*** a factual statement separate from the brief says nothing about whether Nevada courts will ***consider*** such filings. *Id.* The previously cited Civil Practice Manual text indicates that Nevada courts should still allow and consider separate statements. *Id.* Defendants, on the other hand, contend that the Nevada Civil Practice Manual "is not binding authority," but Defendants cite no binding authority that supports their interpretation. *See* Motion to Strike at 8.

NRCP 56 also supports Plaintiffs' position. Rule 56(c)(1) states that "[a] party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Plaintiffs' Separate Statement of Facts does just that. Likewise, Rule 56(c)(3) permits the Court to consider any material when ruling on a motion for summary judgment: "The court need consider only the cited materials, but it may consider other materials in the record." NRCP 56(c)(3).

Federal authority also indicates that factually based separate statements are proper and should not be stricken from the record. *Chattler v. United States*, 2009 WL 2450518 (N.D. Cal. July 10,

[1] The relevant section is attached hereto as Exhibit B.

2009) is on point. There, defendants filed a motion to strike the plaintiffs' "Separate Statement of Genuine Issues." *Id.* at *1 n.2. The court denied the motion to strike and ruled that "legal argument" is improper in a separate statement, but factual statements may be considered:

> On February 27, 2009, defendants filed a "Motion to Strike Plaintiff's Improper Separate Statement of Genuine Issues." To the extent plaintiff's Separate Statement includes ***legal argument*** in addition to that made in her 25-page opposition to defendants' motion for summary judgment, plaintiff's Separate Statement violates the 25-page limit set forth in the Local Rules of this District. See Civil L.R. 7-3(a). Nonetheless, the Court will exercise its discretion to consider plaintiff's Separate Statement, and will deny the motion to strike. . . .

Id. (emphasis added). Here, Plaintiffs' Separate Statement of facts contains no "legal argument" and instead consists purely of a recitation of material facts and quotations from the evidentiary record in this case. *Id.*

In contrast, Defendants largely cite cases from the District of Nevada, but that court's local rules undermine their argument. Unlike this Court, the District of Nevada contains a local rule regarding motions for summary judgment page limits as follows: "***The statement of facts will be counted toward the applicable page limit in LR 7-3***." Nev. Dist. LR 56-1. This Court has no similar rule explicitly stating that separate statements of fact count against page limits, which indicates that they do not.[2]

Plaintiffs concede that this is a matter subject to the Court's preference under Nevada law and submit that, consistent with the Nevada Civil Practice Manual's discussion, a separate statement of facts will aid the Court in adjudicating the pending motion by "eliminating the need for the trial judge to search for the entire record for a genuine issue of material fact." 1 Nev. Civ. Prac. Man. §19.15[2].

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[2] Defendants' citations are also factually inapposite. For example, in *Rimini St., Inc. v. Oracle Int'l Corp.*, 2019 WL 2358389 (D. Nev. June 4, 2019), the court noted that a party's "55 pages of tables offering a line-by-line analysis and refutation of [the moving party's] statement of facts," including citations to a legal opinion. *Id.* at *3. The exhibit "is not evidentiary in nature" and "instead of presenting evidence of claims made in the brief [which would have been proper], merely continues the briefs' arguments" including through legal citations. *Id.* Defendants' second case did not even involve a separate statement of facts. *See Magdaluyo v. MGM Grand Hotel, LLC*, 2017 WL 736875, at *6 (D. Nev. Feb. 24, 2017) (striking documents tilted "objections" and "motions to strike" incorrectly styled as evidentiary objections).

Ultimately, Defendants make no evidentiary objection to the facts cited and quoted in Plaintiffs' Separate Statement of Facts. *See* NRCP 56(c)(2). Defendants make no argument that any of those facts are inaccurate or misstated in any way. And Defendants make no argument of prejudice regarding any of those facts. Rather, because Defendants failed to demonstrate the absence of material issues of fact, they seek to strike the full recitation of those facts from the record. Plaintiffs, on the other hand, believe that consistent with the Nevada Civil Practice Manual, Plaintiffs' Separate Statement of Facts will aid the Court in adjudicating the pending motion.

B. Defendants' Motion to Strike Is Procedurally Improper

The Motion to Strike is procedurally improper because it does not seek to strike the content of a pleading, a rule Defendants previously advocated and the Court adopted in this litigation. During earlier motion to dismiss briefing, Plaintiffs filed a motion to strike certain exhibits from Defendants' motion to dismiss, arguing the exhibits could not be considered at the motion to dismiss stage and should thus be stricken.[3] Defendants opposed the motion, making the following argument in their opposition brief:

> Plaintiffs' [Motion to Strike] is procedurally improper as a matter of Nevada law. Nevada Rule of Civil Procedure 12(f) only authorizes motions to strike the contents of a "pleading" and otherwise is inapplicable to attack the contents of other documents. . . . Thus, because Defendants' Motions to Dismiss are not pleadings, Plaintiffs' Motion is procedurally improper and must be denied on this basis alone.[4]

Defendants continued this argument during the February 15, 2017 hearing, asserting "the fact is a motion to strike is a procedural motion. It's a procedural motion under Rule 12(f). Rule 12(f) permits motions to strike pleadings. What they're seeking to strike is not a pleading, it's a motion . . ."[5] To be sure, Plaintiffs disagreed and argued to the contrary. But, the Court agreed with the Defendants on this issue, not Plaintiffs, and denied the motion to strike because it was "procedurally

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[3] *See* 1/20/2017 Plaintiffs' Motion to Strike Exhibits A and B in the Appendix of Exhibits Submitted with the Declaration of Brian Lutz.

[4] *See* 2/03/2017 Defendants' Joint Opposition to Plaintiffs' Motion to Strike Exhibits A and B in the Appendix of Exhibits Submitted with the Declaration of Brian Lutz at 2-3.

[5] *See* 02/15/2017 hearing tr. at 7, Newport Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

incorrect."[6] Here, the Motion to Strike is procedurally improper for the same reason. *See* NRCP 12(f).[7]

Moreover, were Defendants' motion procedurally valid, Defendants do not contend that any facts from Plaintiffs' Separate Statement of Facts involve a "redundant, immaterial, impertinent, or scandalous matter[,]" as required by NRCP 12(f). The Motion should be denied for these additional reasons.

III. CONCLUSION

A factual statement is useful because it "conserve[s] judicial time and resources by assisting the trial judge in ruling upon a summary judgment motion by eliminating the need for the trial judge to search for the entire record for a genuine issue of material fact." 1 Nev. Civ. Prac. Man. §19.15[2]. Plaintiffs' Separate Statement of Material Facts is procedurally proper, sets forth no legal argument, and contains a detailed recitation of facts and quotations from the record evidence in this case. Defendants make no evidentiary objection to any of that evidence, nor do they contend that any fact from Plaintiffs' statement is inaccurate or prejudicial. For the reasons stated herein, Defendants' Motion to Strike should be denied.

However, should the Court prefer to review the evidence without use of Plaintiffs' Separate Statement of Facts, the table attached hereto as Exhibit A contains an index that will facilitate the Court's review of the evidence showing dozens of genuine issues of material fact in this case.

DATED: November 18, 2019

Respectfully submitted,

THE O'MARA LAW FIRM, P.C.

/s/ David C. O'Mara
DAVID C. O'MARA

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[6] *Id.* at 12.

[7] Notably, Defendants filed an over-length motion for summary judgment brief that sat on the docket for 74-days until they found a way to electronically condense it. 74 days after filing that brief, one month after Plaintiff filed their Opposition, and the day before filing this Motion to Strike, Defendants filed an "errata" and "corrected" opening brief that shoehorned their original motion into 30 typewritten pages. *See* 11/05/2019 Errata to Defendants' Motion for Summary Judgment.

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Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Bryan Snyder, hereby certify that I am an employee of The O'Mara Law Firm, P.C., and further certify that the foregoing document was electronically filed and served upon all parties via the Court's Electronic Filing system.

DATED: November 18, 2019

/s/ Valerie Weis
VALERIE WEIS

INDEX OF EXHIBITS

Exhibit No.	Description	Total Pages
A	Separate Statement Chart	18
B	Nevada Civil Practice Manual	2

EXHIBIT A

In re Newport Corp. S'holder Litig., No. A-16-733154-B

Index of Exhibits cited in Plaintiffs' Separate Statement of Material Facts and Evidence

SS ¶ No.	Cited Exhibits in Each Separate Statement Paragraph
1	Ex. 1, NEWP019998 at '999 Ex. 2, NEWP001605 Ex. 3, Cargile Ex. 10 at NEWP021376-377
2	Ex. 4, Lubeck Tr. at 126:2-13 Ex. 5, Simone Tr. at 94:12-95:7 Ex. 6, Cargile Tr. at 95:16-96:3
3	Ex. 7, Phillippy Ex. 19 at NEWP062151 Ex. 7, Phillippy Ex. 19 at NEWP062161-62 Ex. 7, Phillippy Ex. 19 at NEWP062137 Ex. 8, Cargile Ex. 11 at NEWP087864 Ex. 9, Cargile Ex. 6 at NEWP001658 Ex. 6, Cargile Tr. at 65:17-67:6 Ex. 6, Cargile Tr. at 67:10-22 Ex. 10, Phillippy Ex. 20 at NEWP062336
4	Ex. 11, Potashner Ex. 12 Ex. 12, Phillippy II Tr. at 240:20-241:12
5	Ex. 9, NEWP001657 at '658 Ex. 13, Khaykin Tr. at 39:16-18 Ex. 14, Potashner II Tr. at 213:11-214:5, 215:5-10 Ex. 15, Potashner Ex. 21 Ex. 14, Potashner II Tr. at 237:18-10 Ex. 13, Khaykin Tr. at 162:4-6
6	Ex. 6, Cargile Tr. at 60:20-61:9 Ex. 12, Phillippy II Tr. at 248:22-249:5
7	Ex. 16, NEWP018778
8	Ex. 5, Simone Tr. at 105:21-106:5 Ex. 17, Cox Tr. at 17:10-18:4 Ex. 18, Kadia Tr. at 49:25-51:21 Ex. 17, Cox Tr. at 17:10-18:4 Ex. 14, Potashner II Tr. at 201:18-23, 218:24-219:18 Ex. 13, Khaykin Tr. at 158:25-159:11

9	Ex. 19, Ippolito Tr. at 97:13-98:11 Ex. 19, Ippolito Tr at 93:20-96:16 Ex. 19, Ippolito Tr at 97:13-21
10	Ex. 18, Kadia Tr. at 27:16-28:12 Ex. 18, Kadia Tr. at 51:3-15, 54:6-9 Ex. 18, Kadia Tr. at 65:2-6
11	Ex. 13, Khaykin Tr. at 27:1-8, 31:23-32:13 Ex. 13, Khaykin Tr. at 42:17-43:5
12	Ex. 20, Phillippy I Tr. at 75:15-76:9 Ex. 20, Phillippy I Tr. at 75:15-77:19, 82:10-18 Ex. 6, Cargile Tr. at 61:12-15
13	Ex. 9, Cargile Ex. 6 at NEWP001658 Ex. 20, Phillippy I Tr. at 82:24-83:19, 85:16-20 Ex. 6, Cargile Tr. at 57:13-58:10 Ex. 6, Cargile Tr. at 57:13-58:10 Ex. 12, Phillippy II Tr. at 257:8-259:4
14	Ex. 12, Phillippy II Tr. at 276:23-277:14 Ex. 21, Coyne Ex. 7
15	Ex. 22, Cargile Ex. 7 at NEWP089476 Ex. 17, Cox Tr. at 14:2-15:5 Ex. 14, Potashner II Tr. at 203:13-205:14, 220:16-20
16	Ex. 13, Khaykin Tr. at 42:25-43:1, 43:19-20 Ex. 18, Kadia Tr. at 59:1-9
17	Ex. 23, Simone Ex. 22 at NEWP073063 Ex. 23, Simone Ex. 22 at NEWP073062 Ex. 23, Simone Ex. 22 at NEWP073061
18	Ex. 12, Phillippy II Tr. at 265:24-268:2, 268:17-269:4
19	Ex. 23, Simone Ex. 22 at NEWP073060-61 Ex. 23, Simone Ex. 22 at NEWP073061
20	Ex. 23, Simone Ex. 22 at NEWP073061
21	Ex. 9, Cargile Ex. 6 at NEWP001658 Ex. 24, NEWP098526 at ‘527

22	Ex. 12, Phillippy II Tr. at 278:4-8
23	Ex. 25, NEWP026070 at ‘071 Ex. 26, Phillippy Ex. 3
24	Ex. 27, NEWP018832 Ex. 28, Phillippy Ex. 2 Ex. 29, NEWP011930 Ex. 30, NEWP026152 Ex. 28, Phillippy Ex. 2 at NEWP018804 Ex. 30, NEWP026152 Ex. 31, Potashner I Tr. at 119:2-120:4
25	Ex. 32, NEWP024495 at ‘495
26	Ex. 32, NEWP024495 at ‘495 Ex. 33, NEWP008105 Ex. 33, NEWP008105 at ‘106
27	Ex. 6, Cargile Tr. at 151:14-18 Ex. 33, NEWP024495 at ‘496 Ex. 34, NEWP083375 at ‘376
28	Ex. 35, Cargile Ex. 19 at NEWP017721 Ex. 35, Cargile Ex. 19 at NEWP017722
29	Ex. 36, Cargile Ex. 20
30	Ex. 36, Cargile Ex. 20 Ex. 37, NEWP069262 Ex. 38, Allen Tr. at 54:8-15 Ex. 39, Werth Tr. at 62:8-18 Ex. 6, Cargile Tr. at 154:6-156:21
31	Ex. 6, Cargile Tr. at 164:7-12, 165:14-166:11 Ex. 6, Cargile Tr. at 164:7-12, 165:14-166:11
32	Ex. 40, Meintjes Tr. at 22:3-10
33	Ex. 41, Werth Ex. 9 Ex. 42, Allen Ex. 5 Ex. 43, Parker Ex. 4 Ex. 38, Allen Tr. at 31:1-32:22 Ex. 39, Werth Tr. at 40:3-41:19 Ex. 39, Werth Tr. at 79:13-82:21

34	Ex. 44, Parker Tr. at 50:20-51:14, 57:24-58:1 Ex. 44, Parker Tr. at 57:24-58:12
35	Ex. 44, Parker Tr. at 40:18-41:19 Ex. 44, Parker Tr. at 98:24-99:17
36	Ex. 38, Allen Tr. at 74:25-76:11 Ex. 38, Allen Tr. at 76:12-20
37	Ex. 44, Parker Tr. at 16:22-20:18 Ex. 44, Parker Tr. at 21:11-16
38	Ex. 44, Parker Tr. at 22:16-23 Ex. 44, Parker Tr. at 22:16-23
39	Ex. 42, Allen Ex. 5
40	Ex. 45, Cargile Ex. 2 Ex. 46, Cargile Ex. 4 Ex. 45, Cargile Ex. 2 Ex. 46, Cargile Ex. 4 Ex. 6, Cargile Tr. at 24:1-35:22, 111:6-114:16
41	Ex. 45, Cargile Ex. 2 at NEWP125970 Ex. 6, Cargile Tr. at 26:3-7 Ex. 45, Cargile Ex. 2 at NEWP125971
42	Ex. 45, Cargile Ex. 2 at NEWP125975 Ex. 6, Cargile Tr. at 34:14-35:13 Ex. 6, Cargile Tr. at 35:14-22
43	Ex. 47, NEWP076884 Ex. 46, Cargile Ex. 4 at NEWP020752 Ex. 46, Cargile Ex. 4 at NEWP020751 Ex. 46, Cargile Ex. 4 at NEWP020752
44	Ex. 6, Cargile Tr. at 48:5-11, 110:3-7
45	Ex. 6, Cargile Tr. at 84:1-85:5
46	Ex. 14, Potashner II Tr. at 210:8-211:21 Ex. 48, Cargile Ex. 3 at NEWP061611 Ex. 49, Cargile Ex. 5 at NEWP073009 Ex. 6, Cargile Tr. at 52:1-24
47	Ex. 6, Cargile Tr. at 45:4-25, 49:2-50:24

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48	Ex. 14, Phillippy II Tr. at 273:10-274:10
49	Ex. 14, Phillippy II Tr. at 206:18-207:18 Ex. 14, Phillippy II Tr. at 219:12-18
50	Ex. 51, NEWP018842
51	Ex. 20, Phillippy I Tr. at 101:4-104:6 Ex. 52, Phillippy Ex. 9 at NEWP006796 Ex. 53, Cargile Ex. 18 at NEWP100819 Ex. 6, Cargile Tr. at 135:10-15
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53	Ex. 58, Coyne Ex. 4 at NEWP000017
54	Ex. 59, Cox Ex. 3 at COH00000301 Ex. 56, NEWP009994
55	Ex. 60, NEWP000121 Ex. 62, Cox Ex. 8 and NEWP000009
56	Ex. 63, Cox Ex. 4 at COH00000120 Ex. 64, Cox Ex. 5 at COH 00000118
57	Ex. 5, Simone Tr. at 62:24-63:15, 64:1-5 Ex. 17, Cox Tr. at 40:25-42:20 Ex. 13, Khaykin Tr. at 67:7-68:25 Ex. 17, Cox Tr. at 39:6-21 Ex. 17, Cox Tr. at 40:25-42:20 Ex. 18, Kadia Tr. at 90:10-18 Ex. 18, Kadia Tr. at 102:9-16
58	Ex. 65, NEWP025124 Ex. 66, NEWP030033 Ex. 67, Phillippy Ex. 8 Ex. 67, Phillippy Ex. 8 at NEWP009116

59	Ex. 68, Coyne Ex. 3 at NEWP116707 Ex. 50, Coyne Tr. at 18:2-19 Ex. 69, Coyne Ex. 2 Ex. 59, Coyne Ex. 3 Ex. 17, Cox Tr. at 112:1-18 Ex. 59, Coyne Ex. 3 Ex. 32, NEWP024495 Ex. 34, NEWP083375
60	Ex. 70, Meintjes Ex. 7 at NEWP032275
61	Ex. 71, Ippolito Ex. 10 at NEWP025647
62	Ex. 36, Cargile Ex. 20 at NEWP082361 Ex. 37, NEWP069262 Ex. 6, Cargile Tr. at 159:19-160:23
63	Ex. 36, Cargile Ex. 20 at NEWP082361
64	Ex. 36, Cargile Ex. 20 at NEWP082367
65	Ex. 39, Werth Tr. at 59:17-60:11
66	Ex. 36, Cargile Ex. 20 at NEWP082361
67	None
68	Ex. 72, Phillippy Ex. 31 at NEWP119412 Ex. 72, Phillippy Ex. 31 at NEWP119415
69	Ex. 44, Parker Tr. at 17:6-40:23 Ex. 72, Phillippy Ex. 31 Ex. 73, Parker Ex. 3 Ex. 38, Allen Tr. at 30:25-31:15 Ex. 39, Werth Tr. at 40:18-42:23 Ex. 73, Parker Ex. 3 at NEWP035193
70	Ex. 44, Parker Tr. at 46:15-48:3
71	Ex. 74, NEWP125271 at ‘272
72	Ex. 75, Potashner Ex. 19 Ex. 14, Potashner II Tr. at 229:22-230:5 Ex. 14, Potashner II Tr. at 210:8-211:21, 224:25-225:2 Ex. 6, Coyne Tr. at 29:23-31:20 Ex. 76, Potashner Ex. 18 at NEWP126800

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73	Ex. 18, Kadia Tr. at 34:8-35:17, 37:14-23 Ex. 18, Kadia Tr. at 43:4-9
74	Ex. 20, Phillippy I Tr. at 71:23-73:3 Ex. 12, Phillippy II Tr. at 273:10-274:10
75	Ex. 67, Phillippy Ex. 8 Ex. 67, Phillippy Ex. 8 at NEWP009116
76	Ex. 78, NEWP030002 at ‘015
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78	Ex. 81, Cargile Ex. 17 at NEWP131689 Ex. 82, Simone Ex. 4 at NEWP061744 Ex. 82, Simone Ex. 4 at NEWP061745
79	Ex. 83, NEWP007873 at ‘874 Ex. 14, Potashner II Tr. at 240:13-22 Ex. 84, Simone Ex. 3 at NEWP062527 Ex. 12, Phillippy II Tr. at 348:1-20 Ex. 17, Cox Tr. at 66:8-12 Ex. 13, Khaykin Tr. at 16:6-13
80	Ex. 85, NOVANTA00000100 at ‘101
81	Ex. 86, Werth Ex. 8 Ex. 72, Phillippy Ex. 31 at NEWP119412 Ex. 86, Werth Ex. 8 NEWP063946 Ex. 38, Allen Tr. at 77:13-78:5 Ex. 39, Werth Tr. at 92:1-94:22
82	Ex. 6, Cargile Tr. at 142:17-20
83	Ex. 86, Werth Ex. 8 at NEWP063947 Ex. 38, Allen Tr. at 77:13-78:5 Ex. 38, Allen Tr. at 77:13-78:5

84	Ex. 12, Phillippy II Tr. at 412:18-413:7, 414:3-415:16 Ex. 39, Werth Tr. at 89:6-90:25 Ex. 86, Werth Ex. 8 Ex. 86, Werth Ex. 8
85	Ex. 40, Meintjes Tr. at 43:24-44:16 Ex. 40, Meintjes Tr. at 46:15-48:6
86	Ex. 87, Cargile Ex. 22 at NEWP024563
87	Ex. 88, Ippolito Ex. 5 Ex. 88, Ippolito Ex. 5 at MKS00002451 Ex. 19, Ippolito Tr. at 44:12-45:25 Ex. 19, Ippolito Tr. at 44:12-45:25
88	Ex. 89, Phillippy Ex. 30 Ex. 89, Phillippy Ex. 30 at 5
89	Ex. 90, NEWP011224 Ex. 91, NEWP005838
90	Ex. 19, Ippolito Tr. at 46:25-47:7, 50:4-17 Ex. 92, Cox Ex. 6 Ex. 93, Ippolito Ex. 6 Ex. 92, Cox Ex. 6 at MKS00003783 Ex. 19, Ippolito Tr. at 52:9-54:6
91	Ex. 17, Cox Tr. at 49:20-50:19
92	Ex. 94, NEWP015657 at ‘659 Ex. 95, NEWP015675 at ‘677 Ex. 96, NEWP016966
93	Ex. 39, Werth Tr. at 135:10-136:21
94	Ex. 12, Phillippy II Tr. at 443:11-19
95	Ex. 97, Potashner Ex. 24 at NEWP052147
96	Ex. 98, NEWP008399 Ex. 99, Werth Ex. 12 at NEWP123602 Ex. 96, NEWP016966 Ex. 100, Parker Ex. 5
97	Ex. 96, NEWP016966

98	Ex. 12, Phillippy II Tr. at 417:18-25 Ex. 12, Phillippy II Tr. at 435:24-436:12
99	Ex. 40, Meintjes Tr. at 53:15-20 Ex. 40, Meintjes Tr. at 54:3-8
100	Ex. 19, Ippolito Tr. at 36:6-21 Ex. 19, Ippolito Tr. at 36:6-21
101	Ex. 101, NEWP008618 Ex. 102, Phillippy Ex. 5 Ex. 101, NEWP008618 at '634 Ex. 102, Phillippy Ex. 5
102	Ex. 103, NEWP011694
103	Ex. 104, NEWP002218 Ex. 105, NEWP011703
104	Ex. 106, NEWP029991 Ex. 107, NEWP029998
105	Ex. 108, NEWP011857
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107	Defs' MSJ Appendix, Ex. 18
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109	Ex. 110, Coyne Ex. 8 at NEWP034759
110	Ex. 111, NEWP096920 at '921
111	Ex. 40, Meintjes Tr. at 58:2-6 Ex. 40, Meintjes Tr. at 59:1-17
112	None
113	Ex. 39, Werth Tr. at 70:2-72:8
114	Ex. 39, Werth Tr. at 70:2-71:14 Ex. 39, Werth Tr. at 70:2-72:8 Ex. 39, Werth Tr. at 95:3-98:2

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117	Ex. 38, Allen Tr. at 31:22-32:19
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119	Ex. 38, Allen Tr. at 107:2-16 Ex. 39, Werth Tr. at 142:16-143:25 Ex. 40, Meintjes Tr. at 59:11-17 Ex. 38, Allen Tr. at 107:2-16
120	Ex. 39, Werth Tr. at 142:16-143:25
121	Ex. 44, Parker Tr. at 71:19-23 Ex. 113, Parker Ex. 7
122	Ex. 40, Meintjes Tr. at 59:11-17 Ex. 39, Werth Tr. at 135:10-136:21
123	Ex. 39, Werth Tr. at 83:23-85:2
124	Ex. 39, Werth Tr. at 137:17-138:22 Ex. 39, Werth Tr. at 133:12-134:16
125	Ex. 39, Werth Tr. at 109:25-111:2
126	Ex. 39, Werth Tr. at 16:11-17:20
127	Ex. 38, Allen Tr. at 13:11-25 Ex. 38, Allen Tr. at 69:18-71:9
128	Ex. 38, Allen Tr. at 76:12-20 Ex. 38, Allen Tr. at 42:8-44:9
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131	Ex. 44, Parker Tr. at 52:5-53:16 Ex. 44, Parker Tr. at 49:5-19 Ex. 43, Parker Ex. 4 at NEWP077312 Ex. 44, Parker Tr. at 34:23-35:20 Ex. 44, Parker Tr. at 51:15-52:4
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133	Ex. 44, Parker Tr. at 62:11-63:15 Ex. 43, Parker Ex. 4 Ex. 115, Meintjes Ex. 9
134	Ex. 20, Phillippy I Tr. at 183:13-185:1
135	Ex. 6, Cargile Tr. at 191:5-24 Ex. 6, Cargile Tr. at 191:5-24
136	Ex. 38, Allen Tr. at 74:11-75:18 Ex. 44, Parker Tr. at 45:7-46:7 Ex. 43, Parker Ex. 4 Ex. 116, MKS00004007
137	Ex. 38, Allen Tr. at 65:1-67:7, 105:7-106:25 Ex. 39, Werth Tr. at 54:4-55:6, 79:13-82:21 Ex. 38, Allen Tr. at 65:1-67:7 Ex. 38, Allen Tr. at 65:1-67:7
138	Ex. 6, Cargile Tr. at 143:6-144:3
139	Ex. 38, Allen Tr. at 105:16-106:25
140	Ex. 39, Werth Tr. at 54:4-55:6, 79:13-82:17 Ex. 39, Werth Tr. at 54:4-55:6, 79:13-82:17
141	Ex. 117, NEWP000207 at ‘209 Ex. 118, NEWP011840 at ‘841 Ex. 119, NEWP001865
142	Ex. 120, JMPC-NEWP_00021644 at ‘645

143	Ex. 63, Cox Ex. 4 Ex. 64, Cox Ex. 5
144	Ex. 121, NEWP011261 Ex. 122, Phillippy Ex. 13 Ex. 123, NEWP000029
145	Ex. 81, Cargile Ex. 17 at NEWP131691
146	Ex. 12, Phillippy II Tr. at 326:24-328:11 Ex. 12, Phillippy II Tr at 329:4-19
147	Ex. 124, Cox Ex. 12 at NEWP131682
148	Ex. 17, Cox Tr. at 69:21-70:19 Ex. 17, Cox Tr. at 71:5-8
149	Ex. 81, Cargile Ex. 17 at NEWP131691
150	Ex. 125, Cox Ex. 13 Ex. 17, Cox Tr. at 78:2-79:17 Ex. 125, Cox Ex. 13 at NEWP126456 Ex. 17, Cox Tr. at 78:2-79:17
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153	Ex. 81, Cargile Ex. 17 at NEWP131692
154	Ex. 13, Khaykin Tr. at 101:19-102:17 Ex. 31, Potashner I Tr. at 55:8-58:1
155	Ex. 13, Khaykin Tr. at 108:12-109:2
156	Ex. 13, Khaykin Tr. at 18:19-19:4
157	Ex. 115, Meintjes Ex. 9 at JPMC-NEWP_00039143

158	Ex. 20, Phillippy I Tr. at 152:3-9
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160	Ex. 112, Lubeck/JPM Ex. 19 at JPMC-NEWP_00027196 Ex. 4, Lubeck Tr. at 74:6-75:20 Ex. 112, Lubeck/JPM Ex. 19 at JPMC-NEWP_00027196
161	Ex. 40, Meintjes Tr. at 60:17-62:6
162	Ex. 4, Lubeck Tr. at 114:18-116:22 Ex. 4, Lubeck Tr. at 112:7-113:13, 114:24-115:2, 115:22-116:22 Ex. 126, Lubeck/JPM Ex. 16 Ex. 4, Lubeck Tr. at 115:22-116:22
163	Ex. 126, Lubeck/JPM Ex. 16 at NEWP036480
164	Ex. 4, Lubeck Tr. at 112:7-19 Ex. 4, Lubeck Tr. at 112:7-113:13, 114:24-115:2 Ex. 112, Lubeck/JPM Ex. 19 Ex. 127, Lubeck/JPM Ex. 17 at JPMC-NEWP_00045513 Ex. 127, Lubeck/JPM Ex. 17 at JPMC-NEWP_00045516
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168	Ex. 5, Simone Tr. at 89:10-17 Ex. 5, Simone Tr. at 92:9-93:8
169	Ex. 130, NEWP013341 Ex. 131, NEWP007850

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170	Ex. 133, NEWP003838 Ex. 131, NEWP007850
171	Defs' MSJ Appendix, Ex. 18
172	Ex. 134, Cox Ex. 9 at NEWP072932
173	Ex. 135, NEWP068976
174	Defs' MSJ Appendix, Ex. 18 at 549 Ex. 13, Khaykin Tr. at 105:11-12
175	Ex. 19, Ippolito Tr. at 20:18-21:2
176	Ex. 62, Cox Ex. 8 at NEWP000009 Ex. 62, Cox Ex. 8 at NEWP000010
177	Defs' MSJ Appendix, Ex. 18 Ex. 136, NEWP021994 at '995 Ex. 137, NEWP011160 Ex. 137, NEWP011160
178	Ex. 60, NEWP000121 Ex. 138, NEWP000018 at '820 Ex. 131, NEWP007850
179	Ex. 31, Potashner I Tr. at 67:2-21
180	Defs' MSJ Appendix, Ex. 18 at 478
181	Ex. 139, Simone Ex. 12 at NEWP061781 Ex. 5, Simone Tr. at 72:14-25, 73:6-10 Ex. 17, Cox Tr. at 65:4-8, 66:8-12 Ex. 12, Phillippy II Tr. at 313:9-13 Ex. 13, Khaykin Tr. at 16:6-13
182	Ex. 140, Simone Ex. 13 Ex. 19, Ippolito Tr. at 20:18-21:2 Ex. 141, NEWP062586
183	Ex. 5, Simone Tr. at 74:24-75:25 Ex. 17, Cox Tr. at 66:21-67:8

	Ex. 12, Phillippy II Tr. at 309:24-310:16 Ex. 13, Khaykin Tr. at 11:23-12:2, 13:2-22 Ex. 18, Kadia Tr. at 165:11-15
184	Ex. 19, Ippolito Tr. at 21:11-22:17 Ex. 19, Ippolito Tr. at 21:11-22:17
185	Ex. 5, Simone Tr. at 74:7-22
186	Ex. 62, Cox Ex. 8 Ex. 142, Cox Ex. 19 Ex. 17, Cox Tr. at 60:15-19
187	Ex. 13, Khaykin Tr. at 13:24-14:5
188	Ex. 14, Potashner II Tr. at 257:5-259:13 Ex. 14, Potashner II Tr. at 257:5-259:13 Ex. 12, Phillippy II Tr. at 330:24-332:21
189	Ex. 143, Ippolito Ex. 18 at MKS00000509 Ex. 19, Ippolito Tr. at 113:6-8 Ex. 19, Ippolito Tr. at 114:11-12
190	Ex. 19, Ippolito Tr. at 122:15-124:18 Ex. 81, Cargile Ex. 17 at NEWP131693
191	Ex. 144, Cargile Ex. 14 at MKS00001763 Ex. 145, Ippolito Ex. 21 at NEWP127392 Ex. 19, Ippolito Tr. at 122:15-124:18
192	Ex. 19, Ippolito Ex. 21 Ex. 146, Ippolito Ex. 22 Ex. 147, Ippolito Ex. 23 Ex. 19, Ippolito Tr. at 122:15-124:18 Ex. 19, Ippolito Tr. at 132:1-10 Ex. 148, Ippolito Ex. 24 at MKS00000439 Ex. 19, Ippolito Tr. at 122:15-124:18
193	Ex. 19, Ippolito Tr. at 94:1-13 Ex. 19, Ippolito Tr. at 138:10-13 Ex. 19, Ippolito Tr. at 94:1-13, 138:10-14 Ex. 147, Ippolito Ex. 23 at MKS00000154
194	Ex. 149, Ippolito Ex. 20 at NEWP126981

195	Ex. 150
196	Ex. 164, Foley Report, ¶28 Ex. 164, Foley Report, ¶¶28-29 Ex. 164, Foley Report, ¶¶28-29
197	Ex. 164, Foley Report, ¶30
198	Ex. 164, Foley Report, ¶30 Ex. 164, Foley Report, ¶30
199	Ex. 164, Foley Report, ¶14 Ex. 164, Foley Report, ¶8
200	Ex. 164, Foley Report, ¶17 Ex. 164, Foley Report, ¶17
201	Ex. 164, Foley Report, ¶¶21-22
202	Ex. 164, Foley Report, ¶¶22, 59
203	Ex. 19, Ippolito Tr. at 96:3-97:21
204	Ex. 144, Cargile Ex. 14 Ex. 144, Cargile Ex. 14 at MKS00001763 Ex. 144, Cargile Ex. 14 at MKS00001764
205	Ex. 151, MKS00001626
206	Ex. 147, Ippolito Ex. 23 Ex. 147, Ippolito Ex. 23 at MKS00000154
207	Defs' MSJ Appendix, Ex. 18
208	Defs' MSJ Appendix, Ex. 18 at 488
209	Defs' MSJ Appendix, Ex. 18 at 487-88
210	Defs' MSJ Appendix, Ex. 18 at 488 Ex. 152, NEWP058706 at '709, '719
211	None
212	Ex. 153, Cargile Ex. 21 Ex. 153, Cargile Ex. 21 at JPMC-NEWP_00034359

213	Ex. 154, Lubeck/JMP Ex. 4 at NEWP019793
214	Ex. 155, Werth Ex. 3 at NEWP000546
215	Ex. 39, Werth Tr. at 46:1-48:11 Ex. 17, Cox Tr. at 102:23-103:13
216	Ex. 6, Cargile Tr. at 82:12-83:25 Ex. 6, Cargile Tr. at 82:12-83:25 Ex. 6, Cargile Tr. at 123:4-22 Ex. 6, Cargile Tr. at 84:1-6
217	Ex. 89, Phillippy Ex. 30 at 4-5
218	Ex. 89, Phillippy Ex. 30 at 4-5
219	Ex. 156, NEWP084014 Ex. 157, NEWP084048 Ex. 158, NEWP002205 at ‘206
220	Ex. 20, Phillippy I Tr. at 159:1-160:2 Ex. 159, NEWP099106
221	Ex. 5, Simone Tr. at 76:25-77:4, 78:1-5 Ex. 17, Cox Tr. at 99:15-24, 101:4-102:3 Ex. 20, Phillippy I Tr. at 179:25-180:24 Ex. 17, Cox Tr. at 101:4-102:3 Ex. 17, Cox Tr. at 98:25-99:14 Ex. 4, Lubeck Tr. at 38:15-21
222	Ex. 6, Cargile Tr. at 100:7-101:2
223	Ex. 11, Potashner Ex. 12 at NEWP083317
224	Ex. 39, Werth Tr. at 52:11-53:7
225	Ex. 38, Allen Tr. at 36:22-40:14
226	Ex. 44, Parker Tr. at 26:11-27:17 Ex. 44, Parker Tr. at 27:18-28:2
227	Ex. 39, Werth Tr. at 118:2-119:12 Ex. 39, Werth Tr. at 115:24-117:3
228	Ex. 39, Werth Tr. at 117:7-118:6 Ex. 39, Werth Tr. at 118:7-119:12

229	Ex. 39, Werth Tr. at 119:13-121:1 Ex. 39, Werth Tr. at 121:3-122:25 Ex. 39, Werth Tr. at 123:12-24
230	Ex. 17, Cox Tr. at 99:15-24, 101:4-102:3
231	Ex. 19, Ippolito Tr. at 76:12-77:7 Ex. 19, Ippolito Tr. at 113:23-115:20
232	None
233	Ex. 160, Ippolito Ex. 25 Ex. 45, Cargile Ex. 2 Ex. 46, Cargile Ex. 4 Ex. 144, Cargile Ex. 14 Ex. 160, Ippolito Ex. 25 at 8 Ex. 19, Ippolito Tr. at 147:2-156:25
234	Ex. 6, Cargile Tr. at 116:4-124:23 Ex. 160, Ippolito Ex. 25 Ex. 6, Cargile Tr. at 116:4-120:15
235	Ex. 144, Cargile Ex. 14 Ex. 19, Ippolito Tr. at 89:24-91:7
236	None
237	Ex. 161, Ippolito Ex. 13 at 3 Ex. 19, Ippolito Tr. at 100:18-101:4 Ex. 19, Ippolito Tr. at 17:9-18:1 Ex. 19, Ippolito Tr. at 18:10-19:1
238	Ex. 162, Ippolito Ex. 14 Ex. 19, Ippolito Tr. at 103:21-104:1 Ex. 19, Ippolito Tr. at 104:17-105:18
239	Ex. 160, Ippolito Ex. 25 at 10 Ex. 19, Ippolito Tr. at 160:5-23
240	Defs' MSJ Appendix, Ex. 18
241	Ex. 163, Quintero Corrected Report, *passim*

EXHIBIT B

1 Nevada Civil Practice Manual § 19.15

Nevada Civil Practice Manual > CHAPTER 19 SUMMARY JUDGMENT

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§ 19.15 Form and Content of Motion

[1] Motion Must be in Writing

Motions for summary judgment must be in *writing* and accompanied by points and authorities, affidavits if any, and attachments if any. NRCP 7(b); FRCP 56(c); NRCP 56(c); *see also Sch. Dist. No. 1J v.* ACandS, Inc., 5 F.3d 1255 (9th Cir. 1993), *cert. denied*, *512 U.S. 1236 (1994)*; *see also* 28 Fed. Proc. L. Ed. § 62:575; 52 A.L.R. Fed. 567 (1981). However, the court recognizes two limited exceptions to these requirements: (1) oral motions that do not prejudice the nonmoving party; and (2) the court *sua sponte* grants summary judgment and provides adequate procedural protection to the losing party. *See* Sierra Nev. Stagelines, Inc. v. Rossi, 111 Nev. 360, 363–64, 892 P.2d 592, 594 (1995); *see also* Scott-Hopp v. Bassek, 2014 Nev. Unpub. LEXIS 352, at *9 (Nev. Feb. 28, 2014); Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83, 847 P.2d 731, 735 (1993); Exber, Inc. v. Sletten Constr. Co., 92 Nev. 721, 733, 558 P.2d 517, 524 (1976).

[2] Concise Statement of Undisputed Facts

Several trial courts have long required both the motion for summary judgment and the responses to the motion to include a concise statement setting forth each fact material to the disposition of the motion that the party claims is—and is not—genuinely in issue, with citations to the supporting portion of the record. TJDCR 7; NJDCR 6.

In 2019, NRCP 56 was amended to closely mirror its federal counterpart, FRCP 56, by omitting the "concise statement" language of former NRCP 56(c). NRCP 56(c)(1) requires, for example, that a party asserting that a fact cannot be or is genuinely disputed cite to particular parts of materials in the record, or show that the materials cited do not establish the absence or presence of a genuine dispute. Much like its federal counterpart though, it is not believed that this amendment was intended to eliminate the "concise statement" requirement. *See* NRCP 56(c)(1) and FRCP 56(c)(1). Rather, it is believed that the requirement persists.

If so, the requirement that a motion for summary judgment set forth a concise statement of undisputed facts is more than a procedural nicety. Armstrong v. Chrysler Fin. Corp., 1999 U.S. Dist. LEXIS 12308 (D. Conn. July 29, 1999). Its purpose is to conserve judicial time and resources by assisting the trial judge in ruling upon a summary judgment motion by eliminating the need for the trial judge to search the entire record for a genuine issue of material fact. Simmons v. Navajo County, Arizona, 609 F.3d 1011 (9th Cir. 2010); Schuck v. Signature Flight Support of Nev., Inc., 126 Nev. 434, 245 P.3d 542 (2010); *Hicks v. Dairyland Ins. Co.*, No. 2:08-cv-1687-*RCJ-PAL, 579 F.3d 943, 948 (D. Nev. Mar. 3, 2010)*. The trial judge is not a pig "hunting for truffles buried in briefs." Indep. Towers of Wash. v. Washington, 350 F.3d 925 (9th Cir. 2003). Rather, the trial judge need only look at the portions of the record cited by the parties in the concise statement and Opposition to quickly and effectively identify the disputed and undisputed facts. Dubois v. Ass'n of Apt. Owners, 453 F.3d 1175, 1180 (9th Cir. 2006); Bordelon v. Chi. Sch. Reform Bd. of Trs., 233 F.3d 524, 527 (7th Cir. 2000); Trout v. BMW of N. Am., 2007 U.S. Dist. LEXIS 12000, *4 (D. Nev. Feb. 12, 2007). The court may also exclude from consideration all factual assertions not supported by citations to the record. Athearn v. Ala. Airlines, Inc., No. 03-35583, 118 Fed. Appx. 172, 173–74, 2004 U.S. App. LEXIS 24779, *4 (9th Cir. 2004).

There is an issue of whether the concise statement must be a document separate from the motion and points and authorities. In view of the fact that Rule 56, in some jurisdictions, expressly requires the concise statement to be in a separate document, *see* *Bradley v. Work, 154 F.3d 704 (7th Cir. 1998)*, it appears that the Nevada rules do not require a separate document. That is also true with respect to the federal rule. *Consejo De Desarrollo Economico De Mexicali, AC v. United States, 438 F. Supp. 2d 1207, 1223 (D. Nev. 2006)*, *vacated and remanded on other grounds*, *482 F.3d 1157 (9th Cir. 2007)*.

Nevada Civil Practice Manual

End of Document

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DATED: 11/18/19

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

FD

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

NOTICE OF ENTRY OF ORDER

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

DATED this 20th day of November, 2019.

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/s/ Adam K. Bult

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CERTIFICATE OF SERVICE

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

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

DATED: 11/18/19

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION _____ This Document Relates To: ALL ACTIONS.	CASE NO.: A-16-733154-B (Consolidated with Case No. A-16-734039-B) CLASS ACTION **REPLY IN SUPPORT OF MOTION TO STRIKE**

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Plaintiffs' Opposition to Defendants' Motion to Strike makes no serious effort to justify their procedurally improper ***84-page*** Separate Statement, which they filed ***in addition to*** a 30-page opposition brief. Defendants' Motion to Strike is not an academic motion on a trivial procedural rule. The page limitation that Plaintiffs disobeyed serves an important purpose: preserving judicial and party resources by requiring that parties concisely get to the point on summary judgment. By ignoring the 30-page limit, Plaintiffs have forced this Court and Defendants to waste time and resources combing through more than 100 pages of summary judgment briefing that never should have been filed. This is not just a distraction; it is unfair and a plain violation of the applicable rule. The Court should strike Plaintiffs' Separate Statement from the record and decline to consider it in ruling on Defendants' Motion for Summary Judgment.

First, Plaintiffs' Opposition fails to even ***mention***—let alone grapple with or distinguish—the controlling rule that expressly prohibits what Plaintiffs have done here. EDCR 2.20(a) provides that, "[u]nless otherwise ordered by the court, ***papers submitted in support of pretrial and post-trial briefs shall be limited to 30 pages***, excluding exhibits." (Emphasis added). Plaintiffs' Separate Statement is—by their own admission—a "paper[] submitted in support of [a] pretrial …brief[]," namely, Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. (*See* Opp. 1 (arguing that the Separate Statement "will aid the Court in adjudicating the pending motion for summary judgment")). Plaintiffs did not seek leave to exceed EDCR 2.20(a)'s 30-page limitation, and the Court did not grant them leave. Plaintiffs' ***114-page*** summary judgment filing indisputably violates EDCR 2.20(a). The Motion should be granted on this basis alone.

Second, Plaintiffs' continued reliance on the non-precedential, non-controlling Nevada Civil Practice Manual as a basis for unabashedly flouting a controlling rule of court is a head-scratcher. All the Nevada Civil Practice Manual says is that "the Nevada rules ***do not require***" the "concise statement" of material facts to be contained in a separate document. (Opp. 2 (quoting 1 Nev. Civ. Prac. Man. § 19.15[2]) (emphasis added)). So what? That certainly does not mean that Plaintiffs can circumvent EDCR 2.20(a)'s page limitation by filing a far-from-

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concise 84-page Separate Statement, in addition to a 30-page opposition brief.[1] If Plaintiffs wanted to file a concise statement of material facts as a separate document, they still needed to comply with EDCR 2.20(a)'s 30-page limitation or seek leave of Court to exceed it. They failed to do either.

Third, Plaintiffs' claim that Defendants' Motion is procedurally improper is misplaced. Plaintiffs ask the Court to hold that they can violate the Court's rules, and Defendants and the Court have no legal recourse. Of course this is not the law. The Court has the inherent power to manage the proceedings before it and enforce its own rules. *See Halverson v. Hardcastle*, 123 Nev. 245, 262, 163 P.3d 428, 440 (2007) ("[A] court has inherent power to protect the dignity and decency of its proceedings and to enforce its decrees ….). The Court should exercise that authority to strike Plaintiffs' clearly improper Separate Statement.

Fourth, Plaintiffs' belated submission of an ***18-page*** "index" to their opposition brief fails to cure their flagrant violation of EDCR 2.20(a). (*See* Opp. Exhibit A). Like the Separate Statement, the "index" unquestionably is a "paper[] submitted in support of" Plaintiffs' opposition brief. EDCR 2.20(a). Even with the "index," Plaintiffs' summary judgment opposition papers would still exceed EDCR 2.20(a)'s 30-page limitation by 18 pages, or ***60%***. The Court should not allow Plaintiffs to rectify their egregious violation of the Court's rules through a violation that is only slightly less egregious.

[1] This was not a mere formatting issue, like Defendants' Motion for Summary Judgment, which—before it was corrected—exceeded the 30-page limit by a few lines.

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Accordingly, for these reasons and the reasons set forth in Defendants' Motion, the Court should strike Plaintiffs' Separate Statement pursuant to EDCR 2.20(a).

DATED this 20th day of November, 2019.

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/s/ Maximilien D. Fetaz

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CERTIFICATE OF SERVICE

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

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

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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, NOVEMBER 21, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff(s):	DAVID C. O'MARA, ESQ. DAVID A. KNOTTS, ESQ. ANDREW MUNDT, ESQ.
For the Defendant(s):	MAXIMILIEN D. FETAZ, ESQ. BRIAN M. LUTZ, ESQ. COLIN B. DAVIS, ESQ. MERYL YOUNG, ESQ. (Appeared telephonically)

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA; THURSDAY, NOVEMBER 21, 2019

[Proceeding commenced at 1:29 p.m.]

THE COURT: Thank you. Please be seated. Good afternoon, everyone.

Let's take appearances from your right to left, please.

MR. O'MARA: Good afternoon, Your Honor. David O'Mara, on behalf of the Plaintiffs.

With me and to my left is Andrew Mundt. He's an associate with Robbins Geller. He's not admitted, but we would ask the Court to allow to him to sit at chambers so we can facilitate the exhibits --

THE COURT: Sure.

MR. O'MARA: -- and help us with that.

THE COURT: Thank you.

MR. MUNDT: Thank you.

MR. KNOTTS: Good afternoon, Your Honor. David Knotts, Robbins Geller Rudman Dowd, for Plaintiffs.

THE COURT: Thank you.

MR. LUTZ: Good afternoon. Brian Lutz from Gibson Dunn, on behalf of the Defendants.

THE COURT: Thank you.

MR. DAVIS: Good afternoon, Your Honor. Colin Davis from Gibson Dunn, on behalf of the Defendants.

THE COURT: Thank you.

MR. FETAZ: Good afternoon, Your Honor. Maximilien Fetaz from Brownstein, on behalf of Defendants.

And we also have on the telephone Ms. Young, who is also *pro hac'd* in on behalf of the Defendants.

THE COURT: Thank you. Does anyone object to Mr. Mundt sitting at counsel table?

MR. LUTZ: No, of course, not.

MR. DAVIS: No, Your Honor.

THE COURT: All right. So we have first a Motion to Strike. I'd like to hear that before we get to the summary judgment. And at the conclusion of the summary judgment, we'll do the status check.

Mr. Davis.

MR. DAVIS: Good afternoon, Your Honor. Colin Davis.

This is a motion about the Plaintiff's 84-page, 241-paragraph, separate statement of material facts. Plaintiffs filed this lengthy document in addition to a 30-page opposition brief and in addition to 165 exhibits in opposition to the Defendants' Motion for Summary Judgment.

Plaintiffs' separate statement plainly violates the Court's rules. 8th District Court Rule 2.20(a), which Plaintiffs don't even mention in their opposition, says that unless otherwise ordered by the Court, papers submitted in support of pretrial and posttrial briefs shall be limited to 30 pages, excluding exhibits.

Plaintiffs violated this rule by filing a total of 114 pages of papers in opposition to the Defendants' Motion for Summary

Judgment.

They didn't ask us to stipulate to extend the page limits. They didn't ask the Court's permission for an extension. They just filed a separate statement. There's really no question that the separate statement is a paper filed in support of their opposition to their motion for -- or our Motion for Summary Judgment.

So the Motion the Strike should be granted on that basis alone.

But the Plaintiffs' only response is to point to the Nevada Civil Practice Manual, a nonbinding, nonprecedential, secondary authority, which says that there's no requirement that the concise statement that previously was required under NRCP 56 has to be filed as a separate document.

Your Honor, that's irrelevant to whether Plaintiffs complied with EDCR 2.20(a). Whether or not they could file their separate statement as a separate document, they still needed to comply with the 30-page limitation.

Plaintiffs also say that even if they violated Rule 2.20(a), we're out of luck because a Motion to Strike can only be directed to a pleading. Frankly, that's a pretty surprising argument, Your Honor. Plaintiffs basically are saying that they can violate the Court's rules with impunity, and we and Your Honor have no recourse. That's not the law. However you interpret our Motion to Strike, it's black letter law that you have inherent power to enforce the Court's rules, including by striking the procedurally improper separate statement.

Finally, Your Honor, just a few words about the index that Plaintiffs submitted with their opposition to our Motion to Strike. When the Plaintiffs filed their separate statement, we contacted Plaintiffs' counsel. We advised them that we believe their filing violated EDCR 2.20(a), and we gave them an opportunity to file the corrected brief. They chose not to do that.

This whole issue could have been avoided. We could have avoided filing a Motion to Strike. And Plaintiffs shouldn't get a second chance to correct their violation, and they certainly shouldn't be allowed to correct their violation with another violation, which is an 18-page index, which they proposed to submit in addition to their 30-page opposition.

Unless Your Honor has any questions --

THE COURT: I don't. Thank you.

Opposition, please, Mr. Knotts.

MR. KNOTTS: Thank you, Your Honor. I'll be very brief.

I think the timing on this is somewhat interesting because I think the Court has likely either considered the separate statement at this point or hasn't. And, you know, I think we're anxious to get -- or to talk about the actual substantive evidence on the real motion.

You know, but separate statements have been filed in this Court in connection with the motions for summary judgment for a long time, without an accompanying page limit motion. And yes, the NRCP was amended in March of this year.

You know, that didn't catch us by surprise. We have great

Nevada counsel who keeps us apprised of these sorts of things, so we looked at the practice guide, and said, well, what does this change in the rules mean? We looked at some of the cases. We couldn't find any cases on point from this Court or appellate, but we did look at some of the federal cases.

And we read from the practice guide that submitting a separate statement of facts assists the Court in adjudicating the motion. And while it's not required, it doesn't indicate that the common practice still isn't being followed.

In the federal cases that we looked at, we saw two points. First, you know, they've had the same version of NRCP that Nevada has now for a few years. And the federal cases indicate that as long as we don't include legal argument in the separate statement of facts, as long as we don't start citing cases and just filing another brief essentially, that it doesn't violate the page limits. And that's a Central District of California case.

And the district of Nevada, interestingly enough, has an actual local rule that says a separate statement of facts is counted against the page limits. You know, this Court doesn't have that particular rule.

You know, and then we filed the chart and the events that the Court intended to strike the separate statements so that the Court could access and find the exhibits that we had cited in the brief. And I think it's ironic that Mr. Davis said that you can't -- and even assuming that it's a violation, you can't correct a violation of the page

limit, but at the same time they filed their reply, they filed a new condensed version of their opening brief that somehow electronically condensed it down into 30 pages. And we don't object to that, but I do think it's ironic that the Defendants who filed an errata and a corrected brief say that you can't correct a page limit violation.

So in any event, I think we stand by the decision to file that separate statement. It was supported by our reading of the treatise, but, you know, again, we submit that it is ultimately a matter of the Court's discretion whether to consider or not. And, you know, I think the Court has likely considered it one way or another. So we respectfully request that the motion be denied. But either way, we're ready to talk about the evidence on the substantive motion.

So thank you, Your Honor.

THE COURT: Thank you.

And the reply, please.

MR. DAVIS: Your Honor, we don't have anything further. Thank you.

THE COURT: All right. So I'm going to deny the Motion to Strike. I -- easily could have been attached as an exhibit. I -- the Nevada Supreme Court continuously tells us that matters should be determined on the merits, and I actually had started reviewing it before the Motion to Strike came in. So I can't -- I can't take that out of my thought process. So in the interest of fairness, I am going to deny the motion.

Also, the other thing is that when we strike, things are

removed from the record. This is likely to end up in appeal, so -- or it's possibly going to end up in appeal. I don't want to hamper either party from having a full record.

That takes us into the motion. I'm going to limit the moving party to 20 minutes, 25 minutes on the opposition, and 15 minutes on the reply. And in your argument, if you'll focus on materiality --

MR. LUTZ: Sure.

THE COURT: -- and the basis of dispute with the facts, because those are the issues that I'm focusing on.

MR. LUTZ: Say the second --

THE COURT: The material and the evidence with regard to disputed issues -- the strength of evidence.

MR. LUTZ: Sure. And by "materiality," you mean the materiality of the supposed interest to Mr. --

THE COURT: The -- yes.

MR. LUTZ: Okay. I'll get there.

THE COURT: Yes. Yes. And that's exactly what I'm looking for.

MR. LUTZ: Sure. And if I may, I have some slides that I'd like to pass out. I have copies for you guys as well.

May I approach?

THE COURT: Are you going to need the ELMO or the --

MR. LUTZ: No.

THE COURT: Okay. Good enough. Thank you.

MR. LUTZ: Sure.

THE COURT: Do you have one for the law clerk?

MR. LUTZ: Yep.

THE COURT: That would be great.

MR. LUTZ: And I'm going to skip through some things just to respect the time limits that you gave us.

THE COURT: Well, you know, we set you on an afternoon stack. But as it turns out, I have two matters at 2:30, one of which -- I have two matters at 2:30, one of which is going to be delayed by an hour.

MR. LUTZ: Okay.

THE COURT: So if you need to -- if you guys go over a few minutes, I'm not going to, like, set a stopwatch.

MR. LUTZ: Understand.

THE COURT: But we can't do protracted arguments today.

MR. LUTZ: Got that. That's great.

THE COURT: And you guys are such good lawyers, you won't need the time I've given you anyway, probably.

MR. LUTZ: Yep. Thank you, Your Honor. Brian Lutz for Gibson Dunn.

Your Honor is aware this case has been litigated for four years, Defendants have hundreds of thousands of documents -- or tens of thousands of documents, they deposed --

THE COURT: Actually four and a half.

MR. LUTZ: What's that?

THE COURT: The complaint goes back --

MR. LUTZ: It feels like hundreds of thousands in the stack of materials that you have, I'm sure.

THE COURT: No. It goes back to March 9 of 2016 --

MR. LUTZ: Yeah.

THE COURT: -- the complaint.

MR. LUTZ: It's a massive body of evidence that the -- that's at issue. Plaintiffs seem to have given you a good chunk of that evidence in support of their -- in their opposition, and their strategy, I think, is pretty clear. It's to load up the record with information regarding every theory, every issue, every argument that's been developed during this case.

Their goal, I think, is to make it appear to the Court that there's so much evidence in this case covering so many different issues that there must be some material dispute that should force this case to go to trial. That's -- to us, that's what it seems like is the strategy here.

The massive submission from the Plaintiffs obscures the critical point, which I'm going to talk about today. They have no evidence on the core issues that are relevant today to get them to trial. That's a business judgment rule and breach of fiduciary duty with intentional fraud -- intentional misconduct or fraud.

They have -- and I'll touch on these today -- there's no evidence of a conflict, a material conflict, which I'll get to; no evidence of a one director controlling the company or controlling the other

directors; no evidence that the directors were duped into approving this transaction; no evidence that any director had an illicit intent to deceive the stockholders into approving a transaction that wasn't in their interest; and no evidence that any director knew that it was wrong to approve this transaction, but did it anyway. Those are the key issues that when you take the funnel of information that the Plaintiffs have put to you and you actually bring it down to what's relevant here, those are the critical issues that I'm going to go through today. There's just no evidence that they have to get them past summary judgment.

Just turning to the slides, Slide 1: This is not a lawsuit against a big company. This is a lawsuit against six individual -- individuals who four years ago served on the Board of Newport Corporation.

These Defendants, these individuals are highly experienced, highly credentialed, former directors of the company. They're founders of technology companies. They serve as CEOs of major corporations. They serve on the boards of major companies. Mr. Cox being one of them, was a 17-year member of Congress, a lawyer, the former head of the Securities and Exchange Commission. These are the individuals who the Plaintiffs say engaged in intentional misconduct and fraud. These directors had 47 years of combined experience as directors of Newport.

The point is they knew the company well. They're well equipped to make the business decision that is the critical issue,

really the only issue in this case, and that's the decision to sell Newport to MKS for an enormous premium to the stockholder.

Turning to Slide 2, and that focusing on the business decision -- the business decision for the sale of the company. A nine-month process, the sales process. They contacted nine different potential bidders, five of whom were interested and engaged in diligence; MKS at the end of the process was the last bidder.

After negotiations, MKS made a final bid of $23 per share. This price represented -- which was ultimately accepted -- this price represented a 53 percent premium on Newport stock price.

It was a -- it is -- Newport hadn't traded at that high for 13 years. Okay?

The directors, in consultation with their financial and legal advisors approved the transaction unanimously. That's the decision that Plaintiffs challenge, the decision that they ask you to second guess and determine was the wrong one.

So moving to Slide 3, just quickly, overwhelming support by both the shareholders and the market in general. And I focused on two leading proxy advisory firms here and their reaction to the deal. These are firms whose goal, whose objective is to advise shareholders on major issues, voting for directors, voting on transactions. This is what they do.

ISS and Glass Lewis are the two leading advisory firms. ISS says at the top: A vote for this proposal is warranted in light of the significant premium and the certainty of value, which I'll talk

about.

Glass Lewis says a similar thing: Focusing on the certainty of value, the substantial market premium, and the merger consideration, representing a 13-year high for the company shares.

What is certainty of value? They both focus on certainty of value. This was not a deal, a stock-for-stock deal. Newport stockholders weren't getting shares, weren't exchanging their Newport stock for shares of MKS. This was an all-cash deal.

So both proxy firms determined, just like the Board of Newport, that $23 per share -- in your pocket is better than a piece of paper worth $16 that could go up or could go down, but hadn't been worth $23 for 13 years. Both the advisory firms focused on this, and this, of course, was an issue that the directors decided.

Of course, night -- the shareholders in Newport overwhelmingly voted in favor of the transaction. 99.4 percent of the votes that were cast, were votes in favor. And this includes, by the way, Mr. Knotts' client, one of the lead Plaintiffs in this case, who also voted in favor of the transaction.

Turning to Slide 4, focusing on the relevant legal framework. This is a case -- and this is really a motion principally about the business judgment rule. Okay? The business judgment rule enshrined in the statute, as reflected here on Slide 4, says that directors and officers, in deciding upon matters in business, are presumed to act in good faith on an informed basis and with a view to the interest of the corporation. That is a legal presumption that

directors have.

The purpose of the business judgment rule is to provide the maximum protection to directors when they're doing the very thing that they're elected by shareholders to do: make business decisions. And the recent Nevada Supreme Court decision in *Wynn* talks about this exactly, and we're going to be spending some time on *Wynn* today, because it's nice when we have actually Nevada Supreme Court case law that talks about the very issue that we have.

Wynn says this: The business judgment rule goes beyond shielding directors from personal liability and decision-making. Rather, it also ensures that courts defer to the business judgment of corporate executives and prevents courts from substituting their own notions of what is and is not sound business judgment. It's a differential standard saying, Directors, you get to make the decision.

The point here: Business judgment rule is an incredibly strong defense, especially in Nevada where the legislature specifically designed the statute to be more protective of director decision-making than even Delaware.

Turning to the next slide: This is the framework for the analysis today. This is 78.138. We've spent the last four years talking about this statute with Your Honor. This is the statute that lays out what a Plaintiff -- what the Plaintiffs here need to prove in order to succeed and ultimately what they need to present evidence on in order to get past summary judgment.

It's two things. And first -- this is A. The first thing that

they have to do is present evidence that allows them -- that demonstrates that they can overcome the presumption of the business judgment rule. Business judgment rule is the first analysis. They have to get past that. If they can't get past the business judgment rule, it doesn't matter -- the rest of the statute doesn't matter. You don't get to the second part, which is whether there's a breach of fiduciary duty that involves intentional misconduct, fraud, or a knowing violation of law. They are two separate analyses and looking at different things which I'll talk about today. But it's important to note if we prevail on business judgment rule, you don't even get to the rest of this. The case -- summary judgment is granted on that basis alone.

Let's go to -- moving to Slide 6. So what do they have to do -- and I want to focus most of my argument today on business judgment rule. What do the Plaintiffs have to do in order to overcome the protection of Nevada's business judgment rule? Again, *Wynn*, in the Nevada Supreme Court, tells us. It says to revoke -- rebut the business judgment rule, you have to produce -- you have to prove ultimately that the Board's decision to approve the merger was, quote, the product of fraud, the product of self-interest, or that the directors failed to exercise due care in reaching the decision.

So three things that we're going to focus on: product of fraud, product of self-interest, due care. Those are the three things that *Wynn* tells us that we need to focus on.

Just taking a step back, business judgment rule. What do these focus on? These focus on structural issues around the Board's decision-making. Okay? The question is not at this phase of the business judgment rule whether the decision was the right one or the wrong one, but whether -- they focus -- the question focuses in on the way in which the Board reached the decision, and whether that was fundamentally flawed. It's a procedural, structural issue. As the *Wynn* says, it focused on the -- quote, unquote -- procedural indicia of reliability. Not whether it was right or wrong, but whether the way in which they made the decision should be changed -- is capable of being challenged in some way.

To rebut the business judgment rule presumption, there has to be some evidence that the Board decision was so compromised that it is not entitled to deference. Okay? Going to the nature of how they made the decision. They have to show that there was, for example, a conflict of interest or gross negligence. That doesn't just impact one director or two directors, but fundamentally impacts the decision of the Board as a whole. It impacts the ultimate decision here to approve the merger. It's not about one director. It's about the Board as a whole.

So -- and we'll talk about Mr. Phillippy, which is the focus here. It's not just whether he has a conflict, which he doesn't -- but I'll get to that. It's whether that conflict somehow impacted the entire Board's decision. Okay? And again, structural issues around the decision-making. That's what the business judgment rule is all about.

Okay. Let's keep moving onto Slide 7, and I'm going to take each of those three *Wynn* structural issues and go through each of them in reverse order. So I'm going to start with due care.

It's really not a focus on the argument, because the argument is more on the conflict, but just to deal with it. *Wynn* also talks about this. It says, The business -- quote: The business judgment rule is designed to limit judicial involvement in business decision-making, so long as a minimum level of care is exercised in arriving as that decision. That's at 375.

In other words, to rebut the business judgment rule presumption based on a failure to exercise care -- that part of the rule -- Plaintiffs have to show that the Board used less than minimal due care. That's an impossible burden for them to meet in this case. And they don't, to their credit, really try. They focus on other things.

And the reason they don't really try, as reflected on page 7, it's indisputable that this was a nine-month's sales process; the Board hired highly competent, accomplished legal and financial advisors; met 16 times during the course of the process; you know, reached out to highly, negotiated with five who were interested, ultimately increased MKS's price; and got a fairness opinion from JP Morgan that the price was fair from a financial perspective.

The process really isn't challenged. The only thing that they say in their brief is that an independent committee of the Board was appointed to work on the transaction, and that they didn't meet separately, but they met as a Board as a whole -- 16 times, by the

way. Plaintiffs don't explain how this reflects a "less than the minimal" standard of due care. They just sort of raise it.

The fact is the committee wasn't set up to wall off some conflict. It was set up because the bylaws said you should set up an independent committee.

The determination was made that the committee could function as a full Board, so the full -- those committee members sat in and went all -- to all of the Board -- 16 -- excuse me -- Board meetings. So there's no real question here that just by meeting as a full Board, as opposed to a committee, that there's somehow less than the minimal standard of due care.

Let's focus on what the real focus of the Plaintiffs is here. And that's starting on Slide 8. This is the -- this other -- the next part of the *Wynn* analysis, which is whether the transaction was the product of self-interest. Okay? Plaintiffs don't dispute that five of the six directors have no conflict, have no self -- disabling self-interest in the MKS merger. They focus on a single director, and that's Mr. Phillippy. For nearly four years now, we have been talking about Mr. Phillippy, and Plaintiffs have been trying to tag him with a conflict.

From the start of this case, we've always scratched our head about this, because this case is so unlike every case the Plaintiffs have ever cited and any case that we're aware of dealing with an interested director.

Mr. Phillippy was not a controlling stockholder. He did not

buy the company. He did not sit on the other side of the transaction. He did not -- he didn't get some fancy new job with MKS. He lost his job. He didn't get a financial package from MKS. This has none of the attributes of conflict or interest that is dealt with in any of the cases that we've seen.

Plaintiffs basically have two core theories as to why Mr. Phillippy is supposedly interested. They say, first -- and this is on my -- the bottom part of that slide. They say, Well, Mr. Phillippy had secret side deals with MKS; okay? Your Honor, that is absolutely at odds with the undisputed evidence in this case. Mr. Phillippy lost his job in the transaction. He lost his job.

The undisputed evidence is that there were no discussions with MKS between MKS and Mr. Phillippy before the deal was signed about Mr. Phillippy's role after the transaction or any compensation that would be paid to him.

You saw in our briefing we specifically asked MKS this, and he said no. The undisputed evidence is that there were no presigning discussions. And why is presigning -- why does that matter? And we cited the English case to you. And just to read from it -- what -- this is what the English case says, and this focused on this sort of presigning versus post signing -- what is important is whether -- and I'm quoting -- is whether discussions about post-close employment occurred before the company agreed to a deal -- before signing. This is because the issue that could create a conflict of interest is whether a fiduciary of the company had a motive to play favorites during the

sales process in order to secure post-closing employment.

In other words, to be material, post-close employment discussions must have occurred before the merger agreement was signed. This is common sense, but it's nice to have a clear recitation of the law.

It doesn't matter what happens if there's discussions after signing, because at that point, the deal is done. The $23 per share that the shareholders are ultimately going to get -- are ultimately going to get is a done deal. It doesn't matter what happens after. It matters what happens before, because that's when it can create an improper incentive. Okay? There is -- the evidence is clear that there were no discussions before, zero.

And then finally, even if you look at what happened after, and this is -- I'm still on the slide here -- Mr. Phillippy lost his job. He was retained for a couple of months as a consultant, which, of course, is common in situations like this, and he was put on the Board for I think two years. He was -- served as a member of the MKS Board. These are all things that happened through discussions after the signing, which is critical.

And then the other theory that Plaintiffs have -- so I -- look, well, the other theory that Plaintiffs have is that Mr. Phillippy's job as Newport's CEO is at risk.

Again, the core undisputed evidence on this is that the Board chose Mr. Phillippy as CEO, despite the conflict with Mr. Cargile, the CFO, the Plaintiffs make much of this. The Board

decided to go with Mr. Phillippy over Mr. Cargile. Okay? It's undisputed. And it also is undisputed that the Board never considered firing Mr. Phillippy. There is no evidence that the Board ever considered that. They focused on the conflict with Mr. Cargile. They focused on one shareholder who is saying bad things about Mr. Phillippy. There is no evidence, because it didn't happen, that the Board ever considered firing Mr. Phillippy, undisputed.

So why does this all matter? This all matters because without a conflict for Mr. Phillippy, this entire case goes away. There can't be -- and I'll show how it runs through all of this, but this whole case is built on there being a conflict for Mr. Phillippy that would have caused him to steer a transaction to MKS, to push for a sale of the company.

There is no evidence demonstrating that Mr. Phillippy had any interest in a transaction with MKS. It -- that all goes to materiality, but if you want to talk about the materiality of what he got, the Plaintiffs haven't submitted a single piece of evidence demonstrating that what Mr. Phillippy received from MKS after the transaction was material to him personally. It is an absolute black letter requirement that they have to come forward with evidence that the post-closing benefits to him were material to him.

The fact of the matter is he lost his job. He got less the in compensation afterwards. But the Plaintiffs haven't even developed any evidence that what he got was material to him personally. They can't just rely on inference. We saw that in your briefing, because

you asked the question. It's not just about inference. We are past the inference phase of a Motion to Dismiss. We are at summary judgment where it is their responsibility to come forward with some evidence of a material benefit to Mr. Phillippy.

I don't even think you have to -- not even think -- you don't even have to get there, because the undisputed evidence is that there was nothing on the table for him, no discussions at all before signing. That is the end of the case. That is the end of the case.

Okay. No self-interest for Mr. Phillippy, but going back to the framework of *Wynn*. It has to -- the transaction has to be to overcome the business judgment rule, the product of self-interest. So it's not just they have to establish self-interest. They also have to show that that self-interest also impacted the entire Board decision.

Here, the conflicts that they talk about, Mr. Phillippy's job was at risk because the Board was going to fire him. No facts to support that, but guess what, if -- even if it were true, that's not undisclosed to the Board. The Board knows that. It doesn't impact the Board's decision. And to put it in the framework, there is no evidence that the transaction was the product of self-interest.

Okay. I know I'm probably pushing my time, but one more point on the business judgment rule.

THE COURT: No. Go ahead.

MR. LUTZ: The last part of that analysis is whether the transaction -- to overcome the business judgment rule is whether there's evidence that the transaction -- that the decision was the

product of fraud. Okay?

The inability of the Plaintiffs to demonstrate that Mr. Phillippy had a material, personal, self-interest, had a conflict that caused him to push for MKS ends the story. It can't be the product of fraud if Mr. Phillippy had no personal interest. It just cannot be. That is the end of the case.

And as we said here, the product of fraud theory of the Plaintiffs is that Mr. Phillippy hid these in-process, strategic plan numbers from the Board in order to deceive it into approving a bad deal. There is no evidence that Mr. Phillippy had a conflict, had a personal self-interest through discussions with MKS before the transaction or otherwise. That means that there cannot be a product of fraud because Mr. Phillippy has no incentive whatsoever to deceive the directors.

That's what -- and you have to think about what product of fraud means. It can't just be nondisclosure. It has to be intentional deception that causes the Board to approve a deal that was against the interest of the company. Fraud -- product of fraud.

And if you look at all of the cases that deal with this concept of fraud on the Board, *EXX* is one that the Plaintiffs have focused on. *Weinberger* is another one in Delaware. *MacMillan* is another fraud on the Board case. Every single one of those cases dealt with a director standing on both sides of the transaction, either a controlling stockholder or otherwise, where the director concealed material information from the Board so that he could personally

benefit himself, this director, when he's standing on the other side of the transaction. That is fundamentally not this case.

Mr. Phillippy wasn't on both sides of the transaction. Mr. Phillippy had no interest in MKS. Mr. Phillippy wasn't buying the company. It's fundamentally different. So this whole concept of fraud on the Board by withholding information and deceiving the Board in order to benefit himself, just makes no sense. There's no evidence that he had any illicit interest in this transaction at all.

I'm happy to spend time, if you'd like -- I'm sensitive to time, going through the specifics of the strategic plan and how it -- he didn't intentionally -- there's no evidence that he intentionally withheld material information, but maybe I'll save that for a rebuttal if it comes up.

But the fundamental issue here, the gating issue and why they don't get past the business judgment rule is there is no evidence showing a self-interest for Mr. -- an improper, material, self-interest for Mr. Phillippy, or that that somehow impacted the Board as a whole. That is the end of the story. They haven't gotten past the business judgment rule.

Let me just focus maybe on one more issue, and then I can save the rest for rebuttal.

You don't have to get to the second part of the analysis, breach of fiduciary duty with intentional misconduct or fraud, because they don't get past the business judgment rule. But they don't actually satisfy the second part either.

Turning -- just starting with page 11, intentional misconduct and fraud, what does that mean? They have to provide evidence at this phase that the directors did something wrong on purpose.

Intentional misconduct means that they knew they were doing the wrong thing and they did it anyway. That's intentional misconduct.

And fraud, black letter law, fraud is you intentionally deceive somebody in order to convince them to do something that's against their interest. You lie to them so that they do something that you want them to do. Or here, in this context, they have to show, with evidence, that the directors intentionally deceived the stockholders of Newport to convince them to vote in favor of this deal. They had to -- they have to show that the directors lied, that they knew it and they intentionally lied to the stockholders. Again, it is a tall, tall order.

And you have to just ask yourself, why would the directors do this? Why would they do that? Every director held Newport stock. Every director had an incentive to do the right thing for the corporation. Every director had an incentive to get the highest price possible if the company was to be sold. Why would Oleg Khaykin -- why would these sophisticated CEOs of public companies intentionally lie to the stockholders to dupe them into approving a deal that was somehow a bad deal for them? Why would they do that? They have to come forward with some evidence to show that

they intended to deceive the stockholders.

You can read Plaintiffs brief and their separate submission and their boxes of documents. They never present a single piece of evidence that answers that question for the directors, and that's why they say in their brief, well, intent is a question that can't be resolved short of trial? Right? That's basically their point. That is absolutely not a basis to deny summary judgment.

It is Plaintiffs' burden to come forward at this phase, after four years of this case, with some evidence demonstrating that the directors knew that what they were doing was wrong and they did it anyhow, or that they intentionally lied to the stockholders, and they just have not done that.

There's only -- there's one category that -- of claim, breach of fiduciary duty claim that applies to all the directors, and I'm going to end shortly. But I just want to focus on those -- on that issue. And this is starting at page 12.

The claim is that the Newport stock -- directors made statements in the proxy materials to the shareholders that were false; right? That they -- that the materials that were put out to stockholders describing the transaction and saying, hey, we think you should vote in favor of it contained false, fraudulent statements.

To get past summary judgment, they have to provide evidence not only that the statements were false -- and there's two of them we'll talk about -- not only that they were false, but critically, given the standard here, that the directors intentionally lied in here.

They can't just say falsity. They have to say falsity and intent to deceive. Otherwise, summary judgment has to be granted as -- on this basis as well.

So what are the disclosures that they focus on. Slide 12. They say, well, the directors lied when they said that they believed the deal was fair to and in the best interests of the company and its shareholders and that $23 per share was a good price and better than either selling to somebody else or staying independent. That's the claim. The claim is that was false.

Okay. What's the evidence of that? They have one piece of evidence. They say, well, four months earlier there's a Board minute when the company was negotiating with another bidder in a stock and cash deal, a company called Coherent, that at that time -- it says in the Board minutes that the price that was being negotiated, which I think was 22.60 to 23, was in the low range of what the company -- of what they thought the company should be sold for. Okay. And at that time, so four months earlier, that means that when you said four months later that $23 per share was a good deal, that you were lying about it.

Four months had passed. They auctioned the company, essentially. They got the highest bid they could from MKS. The market had spoken that the top value for this company was $23 per share. And the context of that four months earlier with Coherent has to be taken into account.

Coherent was a company that presented antitrust risk. We

talked about this months ago -- well, years ago now. Totally different; right? A stock and cash deal which is not the same as a cash deal. Antitrust risk. It's a completely different context and four months removed. These are not -- there's no evidence that these are false statements, but even more, there is no evidence that the directors intentionally lied, intended to deceive the stockholders when they put these anodyne statements, I would say, in the proxy saying we think $23 per share is a good deal. There's nothing -- there's no evidence that the -- that the directors were lying when they said that.

And then finally, the only other sort of issue that applies to all the directors is the next slide, and this is 13. Another statement in the proxy had to do with the acquisition forecast. They say here what's in the proxy, the acquisition forecasts which were a different set of projections than the base case and were higher than they which were provided in the proxy, they -- you say in the proxy. They were prepared to provide the company with a potential alternative standalone prospective to the base case, reflecting a hypothetical scenario in which the company was projected to complete significant acquisitions each year during the period.

Okay. What do the Plaintiffs say? In their opposition brief, at page 27, they said, well, quote, the proxy downplayed the reliability and certainty of the acquisition's strategy by stating that the acquisition's strategy was merely potential and hypothetical. This is nothing about the acquisition's strategy. Those words don't even exist in here. This has nothing to do with that. There is no dispute

that this language in the proxy is not false.

It's undisputed that the acquisition case forecasts represented hypothetical scenario, because it's hypothetical acquisitions that might occur in the future. You don't know if you're going to make acquisitions three years from now. It's of course it's hypothetical. There's no evidence that this was false. And again, no evidence that the directors intentionally lied, tried to deceive the stockholders, which is what they need to show, in order to -- in connection with the statement.

I'll stop -- I'll stop there, and I'll --

THE COURT: I guess my only question then is so if there's evidence of any kind, of any value, that Phillippy concealed the projections, it still doesn't matter, because --

MR. LUTZ: You have to start --

THE COURT: -- they were just one vote?

MR. LUTZ: You have to start with the question of whether he had a self-interest, whether he had an improper self-interest that -- you have to start there. If he doesn't have a self-interest, there's no intent to deceive. There's nothing that would support a -- there's no evidence that would suggest he had any reason to lie to the Board. You have to start with self-interest. This case rises and falls on whether they can prove that Mr. Phillippy has an improper interest.

They don't want to acknowledge that there is no evidence that he had any discussion with MKS -- excuse me -- MKS, before the

signing of the transaction, about a future role or compensation. That is game ending. That is the end of the case right there. There is no improper self-interest.

And this whole notion that he was -- his fear for his job so he had to push the company into a transaction, all of the relevant facts there were known -- there's no conflict. That's just completely untrue. Even if you assume it was true, okay, even if they had some evidence to demonstrate that it was true, that was known to the Board. It's not something that dupes the Board. It's not something that deceives the Board.

You have to start with whether there's a self-interest. If there's no self-interest, there's no intent to deceive. There's no reason for him to withhold anything. Okay?

If -- if you have more questions on that, I just -- it's a gating issue, and we've been talking about this for four years. They don't have evidence to show it.

THE COURT: Thank you.

And I allowed extra argument, so I'll extend the same courtesy to you, Mr. Knotts. And I may have to stop the arguments --

MR. KNOTTS: Yeah.

THE COURT: -- just to recess for another matter to go, but I want to make sure that both of you get the time you need.

MR. KNOTTS: Thank you, Your Honor.

I have some binders of some selected evidence. There's no question we won't get through all of it. May I approach?

THE COURT: Sure. Thank you. You have two?

MR. KNOTTS: Yes.

THE COURT: Very nice. Thank you.

MR. KNOTTS: Thanks.

The binder consists of just excerpts of evidence that was attached to our motion and one or two exhibits from the Defendants as well.

May it please the Court, here's the thing about this corporate transaction. We know now that it was an unmitigated disaster for stockholders. We know that Newport continued to perform exceedingly well and was, in fact, worth more than $23 a share, based on the company's most updated reliable projections.

And I think troubling these evidence -- or these Defendants have evidence showing that value before they closed the deal, and they knew about that evidence, and they concealed it from the stockholders. Defendants have motive. They engaged in self-dealing. We'll walk through the evidence on that. And they concealed facts that they knew about from stockholders. We know all of these things now. We have the evidence to support all of these things.

And the discovery in this case has proven out everything that the complaint alleged. Everything that we stood up and talked about a couple years ago on a Motion to Dismiss, we've proven everything that was grounds for denial of the Motion to Dismiss. We've assembled that evidence. I'll walk the Court through some of

that evidence, and that evidence should be heard at trial.

In moving just briefly to the legal framework -- and I think Mr. Lutz and I agree on the standard for rebutting the business judgment rule under *Wynn*. Under *Wynn* a plaintiff can rebut the presumption that a director's decision was valid by showing either the decision was a product of fraud or self-interest or that the director failed to exercise due care in reaching the decision.

We've presented dozens of documents and pages of testimony showing how each of these things were met here. Materially and intentionally misleading stockholders is fraud. Materially misleading other directors is fraud.

There is no world -- and I don't think so Mr. Lutz went here, but there is no world in which a plaintiff shows a knowingly misleading representation to stockholders in the proxy and that a Motion for Summary Judgment should still be granted.

Mr. Lutz hasn't cited to any case, anywhere, where a director knew about a material fact, intentionally concealed it from the stockholders in the proxy, and the case was dismissed as a matter of law. No case anywhere. And the same goes for misleading other directors.

So if we show evidence of those things, this case should go to trial.

And just quickly, on Mr. Lutz' notion of -- that a director has to have a secret motive -- not only a motive, but a secret motive that he conceals from the other directors, that's not found anywhere in

Nevada law. It's not in the statute. It's not in *Amerco*, for example, where the Nevada Supreme Court allowed the claim to proceed against Mark Shoen, a conflicted CEO, dismissed the outside directors. But everybody knew that the CEO was conflicted. It wasn't an issue that he concealed from the Board.

And by the way, on the issue of materiality of the conflict, the Court didn't stop and say, wait a second, I need to know what's in this guy's bank account before I allow the case to proceed.

Wynn, I think Mr. Lutz and I can agree on that point, that *Wynn* is an important case, and *Wynn* describes the contours of the business judgment rule. Nowhere in *Wynn* -- I've read that case backwards and forwards -- does it say that a director has to have a secret motive that he's concealing from the other directors -- fraud, self-interest. Those are the things that rebut the business judgment rule. *EXX*, that's another one, the director didn't have a secret motive.

So you won't find Defendants' new rule anywhere in Nevada law, and there's a reason for that or at least there's a reason that Defendants make this argument. And I'll get into some of the evidence on this point, because Mr. Phillippy was talking to Mr. Potashner, Mr. Khaykin, about his conflicting motives and his intent to seek benefits and compensation from the acquirer. So that's why Defendants argue that it has to be a secret motive because multiple Defendants knew about it, and they knew about it that it was improper.

And then if you want to go to Delaware -- and I think Your Honor asked a similar question about this, because Defendants rely on Delaware law for this rule. Delaware Supreme Court in *Kahn v. Stern* had put to rest this majority has to be conflicted notion. And it said, for example, there are iconic cases, such as with *MacMillan* that are premised on independent board members not receiving critical information for conflicted directors.

And they went on, and there are also cases where impartial board members did not oversee conflicted members sufficiently. MacMillan has a famous passage pointing to this possibility.

DiMarco is another classic case in Delaware that addresses this issue. And it makes it clear that concealing facts, material facts, especially those that go to value, from fellow directors, from -- well, from fellow directors will interfere with and corrupt the proper functioning of the Board.

So moving to -- well, and just to address one issue that Mr. Lutz, you know, touted the -- touted the premium on this deal, you know, it's the same premium that existed on the Motion to Dismiss stage. There's nothing new about that.

But premiums don't cleanse misconduct, especially when the directors have evidence showing that the company was worth more and concealed it. I think *Brown v. Kinross* is a case that addresses this issue directly out of the district of Nevada. And Judge Pro denied a Motion for Summary Judgment on a breach of fiduciary duty case, where the defendant said, there's a premium, there's a

premium, it has to be dismissed for that reason. Directors are entitled to the business judgment rule because of the premium.

And Judge Pro -- well, first of all, and that case, by the way, is a 68 to 100 percent premium, so it was very significant. And Judge Pro said that, you know, look, the fact that you are now arguing this and arguing that the deal was fair, well, the other side has an expert report on the issue, so that's just creating triable issues of fact, which is the same case here.

So moving to motive and self-dealing. And Defendants say that this case rises and falls on Mr. Phillippy's self-interest. You know, okay. We're happy to walk through that evidence.

So setting the stage, Mr. Phillippy was in a bitter power struggle with his CFO. He was under siege from large activist stockholders. They were calling for his termination. The Board questioned his leadership and backed Mr. Cargile in the power struggle with Mr. Phillippy.

Through this deal, Mr. Phillippy was able to get out from all of that, and not only that, he received payments from the acquirer, MKS, in the process. Phillippy received $618,000 directly from MKS, the acquirer, as a result of this merger. That was in the form of a consulting agreement with MKS. That was in the form of a board seat from MKS that lasted for a couple years. That was in the form of additional post-closing employment with MKS. And it was in a form of a bonus, post-close from MKS, that Mr. Phillippy touted for. So that's 16 -- $618,000 from the acquirer that no one else received.

Mr. Phillippy wasn't entitled to any of that, coming into the deal. He had to personally negotiate for it. And he did directly with MKS.

Mr. Phillippy also received a total of $4.3 million in cash as a result of this merger. We have a full expert report on all of Mr. Phillippy's economic circumstances in connection with this deal that created -- in the words of the expert, who is a very credentialed compensation expert, Mr. Phillippy had a clear and significant personal financial incentive to favor the MKS acquisition. And this was a financial incentive that was different than Newport's public stockholders.

Expert reports are evidence at the Motion for Summary Judgment stage, and at trial, and that is evidence that Mr. Phillippy had a conflict.

And under *Amerco*, transaction-related payments are conflicted. It's language from *Amerco*.

And by the way, on *Chen*, or regarding *Chen*, a Delaware Court of Chancery case where Vice Chancellor Laster denied a Motion for Summary Judgment in this case, I think, on a number of issues on all fours with this scenario. It also involved concealing projections from stockholders.

And here's what Vice Chancellor Laster said about the CEO in that case. Howard-Anderson was interested in the merger. He personally received more than 804 -- $840,000 in benefits from the merger that were not shared with stockholders generally, including

$272,800 this cash severance and other benefits from a change of control severance agreement. The Board acted to increase the amounts under his severance agreement, the same day the merger agreement was executed. We have facts on that.

It can be inferred at this procedural stage that the benefits were material to him. And that was summary judgment. That procedural stage. Didn't stop and say how much was in the CEO's bank account. It held that $840,000 was material at the summary judgment stage, which makes sense.

Another case, *Orman v. Cullman*, both parties cited to it -- it was a Motion to Dismiss, not Motion for Summary Judgment. And it held that $75,000 was sufficiently material at the Motion to Dismiss stage. We're past that. But we're also past that in dollar amounts. So Mr. Phillippy got $600,000 from MKS and 4 million as part of the deal.

There's a line in *Orman*, where one of the directors got, I think, $3 million or something like that in connection with the deal, and the Court said that the it would be naive to assume that $3 million is not material to someone. And that's -- that's the case here too.

So on the issue of motive, we have this case *Zura* that we cite to, where the Court found a conflicting motive where the CEO knew that the board and stockholder activists were displeased by his performance and likely would remove him from office if a sale of the company did not occur.

So if Your Honor doesn't mind flipping to the first tab of the exhibits -- or the first tab, I'm sorry, in the binder that I handed out. So it's Exhibit 23, Tab 1.

Is Your Honor there?

THE COURT: Uh-huh.

MR. KNOTTS: Okay. So this e-mail chain is between two directors, Mr. Khaykin and Mr. Potashner -- this is right after Mr. Phillippy tried to fire Mr. Cargile. And these two directors are talking about Mr. Phillippy. Mr. Khaykin says, Bob Phillippy basically maneuvered, shocked to say that he intended the leave and has put the process on a course he wanted. I expect our activist stockholders to go ballistic over it. It will put the Board in a very bad spot. And then Mr. Khaykin talks about two concerns expressed by activists. No. 2 is no confidence for Bob Phillippy, and praising Chuck.

He goes on, now with Chuck Cargile leaving, effectively it looks like the Board chose to double down on the guy they have no confidence in, meaning Phillippy, and got rid of the only guy they thought had the right ideas, meaning Cargile.

I specifically told Bob that he would really put the Board in a bad spot if he moves on Chuck now. He chose to do so anyway, and as a result put us on a collision course with the activists. The golden rule of dealing with activists, to avoid giving them the righteous anger reason, Bob just delivered that to them and I think showed very poor judgment, and he goes on and says that we need to ask ourselves a question if we need the new leadership team.

Unfortunately, with Chuck Cargile leaving, the threshold for this option goes up significantly.

He's talking about getting a new leadership team. And Mr. Lutz said -- it's in the PowerPoint, page 8, and he said, five or six times, the Board never considered firing Mr. Phillippy. Well, we have evidence that they did.

That's a disputed material issue of fact regarding Mr. Phillippy's motive. It's not an irrelevant or a side issue. It was in Mr. Lutz' PowerPoint, and he mentioned it repeated times. And then you go to Mr. Potashner saying, I called Bob and suggested in the strongest possible way that if either deal gets traction, this needs to get bundled in from a timing view. Now, deal meaning possible merger, you know, and the chain goes on. So Mr. Phillippy was under fire, and he found an escape from all of that and found 600,000 plus $4 million from MKS as a result of the acquisition.

So let's go to page 2. I'm sorry. Tab 2. It says Exhibit 81, but it's Tab 2. And this is a chain of text messages that were produced after the Court granted the Motion to Compel on text messages between Mr. Phillippy and Mr. Potashner. And if Your Honor can turn to page -- so I'm going with the -- there's different page numbers on here, but with one at the bottom middle, MSJ Oppo 1368, so it's about four or five pages into the document.

THE COURT: I'm there.

MR. KNOTTS: So this conversation, this text conversation between Mr. Potashner and Mr. Phillippy, they're talking about a

conversation with MKS that Mr. Phillippy is texting Potashner in realtime, saying is Chuck in the same room? He's on the phone.

And then Mr. Potashner writes about MKS, Now you get them to have you and Jeff Coyne, management, stay and get extra bonus and recommend you don't need Chuck Cargile to stay through end of Q2. That is talking about getting a transaction bonus directly from MKS. Defense said there's no issue of material fact, that all of these directors were acting in the stockholders' interests at all points in time. You know, that's -- that's self-interest.

And Defendants also say -- and I'll get into some evidence that ties this back before the signing of the merger. Defendants also say, it doesn't matter what it does after the announcement and before the close. It's a done deal. Well, guess what's the issue at this time? The proxy. All right. So that impacts. So Mr. Phillippy is doing these things in self-interest. And this wasn't just a text from Potashner; Phillippy acted on this.

When Mr. Phillippy is doing these things in self-interest, while he's editing and reviewing the proxy and while he's making the decision to withhold projections from stockholders, you know, I disagree with the Defendants that it just -- it doesn't matter. He can do whatever he wants during this time period. But we can tie it back earlier.

And there's also some indication that this text messages -- and I'll get into this, where Potashner is saying that he's not accepting another potential merger partner, GSI, to have their

chairman be the chairman of a combined GSI and Newport entity. Potashner is texting Phillippy and saying, I told him absolutely not. I told them that they couldn't have the CAPO spot either.

And, Your Honor, just to get into this briefly, you know, we -- when we were back here on a Motion to Compel on this, we saw one item of evidence, and it was kind of -- it was vague. The Defendants exchanged text messages.

And so we asked them, in knowing that this evidence was there -- I'm not saying the attorneys, but the clients, Mr. Phillippy, and Mr. Potashner -- knowing that this evidence was there, here's how they responded: The evidence does not remotely suggest that Defendants exchanged text messages in the ordinary course of their work or at all. Indeed, Mr. Phillippy previously testified under oath in this case that he did not use text messages for substantive business communications. That's not only the one that I read. They're talking about deal terms and substantive business communications throughout this exhibit.

So we moved to compel, and this is what Defendants represented to this Court. We already discussed this issue with our clients, and we determined that they did not use text messages for substantive communications about Newport or the sale process. Now, that's false.

And look, I have too much respect for counsel and this Court to contend or argue that counsel was intentionally misrepresenting anything at all. But I do think that their clients lied to

them in the discovery process, knowing that these text messages showing self-interest were there, that they had them, and they didn't want them produced.

[Indiscernible] Howard-Anderson has -- he concludes with that issue when there were problems like that in the discovery process, it's hard to find that, you know, an undisputed issue of fact that, you know, as Mr. Lutz would say, these directors would never lie to anybody about anything. Why would they ever lie to stockholders? They lied during the discovery process in this case.

So what does it mean? Now you get to stay and get your bonus. Did Mr. Phillippy ever ask MKS for anything? So Tab 3, page 122. So on Tab 3, which is MKS representative deposition testimony, page 122 of the transcript in the bottom right -- and we're talking about an e-mail from Mr. Phillippy to MKS.

And Mr. Phillippy writes to MKS: I would like to continue my full-time employment with the company through the end of Q2, 2016. That's Mr. Phillippy writing. At that point, my employee service would end and I would be getting a consulting assignment. I recommend that the assignment run through the end of 2016 on a part-time basis, because this would be the time period of greatest impact.

And then we asked the question: So is it correct that Mr. Phillippy asked MKS to keep him until the end of the first half of 2016, rather than the other way around? Yes. I can read that now. Because that's what the Defendants have been arguing that it was

MKS that really wanted him to say and Mr. Phillippy was just doing a benevolent thing on behalf of the company. But no, it wasn't like that. Mr. Phillippy unilaterally reached out for his own self-interest to receive a bonus from MKS.

And then we go on: Does it appear in here that Mr. Phillippy is making that request so that he and others can receive his bonus for the first half of 2016? And then it goes on to say, Yeah, that's part of his request. And he says, Team members including me? Yes. Absolutely.

Turning to the next page, 132, this is quoting an MKS internal e-mail. It says, Also we might address Bob Phillippy's request that we allow this group to stay at least until June to get their incremental incentives. And then the question is, Does that further confirm in your view that Mr. Phillippy requested that MKS retain senior management, including Mr. Phillippy, so the senior management, including Mr. Phillippy could get paid their bonuses? Yes. So again, that's Mr. Phillippy acting in self-interest. That is a conflict. That is a breach of fiduciary duty, clear and simple.

And Defendants -- and one of the arguments for Mr. Lutz is that all of these issues were not even a glint in Mr. Phillippy's eye before the deal was signed. Never occurred to him until after the deal was signed, again, still before the close, to ask MKS for these benefits. Just sprang out to him out of thin air. So not only is that implausible on its face, Mr. Potashner's text implies that the two of them had talked about it before. But we have proof showing that it's

not correct.

So the issue -- and that's in this -- and that's actually stated in this *English v. Orion* case that Mr. Lutz talked about, the issue is whether that conflict could have motivated Mr. Phillippy before the announcement of the merger? And again, Defendants say there's absolutely no issue of fact or that there's no evidence that Mr. Phillippy even contemplated this stuff before the signing of the merger in February of 2015.

Please turn to Tab 4. These are Mr. Phillippy's handwritten notes. And these notes from Mr. Phillippy are dated November 16th, 2015, during the sale process. I think they had a meeting either the same day or the day before with one of the potential acquirers.

And the highlighted points are clearly talking about the MNA process. It's referenced there. And there's a note: As part of negotiating with the acquirer, work for retention agreements or other compensation. So who negotiated this deal with MKS? Mr. Phillippy. Nobody else. Mr. Cox, who Mr. Lutz mentioned, didn't sit on the independent committee. He didn't negotiate anything with MKS. He wasn't involved with any discussions with any potential acquirers. Didn't see the company's most recent projections.

It was Mr. Phillippy doing the negotiating. And Mr. Phillippy is writing down, during the process, as part of negotiating with the acquirer, work for retention agreements or other compensation. Apparently Mr. Khaykin is saying that in a board meeting.

So this is, again, evidence of a breach of fiduciary duty. That is not in the interests of stockholders. Mr. Phillippy continued to do that before the merger and after the merger. There is no benefit to the company here. Mr. Phillippy is writing down his conflict of interest. Rarely do we see, you know, written evidence of what someone plans to do that is in and of itself a breach of fiduciary duty. There is no question that represents self-dealing.

Tab 6. Again, we're looking at evidence as to whether Mr. Phillippy even contemplated these issues before the merger agreement was signed. Is it possible that Mr. Phillippy was motivated by transaction-related payments before the merger agreement was signed?

So I'll ask Your Honor to turn to page -- so I'm on Tab 6. This is testimony from Mr. Cox, who was a director.

Yeah, 78, so it's, what, two pages in. Is Your Honor there? Okay.

So this is discussing -- the highlighted text is discussing an e-mail on February 18th. The merger was signed the next week. And that's a very key period in time. JP Morgan, the financial advisor, three days later gave a fairness presentation touting the value of this company, and what wasn't in that fairness presentation was the strategic plan projections that Mr. Phillippy knew about and Mr. Phillippy concealed from the Board.

So almost contemporaneous with Mr. Phillippy's decision to deceive the Board in that regard, we have this testimony.

Okay. So at one point in time, Mr. Phillippy was requesting additional transaction-related compensation for himself -- or sorry -- related compensation; is that right?

The question continues: For himself?

Answer: In the e-mail from Ken to me, on February 18th, Ken describes it as additional comp without more, but yes, I infer that describes additional transaction related comp.

Question: For Mr. Phillippy?

Answer: Yes.

If this case rises and falls on Mr. Phillippy's conflicts of interest before announcement of the merger, like Mr. Lutz said, I think we're in pretty good shape.

THE COURT: And that date is February 23, 2016?

MR. KNOTTS: The date of the e-mail that they're describing is February --

THE COURT: No, no, the --

MR. KNOTTS: -- 18th, 2016.

THE COURT: -- the agreement to merge?

MR. KNOTTS: Yes.

THE COURT: All right.

MR. KNOTTS: Yes. So we go on to page 87, which is the last -- last page of this particular tab.

Mr. -- and this is going on about the same February 18th e-mail. Mr. Potashner also writes, they are spending lawyer dollars to build the case. And he wrote that to you. And you responded to that.

What did you understand that to mean?

Answer: That they were using outside counsel to make the case that it would be appropriate to seek additional compensation in the circumstances and that this was normal in change of control situations. And "they" means including Robert Phillippy in that answer; correct?

Yeah, yeah. The management of the company.

Again, this is during that crucial time period where Mr. Phillippy is actually spending corporate funds to make the case for transaction-related benefits.

The directors are complaining that management hired Gibson Dunn, who was deal counsel, to start spending time drafting and putting together memos that supported transactional-related compensation for management.

So, you know, I also think -- you know, so again, there's disputed fact as to, you know, A, whether Phillippy even considered the issue prior to February 23rd -- and again, I still think it's significant that he was negotiating these things afterwards, as well.

I think it also comes down to motivation, intent, state of mind, this evidence, you know, the materiality of it to Phillippy. You know, Phillippy got lawyers involved. And then the Board said, Well, all right. Well, let's table it, and then you can talk about it with MKS if you want.

So Potashner returns back a few days later and texts Mr. Phillippy: Now you get them to have you and Jeff stay and get

the extra bonus and recommend that you don't need Chuck to stay. So that's self-dealing. Plain and simple.

And particularly problematic, it's the same guy who is talking to MKS. Sole responsibility. And it's the same guy who was concealing material information from the Board.

And that brings me to this issue of economic circumstances that the Defendants --

THE COURT: And that's where I'm going to stop you, because you're at a stopping point? I'm not cutting you off from continuing your argument. But it's 2:44, and I had a 2:30 matter that I think will --

MR. KNOTTS: Okay.

THE COURT: -- take between 20 and 30 minutes. So I'm going to recess this hearing on the Chung versus Newport case.

[Recess taken from 2:45 p.m. until 3:05 p.m.]

THE COURT: Please be seated. Thank you guys for your professional courtesy. And so that you know, the other matter we had on this afternoon at 2:30 was in a settlement conference. I've been advised that they just settled, so you can expand your arguments. You're the only thing I have left for the afternoon, and so you may address things in your reply that you hadn't gotten a chance to.

All right. Mr. Knotts.

MR. KNOTTS: Okay. Thank you, Your Honor.

THE COURT: Well, let me get settled -- no. Just a second.

I need -- I have everything placed here in a certain order.

Okay. Ready. Thank you.

MR. KNOTTS: Okay. Thank you again, Your Honor. We do really appreciate the time.

So again, just to recap that first part, Mr. Lutz says that, you know, the case rises and falls on Mr. Phillippy's self-interest. Okay. We've got someone who is acting in self-interest. The negotiator with MKS is acting in self-interest, acting on that self-interest.

But so it brings me to the economic circumstances arguments the Defendants are arguing about. And that's the notion you have to show beyond just the dollars, beyond just the activity, the actions. That you have to show a director's net worth just to show whether a particular issue motivated him to act. And again, you won't find that rule in Nevada, not in *Wynn*, not in *Amerco*, not in *Cohen v. Mirage*, not in *EXX* -- even Delaware, where I think Defendants get the rule, the law is clear. And that's where self-dealing is present. Plaintiff need not plead that a director's interest in a challenged transaction is material to him to establish that that director had a disabling interest. And that's because you've already shown the breach. You've already shown the self-dealing.

THE COURT: Why do we have to get to Delaware if the *Wynn* case is a bright-line test in Nevada?

MR. KNOTTS: We don't at all. I mean, my point is that you don't find the economic circumstances rule anywhere in *Wynn*. So Defendants, I think, get their rule from Delaware, and even Delaware

doesn't support it.

Wynn -- just to clarify, which bright-line test did Your Honor reference?

THE COURT: With regard to overcoming the business judgment rule.

MR. KNOTTS: Right. Yeah. So fraud or self-interest, you know, so we have to show self-interest. Mr. Phillippy was acting in self-interest. *Wynn* doesn't go on to say -- and I made this point earlier -- it doesn't go on to say that you have to show the director's economic circumstances beyond what he actually did. You act in self-interest, that's what *Wynn* says. That's what rebuts the business judgment rule, and you know, we've presented some of the evidence on that.

And speaking of -- you know, and the other notion of economic circumstances and materiality, you know, that looks to -- stepping back and sort of thinking about it for a minute, you know, materiality, it just looks to whether someone is likely to act on a conflict. Are they likely to act on it. Is this likely to impact them? But here we know that Phillippy acted. It was material enough for him.

THE COURT: Well, their argument is that it had to be a material financial benefit to him. Does your expert report make any conclusion with regard to that?

MR. KNOTTS: Absolutely. It says that the $600,000 plus the $4 million says that it was a clear and significant personal

financial incentive to favor the MKS acquisition. That's a personal incentive that was different from Newport's public stockholders.

Again, the expert report goes into detail. Here's what Phillippy's compensation was prior to the deal. Here's what he got from MKS. Here's what he got from the acceleration of the stock options that he wouldn't have otherwise got. It goes through in significant detail all of Mr. Phillippy's, you know, existing compensation, possible future compensation, and what he got as a result of this deal.

And it's an exhibit to our Motion for Summary Judgment papers. It goes into significant detail about his economic circumstances. And the cases that talk about economic circumstances the Defendants cite are cases that involve whether a director might act out of self-interest. *MFW* is a case from Delaware that they cite to. You know, any Nevada federal case or federal case applying Nevada law that delves into these sorts of issues are the sort of scenario where it's a derivative case where the courts -- you know, the courts are trying to look at whether directors are conflicted or beholden to another director as a result of personal dealings with each other.

And, you know, those scenarios, you know, they have -- the director hasn't done anything yet. Is this an appropriate guy in a special committee? Is this person conflicted? Again, even though they haven't done anything yet. But we know that Phillippy acted and we know that it was material to him personally.

You know, *MFW*, for example, you know, again, the directors were friends with each other, had various dealing -- business dealings with each other. So it's that sort of scenario -- we're looking to the economic circumstances to see if a director would act, but here we know that they did.

You know, and I'll get into Mr. Potashner. And it's the same notion with him. Mr. Potashner, during the sales process, actually went to another merger partners. He was -- he negotiated with a couple of the parties in the sale process, not MKS. Mr. Phillippy was negotiating with MKS.

But when Mr. Potashner negotiated with GSI, Mr. Potashner submitted a proposal, as did Mr. Phillippy, that named himself chairman of the combined entity.

And I'll get into that issue. And so the issue is not whether, you know, looking into the financial gains that Potashner would make from this particular issue -- you know, it's not that he just sat back and might have a spot on another Board. It's that he actually engaged in self-dealing. He actually breached his fiduciary duties during a process by seeking something for himself and not looking out for the stockholders' interests. The act is the breach, self-dealing is the breach. Materiality measures whether something is important enough for someone -- to cause someone to act. And you know, again, we have evidence on the materiality. We have evidence on how much it meant to Phillippy personally, and we know that Potashner acted on these things.

So when a director actually engages in self-dealing or intentionally conceals a fact from stockholders, commits a fraud, you don't need to show what was in their pocketbook. And I haven't seen a case in Nevada that allowed a case to go forward and then stopped and said, okay, you know, were they wealthy or were they not? Were they too rich to have breached their fiduciary duties, which is essentially the argument here.

So Mr. Potashner -- the text messages support this. It's also throughout the record evidence. Mr. Potashner proposed himself as chairman of GSI, over GSI's objection during merger negotiations. That was an act of self-dealing that caused another acquirer to drop out from the process.

It's uncontested that he did that, but there's two issues that are contested on that. First, did GSI care about it? Defendants say it didn't matter. They were going to drop out anyways. It was totally irrelevant to GSI, and it didn't impact the negotiations.

The second, which I'll get into is, was Mr. Potashner acting in self-interest? So on the first issue, did GSI care? Tab 7 of the binder that I handed out -- Exhibit 85, Tab 7 -- and this is an internal e-mail from GSI. GSI's CEO says, you know, thanks for the analysis, looked through it. Steve, who is the chairman who Mr. Potashner was negotiating with -- Steve Bershad, communicated that we will not do the deal with them, Newport, getting chairman, since they are getting CEO. We are not willing to start joint meetings until that is resolved. So it's a threshold issue.

Again, let's go to the next one. Did GSI care? So Tab 8. This is an e-mail chain from GSI, Mr. Bershad, and Mr. Potashner. And Mr. Bershad writes to Mr. Potashner: I just got off a call with our bankers reporting back on their conversation with JP Morgan, regarding chairmanship of the go-forward company. I realize this was not a subject that was addressed in Las Vegas, but is a critical issue to us. On the next page, he writes: For these reasons, I think the chairmanship role is a threshold issue and needs to be resolved before we proceed further.

Threshold issue. Twice we've seen that. Potashner did not back down. GSI dropped from the process. So this evidence shows that Potashner was the cause for that, or at least a partial cause, which is another disputed issue of fact.

Now, did a conflict impact the process? Defendants want evidence of that? Here it is.

Fact No. 2, Disputed Fact No. 2 on this issue, was Potashner demanding to be chairman of GSI and on the GSI Board for his own personal reasons or for the good of Newport and stockholders overall, because this was Defendants' argument. They say that Mr. Potashner was just exercising his business judgment to propose himself as chairman.

Well, here's how we know that that's not the case.

Tab 9, Exhibit 139. And this is after -- the day after -- the morning after Newport announces the acquisition by MKS. What does Mr. Potashner do? He returns to GSI and asks for a seat on their

board. He goes back to the same guy and asks for a seat on their board. There's no personal -- or I'm sorry -- there's no corporate benefit for that. As Mr. Lutz said, dispute this, because he says the deal is already done with MKS. So it doesn't help Newport to go get a seat on another company's board after they've announced this merger. In fact, it would hurt Newport. This is a competitor where Mr. Potashner is saying, I have some ideas on value creation at GSI. I believe we could make a good team.

You know, but the point is that Mr. Potashner was demanding this position for personal reasons. He continued to follow up on it. Not on behalf of stockholders, not on behalf of the corporation.

And Mr. Potashner didn't just limit these requests to GSI. Both he and Mr. Simone asked for seats on the MKS Board. MKS, it was a cash deal. We didn't know these directors. We didn't negotiate with them. We didn't think it was appropriate. And by the way, Mr. Potashner was on the independent committee. So was Mr. Simone. So was Mr. Khaykin, who was advocating for management too to negotiate for themselves.

Mr. Lutz says we don't challenge the process. That's incorrect. We challenge the process on a number of ways, including that the Board had its most conflicted individual, Mr. Phillippy, negotiating with MKS, and that turned out to be a significant problem.

And that the independent committee was acting out of

their own interests during the deal also. You know, I think Your Honor's probably seen cases where there's a special committee or a special litigation committee, you know, and they're put there, you know, and they negotiate the deal, and they do everything, and there's a conflicted CEO or whoever it is that's sort of off to the side. And it didn't happen here.

And when the independent committee is negotiating for themselves during the process, after the process, not negotiating with MKS as they were supposed to do, you know, not hiring their own advisors and things like that, I think it is a serious process problem that impacts the business judgment rule, not just with respect to Mr. Phillippy, but with respect to the entire Board. *Wynn* talks about process. Those are significant process problems.

So, you know, when the Nevada Supreme Court says that intent and good faith with typically left for trial, especially when you have self-interested conduct like we've walked through just the tip of the iceberg here, the Motion for Summary Judgment should be denied on that particular issue.

And so turning to the projections issue. Just to take a quick step back and reiterate the importance of projections in a merger, and this is from *Chen*. Again, I think this case is on all fours here, denied a Motion for Summary Judgment. The Court noted when stockholders are forced to decide whether to accept a sum certain value in a cash merger, there is no more material information than a standalone corporation's projected cash flows.

After all, the Court goes on: The key issue for the stockholders is whether accepting the merger price is a good deal in comparison with remaining a shareholder and receiving the future expected returns of the company.

And so in this case that's key here too. The most updated, reliable projections are paramount in a merger process. And I don't think Defendants dispute that point. It is fraud to conceal the company's most recent, reliable, ordinary course projections from stockholders. The cases make that crystal clear. *Weinberger v. UOP*, *Lynch v. Vickers*, *KCG Holdings*, and all of these cases are described on page 17 through 18 in our brief.

So, you know, and the Court's well familiar with that issue. And by the way, *Chen* includes this line, and as do a number of other cases, the case law makes clear that projections prepared in the ordinary course of business are deemed or are presumed reliable. These strategic planned projections were prepared in the ordinary course of business. In fact, they were the company's latest ordinary course, multiyear projections in existence prior to the signing of the merger.

You know, again, *Wynn* talks about process problems, you know, issues with advisors, things like that. And this presents a rare case of an advisor actually disagreeing with what Mr. Phillippy ultimately did.

JP Morgan's witness testified, you know, and this is in regard to issuing fairness presentations. He said, The thing you try to

avoid is a buyer getting financials that then aren't used in the analysis. Fairness pending analysis. That's what happened. JP Morgan tried to avoid it. And as he conceded, well, that's what happened here, the buyer got projections that weren't used in the fairness opinion. And it wasn't JP's decision. The witness made it very clear that Newport told him what to do.

So when Phillippy's, at the same time, acting in self-interest and then advises -- or I guess goes against the advice of his advisors in self-interest, I don't think that's a scenario where anyone gets the protection of the business judgment rule.

And there's -- there is so much evidence on the liability of the strategic plan projections. Just to hit on a couple disputed issues of fact.

First, this in process notion, Defendants like to cite an e-mail from Newport's general counsel on December 8th of 2015, where he said at the strategic plan review was in process. So the question was did that still apply on January 31st when Phillippy personally provided the strategic plan projections to MKS? Did it still apply in February when Mr. Phillippy concealed the projections from the Board?

So let's look at some of the evidence on that, and this also goes to the materiality of this information that Mr. Phillippy concealed from stockholders.

Tab 16.

MR. LUTZ: What tab?

MR. KNOTTS: 16, of my binder.

So this e-mail is from MKS, and it goes to Newport management. It's on January 22nd of 2016. So they're in -- they're coming up on final diligence. MKS hasn't definitively agreed to go forward, but they -- there's some key management meetings coming up, and in the -- they send these diligence trackers back and forth. So if Your Honor could turn to -- just the next page, it's the last page of the exhibit.

MKS makes a request. Like I said, these are excerpts of the evidence that we have.

Please provide the company's most recent financial forecasts. Please include detail of all assumptions used in the projections identifying key profitability drivers from fiscal year '15 to fiscal year '16.

Now, Defendants were correct that the strategic plan projections were just in process, pie in the sky, wish list. You don't respond to that request with the strategic plan projections. But let's see what happens.

Exhibit 17 -- or sorry -- Tab 17. It's Exhibit 99. So in this document, we see Mr. Phillippy's sending it. He is editing, personally, the strategic plans to provide to MKS. Responding personally to MKS's request for the company's most recent updated projections. Mr. Phillippy talks about the edits that he's making. Like, that day they're ultimately provided to MKS and Mr. Phillippy authorizes that.

And I mean, we can flip through how detailed these books are. You know, Exhibit -- or I'm sorry, Tab 17, only about 25 slides. There's three of these, one for each division. And these are just the ones presented to MKS, the internal versions are three or four times this size. So the strategic plans and the strategic planned projections were not the in-process haphazard effort that the Defendants claim that -- as a undisputed issue of fact they are.

And Exhibit 22 -- I'm sorry, page 22 of the same tab, 17, so there's -- well, there's a number of -- so we'll go with -- on the -- I don't know if -- so it's Slide 22 of the presentation, which is on the bottom right. I can go -- so there's a number of different numbering options.

Did Your Honor find --

THE COURT: You --

MR. KNOTTS: Okay. Great.

THE COURT: Just tell me which option to use.

MR. KNOTTS: Well, Slide 22 of the deck, so there's -- depending on which way you have them oriented, it would be the bottom right.

THE COURT: I'm there.

MR. KNOTTS: And that's it. That's the -- that's the strategic -- those are the strategic plan projections for one of Newport's three divisions. And, you know, there's not any disclaimers, not any -- oh, this is in process; don't pay any attention to these. Those are the projections. There's three more books just

like this that Mr. Phillippy provided or authorized providing to MKS. And those projections were consolidated in spreadsheets and also provided to MKS and JP Morgan, the financial advisor.

Exhibit -- sorry -- Tab 18, which is the next one. This is January 30th. Again, Mr. Phillippy in response to a request from MKS for the company's latest, most updated financial forecasts, Mr. Phillippy is personally responding and editing the strategic plan presentations. Mr. Phillippy mentions that he included the strategic plan projections purposefully.

And as I discussed, I purposefully used the 2016 to 2018 forecasts from the business group's strategic plan presentations rather than the model we gave to Molecule. Intends to say that business groups are targeting the higher numbers that we provided. We built in a hedge.

Again, this shows that Mr. Phillippy was personally involved in providing these projections to MKS. This shows the knowledge; right? And then it shows the intent when he failed to provide them to the Board, and in fact, concealed them from the Board.

Go to -- all right. We'll go to 20, Tab 20. Now, this tab is an e-mail attaching an excerpt of the same diligence tracker from January 22nd. So the request for MKS comes over on January 22nd. Management has the meetings on January 23rd.

Sorry -- January 31st. Phillippy authorizes personally providing the projections to MKS on the 31st, and then five days later, Newport

responds to that same request with the company's most recent financial forecasts and says, Forecast assumptions and drivers were discussed in 1/31 to 2/2 management meetings, group and strategic plan information included in management meeting overview on the QVR process. So that's it.

MKS asked for the most recent forecasts. Phillippy provides it to MKS. It shows the act of providing a set of projections like this to the buyer, in a crucial time period of due diligence, is no small thing. The company is as good as its cash flows in this context, and the fact that they went over the transom to the buyer in a fashion that indicates reliability is incredibly significant.

Turn to a couple more quick items on this. Tab 27 of this book. And the testimony from -- so this is testimony from an individual named David Allen. He was one of the three business leaders of Newport. He was in charge of one of three entire divisions for the company. He's one of the individuals responsible for hitting the strategic plan projections.

So page 44, if Your Honor could turn to page 44, in the bottom right. And this relates to an issue -- and this was in Defendants' brief, they called the strategic plan projections a wish list. They said, you know, they're not reliable. Phillippy was fine concealing them from the Board and from stockholders because it was --

THE COURT: Where does it say that?

MR. KNOTTS: What's that?

THE COURT: Where does it say that?

MR. KNOTTS: Defendants' brief says that these projections are a wish list. They cite to testimony from Maria Ross, who was a witness that they prepared and who was in the finance department who didn't put these projections together. She sat in on a couple of meetings. She called them in a deposition, a wish list, and Defendants rely on that in their brief. This evidence contradicts that.

On 43, I guess would be the next one.

You weren't trying to -- in the projections through 2018, you weren't trying the just make up numbers that nobody could achieve; right?

No, we would not. They would have to be credible and they would have to be weighed against history, your performance overtime, looking backwards, and so you would be doing the best you could, based on what you knew about the market and your products and your competitive position and your channels to markets and your customer relationships to forecast what you think you would actually do in those time frames.

Question: So you in the projections through 2018, you were trying to forecast what you actually -- or what you would actually do and generate achievable projections?

Yes. That is an issue of fact that contradicts the wish list testimony the Defendants raise in their briefs and it goes to the reliability of the strategic plan projections that Mr. Phillippy purposefully concealed.

And then finishing up on this witness, we'll go to page 107 of this transcript. Mr. Allen. And again, this relates to the in process notion that Defendants talk about, you know, where they just in process as of January 31st, when they were presented with Mr. Phillippy's directions to MKS.

So we ask, and this slide deck attached to Exhibit 6, represented your current and latest and best thinking at the time as of January 31st, 2016; correct?

Yes.

And the slide deck attached to Exhibit 6 was his part of the strategic plan projections.

And it represented -- question: And it represented your most updated views regarding your business unit; correct?

Witness: It did represent my most recent views.

Question: As of January 31st, 2016?

Answer: Yes.

Those are not in progress. Those represent the witness's best and latest views at the time they were presented.

And without spending more time on it, the next tab has deposition testimony from Mr. Worth, another individual who prepared the strategic plan projections.

Well, I guess we'll go to it, since we're there.

So Tab 28, 130 -- page 134. Question: And again, this goes to the wish list concept, this goes to the in-process concept that Defendants pin their hopes on in excusing Mr. Phillippy's

concealment.

Question: And so with respect to the projections for the Photonics Group that you presented to MKS, those were the -- or view -- you viewed those as reliable, credible, good faith, and up-to-date; correct?

Answer: I did. Again, based on the body of knowledge that we put together during the strategic planning process.

And the projections that you presented to MKS represented your and your group's best thinking and most updated thinking at the time you presented them; correct?

They did.

And then Mr. Phillippy, we can go to Tab 36 --

THE COURT: Well, that goes into a new category.

MR. KNOTTS: Pardon me? Actually, you're right.

THE COURT: So what is the best evidence that the projections were concealed by Mr. Phillippy? The actual projections? Because everything here says this is the best we had.

MR. KNOTTS: Mr. Phillippy personally updated and provided -- so the evidence -- so these projections were concealed by Mr. Phillippy from the Board and from stockholders, so when --

THE COURT: And where is the evidence of the concealment?

MR. KNOTTS: Mr. Phillippy knew about them. He updated them. He personally authorized providing them to MKS. And then he and his management team -- his management team --

THE COURT: And they're better than what the Board thought?

MR. KNOTTS: They were better than what the Board saw.

THE COURT: What -- right.

MR. KNOTTS: They were higher than what the Board saw. The valuation that our expert has put forth on those projections is over $25 a share. That's higher than the merger price of $23 a share. So Mr. Phillippy was aware of those projections. He personally updated them when providing them to MKS. He knew of MKS' request for the most updated projections. Obviously he provided them to MKS. And then his management team, which he was a part of, he led, instructed JP Morgan to take them out of the fairness presentation.

THE COURT: And just refer me back to where they instructed JP Morgan to take it out.

MR. KNOTTS: Well, one piece of evidence --

THE COURT: I know we saw it. I just need to see it again.

MR. KNOTTS: Yeah, yeah. Yes, Your Honor. So one item -- 14 -- so Tab 14 is one aspect of that.

THE COURT: Where is Mr. Phillippy? This is coming from Cargile.

MR. KNOTTS: It comes from Mr. Cargile. And the notion that Mr. Phillippy didn't know about it is unsupported. Mr. Phillippy sat in the next Board meeting as the key representative of management when JP Morgan presented a fairness opinion without

the strategic plan projections.

So if Mr. Phillippy wants to come in and argue that Mr. Cargile did it all by himself, you know, that's why we were seeking to add Mr. Cargile. But if he wants to come in and argue that at trial, you know, I think that's an issue of fact, because he was there when JP Morgan presented its fairness opinion -- and I'll get to another exhibit that shows material falsity in the Board room, that Mr. Phillippy didn't -- that Mr. Phillippy knew about.

So if we flip to the back page of this particular Exhibit 14, we have an internal -- well, it's internal -- at least it goes to -- it goes to the company. It's a spreadsheet from JP Morgan. It's got the top down model, which is what Mr. Phillippy advocated using in the fairness presentation. Mr. Phillippy signed a proxy putting those projections out to stockholders. This indicates it is a top down model. This is prepared back in September of '15. That's what the September of '15 represents on this page. It was actually earlier back in August.

MR. LUTZ: I'm sorry, David. What page -- what tab number?

MR. KNOTTS: It's just Tab 14.

MR. LUTZ: Okay.

THE COURT: It's page -- 1959.

MR. KNOTTS: And there's more pages to this -- to this spreadsheet. Again, this is an excerpt. And then it's got over to the right: Strategic plan, used in management meetings. JP Morgan had

this ready to go, ready to run a fairness opinion on it. And then we see this version where a stamp in the top right: Do not use, Willem, pops up.

Willem is in Newport's management. He was the controller. We asked him, did you -- you know, did you instruct JP Morgan not to use this?

He answers: Well, I don't remember -- I don't remember the circumstances. I wouldn't have done it on my own. I don't know. I don't remember. It might have come from Mr. Cargile. I -- I don't know. And this was a witness who was prepped by defense counsel. He said he didn't know where it came from.

So we have management telling JP Morgan not to use the strategic plan projections and to only use the base case, which we've got all sorts of evidence on the unreliability of those projections. And, you know, the buck stops with Mr. Phillippy.

THE COURT: Hang on a second. Is there someone on the phone?

MS. YOUNG: Yes. [Indiscernible] I'm sorry, [indiscernible] the call got disconnected, so I called back in. I apologize --

THE COURT: Thank you, Ms. Young.

MS. YOUNG: -- for the interruption.

THE COURT: Thank you, Ms. Young.

Go ahead, please.

MR. KNOTTS: And then on February 21st, you have a material falsity in the board room that Mr. Phillippy didn't correct. He

was there. He knew it was false. So this is JP Morgan's February 21st Board presentation.

THE COURT: Do you have a tab for me?

MR. KNOTTS: Oh, I'm sorry. Tab 21.

THE COURT: Thank you.

MR. KNOTTS: And if we go to -- if we just flip one page, 1972, in the bottom middle. And JP Morgan is describing key valuation of judgment since November 12th and January 18th Board meetings. And over at the top right, in the second box, it says, Updated 2016 to 2020, Nepal, which is Newport, financials for latest projections provided to Molecule. That's MKS.

That was false. MKS asked for your most recent forecasts. Phillippy personally edited the presentations and authorized providing them on January 31st. JP Morgan indicates that the base -- or the -- yeah, the projections were updated for the latest financials. That was false. Mr. Phillippy sat in there in that Board room and didn't say anything. But he was the one who authorized providing them to MKS.

So we have a falsity in the Board room that Mr. Phillippy caused.

And let's go to the proxy on this issue. That's in Tab 36. There's -- you know, we've talked about the materiality of the strategic plan projections, so it's not just -- I mean, it's an omission, but not just that.

THE COURT: Well, the difference between 23 and 25 is

over 10 percent. I get that.

MR. KNOTTS: Right. But the proxy actually spoke on this issue, and you know, there's a line in the cases, *Chen* is one of them, and there are others that say that directors aren't entitled to tell misleading half-truths anymore then they are to outright lie.

So here's a misleading half-truth in the proxy on this issue, page -- let's go to the bottom right -- so this is Defendant's Exhibit 18, to the numbering is a little different. Bottom right, 487 to 488. This is just an excerpt of the proxy.

So there's a section that talks about the financial forecasts. It's a very important part of the proxy. It's in MKS with the valuation material that the advisors are running discounted cash flow and things like that. The same stockholders, like the proxy firms, they look at this stuff. Here's why you should vote in favor of this deal.

And then over on 488, 51 of the document, in the highlighted text it says -- oh, and by the way, so "parent" means MKS, so I'll change that because it makes more sense.

In connection with MKS's due diligence process, MKS and certain on its advisors were provided forecasts that were the same as the base case forecasts, except as indicated in footnotes 3 and 6 to the table below. And footnotes 3 and 6 don't have anything to do with strategic projections.

So that's in there because it makes the base case projections seem more reliable. But it omits, conceals, and is outright misleading on the latest projections that Phillippy personally

authorized and edited when providing to MKS. That is an outright misleading statement to say, We provided the base case to the acquirer, but completely leave out the strategic plan projections.

You know, I've never heard -- and I probably will on reply, I haven't heard Defendants in the briefs or otherwise try to address that misrepresentation. It is material. It goes to the valuation of Newport, and Mr. Phillippy knew -- he knew that it was misleading. And I just -- I don't think that these are facts. And these are rare facts that can be dismissed as a matter of law before trial.

And with respect to the other directors, the general -- or I'm sorry, the outside directors and the overall Board, you know, there's a few -- at least a couple of issues that we alleged that go to them also, about why the proxy is misleading. You know, there's the reliance on the base case projections as opposed to the acquisition case. You know, we've got a number of exhibits on that in the record. And here, but in the interest of time, I'll turn to the one that I think Mr. Lutz spent a little bit more time on.

And by the way, just quickly, that issue -- you know, to -- we cited precision cast carts and hot topic that are directly on point, and especially precision cast parts indicates that, you know, that -- this same issue, remarkably similar facts was securities fraud.

Defendants say, no, no, no. Precision cast parts was only a Section 14(a) case, which deals only in negligence, but that's only partially true. It initially is, but the Plaintiffs in precision cast parts allege certain things -- intent, things like that -- that caused the Court

to do the two things: Adjudicate it under 9(b) standard, you know, which involves fraud, and then also required subjective falsity. And meaning the Board knew that it was false, in other words, the same set of facts the Court allowed the case to go forward. So on this acquisition case issue, you have federal cases directly on point.

But again, so turning to the issue that Mr. Lutz I think spent more time on, the concealment of the Board's opinion that the company was worth in the neighborhood of $25 a share. The first point on that Board's opinions on valuation are absolutely material. That was a key point from the United States Supreme Court in Virginia bank shares. That's in -- it's the entire point of the opinion.

It is -- also the entire point of the opinion is *Apple v. Bergman* case in Delaware from about two years ago. And both of those cases make very clear that director opinions on value and on the worth of the company are material, particularly where, as here, the proxy touts their favorable opinions about the merger price.

One line from -- from chief justice drawn in *Apple* was: It is inherent in the very idea of the fiduciary relationship that the stockholders that directors serve are entitled to give weight to their fiduciary's opinions about important business matters.

KCG Holdings addresses this issue, as well. And the full line from that case: This court has held that where key insiders change their views concerning the merger, the proxies should disclose their prior belief and explain why they changed their minds. Like the key insiders in *Gilmartin*, *Cullman* changed his view

concerning the merger in a short period, viewing the 2021 per share price as too low, but then voting in favor of a price of $20 per share. Again, that's *KCG Holdings*. So did that happen here? Did the Board hold the belief that above $23 a share is fair? And then issue a proxy that said something different without disclosing that earlier brief -- or that earlier one.

So back to the evidence: Defendants say we have just one piece of evidence on this. We have a few more than that, but we'll go to them.

So Tab 30 -- and Your Honor can -- on Tab 30, just flip one, to the page with the highlights on it.

And this is an excerpt of JP Morgan presentation to the Board on October 28th. Now, this is after a company called Coherent that we've talked about submitted an offer to the company. It was mixed cash and stock. So there was a stock component that both the Board and JP Morgan viewed as more valuable than just cash.

So JP Morgan conducted and presented to the Board at this meeting implied total value per Newport share. And the range was 2439 to 2423. So that was the implied total value.

And I also highlighted the line at the bottom, which is Defendants' response to this evidence. They like to tout that line, so I highlighted it for them. It says this analysis is merely illustrative of the impact of hypothetical trading that assumed multiples. It should not be interpreted as a stock price prediction by JP Morgan. Okay. That's fine. It's got nothing do with the implied value. Nobody's

saying that it's a stock price prediction. But that is the implied value that JP Morgan is presenting to the Board.

So what did the Board conclude about that implied per share value? Tab 31. And so these are October 28th, 2015, Board minutes. Same day. Same presentation. And on the third page, so we have to flip one to get to it, the highlighted text, it's talking about Coherent's offer, the Board is: Following this discussion the consensus with the Board is that the offer price is at the bottom of the range of valuations that the Board would find appropriate.

Well, I think it's a fair question. What does that mean? Does that mean the 2260 or 23 -- that is what's called the headline value? Or does it mean those figures above $24 a share that the Board found at the bottom of the valuations, like we contend?

Well, we have some insight into that from an e-mail that's saying that Tab 32 -- and this is the general counsel who is at that Board meeting writing to Mr. Phillippy: As I told you on Saturday, the Board believes that the intrinsic value of the company is in the mid 20s per share. This is supported by the advise that we have received from our financial advisors.

And Defendants may say, well, these are talking points, but it matches up directly with the language in the previous set of Board minutes. We have more on this. Exhibit -- or sorry, Tab 33, November 25th Board minutes. Following such discussion -- so now we've got -- you know, we're again talking about the Coherent -- Coherent bid?

THE COURT: Hang on. Ms. Young, is that you again?

MS. YOUNG: Yes. I apologize. If it happens again, I'll just -- I won't call in. I'm very sorry.

THE COURT: We do not mind the disruption. Feel free to jump in if you need to again.

Go ahead, please.

MS. YOUNG: Thank you.

MR. KNOTTS: Yeah. No problem at all. Thank you.

So following such discussion, the consensus of the Board was that an offer below 2475 per share would not be adequate. And it goes on. So the Board clearly believed at that point this is --

THE COURT: It's November.

MR. KNOTTS: November.

-- that Newport was worth above $24 a share, and then concealed that view when recommending $23 a share for stockholders. Defendants say, well, you know, it's November. A lot can change between November and February, and when, you know, they agreed to the deal. Well, look, this company was publicly traded for nearly 50 years. There's nothing that happened in those two months that dramatically decreased the value of Newport. In fact, we have testimony, and it's featured in the briefs from Mr. Potashner -- I think I actually have it here, where he's talking about how well the company was doing, hitting its plans, no indication that the company wouldn't hit its plans during that very time period.

So we know that they believed that, or at least there's

evidence that they believed that. Conceal from stockholders. So there's issues of fact here.

Defendants argue that none of this matters because Coherent, and the Board's views on Coherent, you know, Coherent had too much antitrust risk and that the Board would never enter into an exclusivity agreement with Coherent. And the point of that, that Defendants are making, is that, you know, these views expressed by the Board about the company being worth more than $23 a share don't matter because the Board never viewed Coherent as a serious contender.

So Tab 35, this is Coherent -- I think the CEO or chairman of Coherent talking to another Board member, and this is after he gets off the phone with Mr. Potashner. And he writes, We have a hand shake on price and structure. Respective reps are engaged on the NDA and exclusivity agreements. I'll update the Board once these documents are finalized.

So you have Mr. Potashner out there making a handshake deal on the price and the structure of a deal, according to the CEO of Coherent, or I think he's the chairman, to another Board member.

It undermines the Defendants' argument about not taking Coherent seriously. Well, Defendants say -- one of the arguments and I was just looking for it in my notes, and I couldn't -- couldn't find it -- but to paraphrase, one of the arguments that Defendants make about Coherent is that we would never -- you know, Coherent demanded exclusivity, and the Board would never agree to

exclusivity, because doing so would be inconsistent with that goal of maximizing the price. That's a close paraphrase to what's in the Defendants' brief.

Well, that's also a disputed issue of fact, because Mr. Potashner did just that. And again, this goes to how serious we are to take the Board's views on valuations when talking about Coherent's bid. Because Defendants say don't take it seriously at all. But the evidence shows that Mr. Potashner reaches a handshake deal on price and structure.

And then so almost three weeks later, 17 days later, two and a half weeks, again you have Coherent speaking internally, and scorpion update -- that was the code word for Newport. I have reached a handshake with their chairman on cash and stock deal, valued at 22.60 per share, that included up to 20 percent of our equity. An equity component is why we worked on it. He goes on say they informed us that they would -- that we would need to raise our bid and forego exclusivity reneging on the handshake.

THE COURT: And where are you now, please, so I can follow along?

MR. KNOTTS: Oh, I'm sorry. I flipped back onto Tab 34.

THE COURT: Thank you.

MR. KNOTTS: I got ahead of myself.

And I found the line, so I'll backtrack. So this is an e-mail internal to Coherent talking about negotiations with Mr. Potashner. Defendants' briefs say, Agreeing to Coherent's demand for exclusivity

was inconsistent with this objective of getting a higher price, end quote. But Mr. Potashner did that.

They said in their reply brief that the handshake deal never happened. Well, Coherent recorded that it did. So talk about the handshake, and then they say Newport informed us that we would need to raise our bid and forgo exclusivity, reneging on a handshake. So again, that matters because it goes to the weight and how seriously we should take the Board's prior conclusions on value when talking about Coherent's bid.

Again, back to the standard from *KCG* and other cases, the omitted information is material where key insiders change their view concerning the merger price. The proxy should disclose their prior belief and explain why they changed their minds. The proxy here concealed all of that.

And again, these facts go to the Board's view on a higher value of the company when they touted all of the reasons why $23 a share was a great deal. And again, we know in retrospect that it was not.

And that's the point of *EXX* actually. The CEO knew of the true value of the company but only emphasized the negative just to get the deal done.

THE COURT: All right. Is this -- are you proceeding now to a conclusion?

MR. KNOTTS: I am. I am.

THE COURT: Yeah. Good.

MR. KNOTTS: So I think, you know, again, when we go to these issues of intent that, you know, facts that the Board knew and then purposefully didn't disclose; facts that Phillippy knew and then purposefully didn't disclose to the stockholders. Knowledge is more than sufficient for fraud. Knowledge of the fact and knowledge of the concealment is more than enough to show fraud under *Wynn* or any other case.

Again, to the extent Your Honor has any questions on that, again, I think there's at the tail end of the *Chen* opinion that goes directly to the knowledge that's required to get past a Motion for Summary Judgment on misleading information in the proxy, and it makes it very clear that if an individual, if a fiduciary knows material information, he has that in his possession, and he purposefully conceals that information from directors, from stockholders in a proxy, the case goes to trial.

So I think there's just simply too many thorny factual issues to sort out at trial against each and every one of these Defendants for this case to be dismissed.

Now, Defendants point to no case that has repeated evidence of self-dealing, self-interested conduct and fraud to stockholders like this case that's been dismissed. You know, remember, it was evident -- that the evidence that we first walked through, the text messages, the e-mails, the deposition testimony showing that Phillippy was looking at the notes, the handwritten notes, showing that Phillippy was looking out for himself.

So we respectfully request that the Court deny the Motion for Summary Judgment. We sincerely appreciate the extra time that Your Honor has allotted to us.

THE COURT: My only question, is it an all or nothing proposition? Do I have the ability to dismiss some or all, but not all of the Board members?

MR. KNOTTS: No. Yeah, Your Honor, it is absolutely not an all or nothing proposition. And a number of cases speak to that. You know, again, you know -- and this goes to that majority of the Board issue, *EXX* judgment against jut one director Shoen, Amerco, that went forward against one director. *Chen*, that I was talking about, went forward against on a sale process claim, one or two directors. And then on the disclosure concealment claim, the entire Board was in.

So I'm trying to think of other -- there's a number of other examples, *Rural Metro*, Delaware Court of Chancery case, that it was aiding and abetting, but the Court indicated that two of the Board members would have been personally liable.

So we absolutely believe that the case should go forward against all of the Defendants. But if the Court finds that certain of the directors acted in self-interest more than the others, the case can go forward against some of those directors, as well.

THE COURT: Thank you, Mr. Knotts.

MR. KNOTTS: Thank you.

THE COURT: And Mr. Lutz?

MR. LUTZ: Okay. I will be brief.

THE COURT: They had 85 minutes, so -- and it's only 4:10, so you've got some time.

If you'll answer my question before you get into a reply.

MR. LUTZ: Yeah. Of course.

THE COURT: Thank you.

MR. LUTZ: Answer your last question? I agree. I mean, you can dismiss some. I mean, under the circumstances, though, I think you have to think about the question of the business judgment rule. The business judgment rule says it can only be overcome if there's evidence of focusing on the key thing here. The self-interest -- that the decision was the product of the self-interest; right? So that implicates the entire board. It's difficult.

THE COURT: And that's why I asked.

MR. LUTZ: Okay. I mean, I don't think you get there. I don't think that they have evidence that implicates either self-interest or that the merger was the product of self-interest, meaning that the entire decision was the product of self-interest. But the technical answer to your question is, sure, you can dismiss one or you can dismiss more. You can dismiss everybody, or you can dismiss one or two or three or four or five.

Let's just start with self-interest. I mean, you asked in -- exactly the right questions. I mean, this -- we heard the kitchen sink; right? Every single issue that's been litigated in this case was packed into that 85 minutes.

I'm not going to address all of it. We don't have time, and it's not necessary.

The relevant thing here is to focus on the issues that turn on -- that -- on which the business judgment rule question turn and on which the fraud or intentional misconduct question turn.

All of the stuff about Mr. Potashner doing normal course discussions with GSI, I mean, it's -- it cannot be less relevant to those questions, and I'll get there.

Self-interest, the question was from you, where Mr. Knotts, excuse me, said, well, does it matter if it's secret? There's no -- there's no Nevada -- and the *Wynn* doesn't say it has to be a secret motive. You have to get to what is going on here.

Towers Watson says, absolutely, it has to be a secret motive. It says in that case -- we've cited it; we've discussed it at length in our brief. The issue there was the CEO had a conversation -- unlike this case, there was clear evidence that the CEO, in fact, discussed post-closing compensation and role before the transactions, and the Plaintiffs went crazy and said, Well, that can't be. That's the self-interest, and it impacted the Board decision, the product of self-interest.

The Court said no. You know why? It wasn't a secret. The Board knew about it. The Board had full information. It wasn't a secret. It has to be a secret motive.

The motive that they -- the self-interest that Mr. Knotts is focused on here was known to the Board. The product of

self-interest. That is critical. That's what *Wynn* says.

You asked many questions about materiality, and I -- again, that is the right question.

Mr. Knotts says, Well, he got $618,000 from MKS as a result of the transaction through his consultancy and his Board service.

No evidence, because it didn't happen, that those discussions happened before the transaction.

Mr. Knotts doesn't say that was paid over the course of two years during his Board service. Mr. Knotts does not -- did not say what is that 618,000 relative to what Mr. Phillippy would have earned had he stayed at MKS -- had he stayed as the CEO of Newport? I will tell you, it pales in comparison to what his overall compensation would have been had he stayed as -- at Newport.

Mr. Knotts doesn't want to address that, because it goes directly to the relevant question of materiality, and it shows that there's no material benefit that Mr. Phillippy was seeking here.

You said -- Mr. Knotts kept on saying, well, it doesn't matter whether Mr. Phillippy is a wealthy person. He said that two or three times. It doesn't matter whether he's a wealthy person. And you said, well, what is your expert? Did you have an expert report that said -- that discussed the materiality of the compensation? He has an expert report who specifically does not opine on materiality. Here, in fact, is what he said -- and this is in Exhibit 5 of their submission, and I can read it to you. It's at pages 157 and 158,

because material -- I'm sorry. It's our Exhibit 5. I apologize.

And the question of materiality --

THE COURT: In the motion?

MR. LUTZ: Yes.

THE COURT: All right. I just -- talk and I'll find it.

MR. LUTZ: Sure. The question of materiality is whether it's material to the person's individual circumstances, material to what they would otherwise -- what they're giving up, their overall circumstances. And we asked -- my colleague, Mr. Davis asked their expert Mr. Foley, question: You didn't do any analysis of Mr. Phillippy's personal financial circumstances, did you; correct?

Answer: I didn't have data on his personal stuff, other than the proxy data.

Question: -- and this is now on 158 -- you don't know how the 4.33 million, which is what he got from MKS and then what he received under his contracts with Newport -- you don't know how the 4.33 million compared to Mr. Phillippy's overall net worth; correct?

Answer: I didn't have access to his overall net worth. There is no evidence in this case that the compensation that Mr. Phillippy received after the deal from MKS through his consultancy and through his Board service was a material -- caused a material self-interest for Mr. Phillippy.

I want to focus on the evidence that Mr. Knotts was discussing about the compensation. And he cited to some e-mails and some text messages. The issue is not whether Mr. Phillippy

thought about what he might earn, what he might receive, which is what we heard a lot of. The issue isn't what Mr. Phillippy discussed with MKS after the transaction -- after the deal was signed. The issue is not, as reflected in these documents, what Mr. Phillippy may have asked Newport for, not MKS, Newport. The issue is whether there were discussions before the signing of the transaction that gave Mr. Phillippy a personal, material incentive to push the transaction for MKS. That is exactly what *English* says.

You notice Mr. Knotts does not want to acknowledge the language that I write to you earlier, which I'll read to you again -- what's important from the *English* case, what's important is whether discussions about post-close employment occurred before the company agreed to do a deal. This is because the issue that could create a conflict of interest is whether a fiduciary of the company had a motive to play favorites during the sales process in order to secure post-close employment.

In other words, to be material, post-close employment discussions muff occurred before the merger agreement was signed.

What is the evidence on the discussions before the merger agreement was signed? It is the question that we asked MKS: Did you have any discussions with Mr. Phillippy about his post-close employment or his compensation before the deal was signed?

Answer: No.

Who -- you noticed Mr. Knotts doesn't want to deal with that; right? Because it's devastating to his case. All of the evidence

that he pointed you to in his -- at the outset of his argument, dealt with after the transaction. You look, for example, at his Exhibit 3, the text message that he spent all of this time on. What's the date of the text message? After the transaction, March 2nd, 2016. After the transaction.

Between Mr. Phillippy and Mr. Potashner. Now, you go get them to give you some money. This is Mr. Potashner saying it. Now that the deal is signed, now that the Newport shareholders, the $23 per share is locked in, it doesn't matter. You can go ask for compensation now. You can go ask for a post-closing role. It's not going to impact what the Newport shareholders get. That is critical that before the transaction is signed is the critical period.

Mr. Knotts doesn't want to acknowledge it. He says, oh, I can tie it back, I can tie it back. None of the documents tie back. And the only evidence is, is the evidence that shows that there were no discussions before the signing of the transaction.

THE COURT: Well, weren't there e-mails referencing -- weren't there e-mails referencing an interest to work for MKS?

MR. LUTZ: Absolutely not.

THE COURT: Okay.

MR. LUTZ: Absolutely -- and even if there were, it doesn't matter if he is interested, if he has a thought, oh, maybe I'll be able to do that. And, Your Honor, we can't blind ourselves to the reality here. He got fired. This would be the first case that I'm aware of where

there's -- where a court might decide that there's a material self-interest at summary judgment or otherwise, when the guy who is supposed to have a self-interest got fired, and what he was paid as a short time consultant and in a short-term Board role paled in comparison to what he was receiving as CEO. It's mind boggling that that could possibly create a self-interest here.

And again, it's not just is there a self-interest. It's whether the decision was the product of a self-interest. This is not a situation where like *EXX* or *Weinberger* or *MacMillan*, where the self-interest -- the director standing on both sides of the transaction is going to personally benefit by driving down the sale price so that on the other side he can benefit as the owner of the company. It's totally different. Totally different than the situation here.

Okay. I promised I was going to be quick.

Okay. I'm going to talk about fraud on the Board. Again, the question is: At the business judgment rule level, the first analysis you have to do was the decision the, quote, product of fraud? It's not whether there was an omission or information wasn't shared. Was the whole decision the product of fraud? Was there an omission, and did somebody intentionally and on purpose fail to disclose material information that was relevant to that decision? Okay.

THE COURT: All right. And --

MR. LUTZ: Not --

THE COURT: Have they not made a prima facie case --

MR. LUTZ: Oh, not even --

THE COURT: -- with regard to Phillippy?

MR. LUTZ: No. And I'm going to get there. That's why I'm here right now.

THE COURT: The -- on the projections?

MR. LUTZ: They're not projections, but --

THE COURT: Well, it's a forecast -- they called it a forecast.

MR. LUTZ: Let's -- let's go through --

THE COURT: Let's do.

MR. LUTZ: -- the actual evidence on this. Okay?

You asked Mr. Knotts, What's the best evidence that you've got; right? And he says, Well, the -- they were provided to JP Morgan, and he said -- and you said, Well, did Mr. -- where is Mr. Phillippy on that? Mr. Phillippy didn't send them to JP Morgan.

THE COURT: Well --

MR. LUTZ: Mr. -- hold on -- oh, go ahead.

THE COURT: And what was the relationship with Willem who did to Mr. Phillippy?

MR. LUTZ: Yeah. Let's read the -- let's read the deposition testimony that Mr. Knotts did not read to you.

THE COURT: Give me a tab, please.

MR. LUTZ: Yeah. Of course. It's in Exhibit 40. Plaintiffs' Exhibit 40.

THE COURT: And this is in support of your motion?

MR. LUTZ: In support of their opposition.

THE COURT: And give me a second.

MR. LUTZ: No, yeah. Of course. And this is on page 61 of that exhibit.

THE COURT: All right. So now I need a --

MR. LUTZ: So this is the guy who sent it to JP Morgan. 61.

THE COURT: And this is Exhibit 40?

MR. LUTZ: Oh, I'm sorry. I couldn't hear you. Yep. Too many documents; right?

THE COURT: No, no. I've just got to get there.

MR. LUTZ: Sure.

THE COURT: And that'll be the -- Willem's updated?

MR. LUTZ: Yep. Exactly. Willem Meintjes.

THE COURT: Got it. Uh-huh.

MR. LUTZ: And the first question at the top of 61, and this is Mr. Knotts asking, Did you make the decision on your own to tell JP Morgan to use the top down model and not the strategic plan numbers?

This is not my decision. This is Chuck's decision to make.

Question: Do you recall specific instruction from him on the issue?

I don't recall specifically why I sent this e-mail, but this is Chuck's decision. Okay? It's not Mr. Phillippy. It's not Mr. Phillippy. But -- but there's -- but there's more.

Mr. Knotts makes it seem --

Oh, thanks. Sorry.

He focuses on the reliability, and I'll get to more evidence.

It's just hard doing it on the fly. The reliability he wants to talk about on the strategic plan numbers, the two things that I would point out there, I'm not going to get into a fight about reliability. What Mr. Knotts doesn't want to acknowledge is Exhibit 82, the clawback document, where MKS -- it shows that MKS itself determined that the strategic plan numbers were not reliable, and instead, what did they use? The base case, on their own. Nothing to do with Mr. Phillippy.

And No. 2, Mr. Knotts makes much to do about -- that the strategic plan numbers weren't used, but the base case was.

The critical thing here, that is -- the first year -- the strategic plan is a three-year plan, 2016, 2017, and 2018. They focus -- the focus of all the work is on 2016, right, the immediate year, and that's the year that you have the most accurate information about, because it's closest to the time.

The undisputed evidence that Mr. Knotts will not dispute because it's clear is that the base case was updated to use that first year of the strategic plan. Okay? That's why when you see in the exhibit, in the JP Morgan reference where they say we updated the --

Can you get me that exhibit? Thank you.

-- where we updated the base case to reflect the current -- I'm sorry. I'll get you an exhibit. I think it's 19. That's a reflection that, in fact, the first year of the strategic plan was used. This wasn't withheld in some way from the Board. They used in the base case the first year of the strategic plan numbers.

The other thing I'll note -- and I'm sorry, this was at Tab 21

that Mr. Knotts focused on, of his -- his binder that he gave us -- Tab 21.

THE COURT: Oh, the texts? Were they text messages? No.

MR. LUTZ: No, no, no. Tab 21, which is -- and then the very -- second-to-last page. Plaintiffs' Exhibit 129, which is their Tab 21.

This is the updated 2016 Nepal financials for latest projections provided to Molecule. Again, they said Mr. Phillippy sat silent. The base case was updated to reflect the first year of the strategic plan because that was the most accurate information that they had. It was updated.

This -- the strategic plan, it's made to be that there is some grand scheme by Mr. Phillippy to withhold this from the Board and to hide it, to not show them anything. Right? The fact is Mr. Phillippy -- the Board knew what was going on. This was part of the normal course strategic plan annual process.

Mr. Phillippy presented to the Board on the progress of that first year of the strategic plan during the December Board meeting. This is Tab -- it -- I'll get you the exhibit number. This was not some big secret from the Board. You asked Mr. Knotts, Well, did it show that the -- were the numbers better than the base case? Was it -- were they the highest numbers and the Board didn't see them?

Your Honor, the Board had the base case. They had the acquisition case. The strategic plan numbers were a middle -- middle

tier set of numbers. It was not -- you said were they the highest numbers that the Board didn't see? No. The Board had higher numbers, they had the acquisition case.

You have to show not just that something wasn't shared. You have to show that it was material and that Mr. Phillippy consciously and deliberately withheld that information from the Board. Where is that evidence? Where is the evidence that Mr. Phillippy made the deliberate decision to deceive the Board by withholding this information? It does not exist. It does not exist. There's no conflict. As I describe, there's no factual dispute of the secret conflict that wasn't disclosed about Mr. Phillippy getting some secret deals with MKS. The conflict doesn't exist, and the fraudulent intent to deceive the Board by withholding material information, both of which are necessary, does not exist, on both counts. They don't get past the business judgment rule. Okay?

A couple other points, and I'm trying to focus on the things that actually matter here. You asked, as part of the discussion about the other directors, right, and Mr. Knotts was focused on the proxy, because it's really the only claim that possibly relates to the other directors.

As a threshold matter, there is not any evidence, and Mr. Knotts certainly did not point to any, demonstrating that any director consciously and intentionally deceived the shareholders of Newport. We're talking about the second level analysis here, now, putting the business judgment rule to the side. What is the evidence

of a breach of fiduciary duty --

THE COURT: Right.

MR. LUTZ: -- involving fraud or knowing intention -- knowing violation of the law.

THE COURT: You did argue about Potashner with regard to GSI and Coherent.

MR. LUTZ: Yeah. Yeah. I'll get there in a second.

THE COURT: Okay.

MR. LUTZ: But just focusing on the proxy for the time being, he said, you know, they -- all this stuff about $23 per share being a fair -- you know, that the Board believed that was the best price, a fair price for the company. He said, well, that wasn't true because you didn't disclose all this stuff about Coherent. And he said, in November, three months, four months earlier, yes, it was November. Obviously a temporal distinction that is incredibly important here. Obviously before a continued market search in which MKS evolved as the only bidder and at $23 a share a significant premium. Okay? He says, well, you didn't disclose the information about Coherent, that there's a Board reference to 2475, I think. And he pointed to a JP Morgan presentation and said, where's that? Well, guess what, Your Honor, it's in the proxy. Okay?

If you look at our Exhibit 18.

THE COURT: Is that the Kadia?

MR. LUTZ: I'm very sorry. I couldn't hear you.

THE COURT: Your 18, is that the Kadia deposition?

MR. LUTZ: No. It's --

THE COURT: No? All right.

MR. LUTZ: It's the proxy.

THE COURT: Okay.

MR. LUTZ: If you look at page 35, at the bottom -- very bottom of the page, it says 472, but in the sort of -- do you see that?

THE COURT: I'm almost there.

MR. LUTZ: Okay. I realize it's a lot. Just say --

THE COURT: I'm there.

MR. LUTZ: That was misleading because nobody knew, the shareholders didn't know about this 2475. Well, look at the last sentence in there. The company Board determined that a purchase price below 2475 per share from Party C, which is Coherent, would not be adequate to recommend to the company stockholders. It's right there. Okay? That is not a basis -- that is not a disclosure violation. It's right in the proxy. Okay?

Let me okay. So fully disclosed -- and let me just finish with GSI. I mean, the theory here is that during the course of the market outreach that Mr. Potashner somehow did something wrong when during the course of discussions he proposed himself as the chairman. Of course, in that -- if that transaction were to occur, we would have -- Newport would have been the larger of the two merger partners. The testimony from Mr. Potashner was it's totally normal in that circumstance that the larger company takes the chairman position. So it sort of was baffling that that could have possibly been

seen as doing something wrong.

Mr. Knotts says, well, this is what drove them away. He did this, and then GSI never wanted to do meetings anymore. That's not accurate. They followed up with and had in-person meetings following that. Absolutely.

And then finally, he says, well, that's the reason why you -- Mr. Potashner proposing himself as chairman is the reason why GSI didn't want to do anything. And that's not accurate either. And it's in the record. This is Tab 73 of ours. I can just read it to you, but if you -- it's an e-mail from Mr. Phillippy to the Board, reflecting an update.

Do you want me to -- okay.

THE COURT: No. Go ahead.

MR. LUTZ: Oh, I'm sorry. I was waiting for you. Sorry.

So Mr. Phillippy, all he -- this is in January 23rd, a month after Mr. Phillippy -- Mr. Knotts says that GSI wanted nothing to do with us; right? A month later, he says in a follow up to our all-day management meeting on January 8th, 2016, and follow-up strategy discussions on January 14th, 2016, Geneva, in the records -- Geneva is GSI, completed their modeling and made the decision not to move forward with the merger transaction. Then he goes on to cite the reasons, including that their analysis indicated the potential value created by the combination was not as high -- was not high enough to justify the disruption and risk of the transaction.

There's no evidence that Mr. Potashner proposing himself

during the course of the discussions with GSI as the chairman was improper, let alone that it drove GSI away, let alone that it reflected intentional misconduct -- you know, that he knew he was doing the wrong thing and he did it anyway. And this is all just -- and on top of it, how could that possibly have hurt Newport shareholders? I mean, they got a deal at $23 per share. They went away on their own, having nothing to do with it.

So it's -- to me, it's just a side issue.

At the end of the day, you have to focus on the business judgment rule. It has specific requirements under *Wynn*. It says it has to be -- you can only overcome it with evidence showing that the decision at issue, the decision to approve a transaction with Newport -- with MKS for $23 per share was the product of fraud, was the product of self-interest, or reflected a lack of due care. This issue -- this case has been focused on a product of fraud and product of self-interest, which are sort of intertwined.

They can't show a material personal interest for Mr. Phillippy because the undisputed evidence is that there were no discussions with MKS before the deal was signed. Undisputed. There is no material self-interest. The Plaintiffs haven't submitted any evidence. The evidence -- zero evidence showing that what he received, what Mr. Phillippy received after the signing, namely the consultancy and the Board seat, the compensation associated with that was material to him. Zero evidence. There is no evidence of a material self-interest conflict for Mr. Phillippy. Nor is there any

evidence that that conflict impacted the Board as a whole. In other words, no evidence that the decision of all of the these other directors was the product of his self-interest.

That is the end. That is the -- they cannot get past the business judgment rule on summary judgment. There's no evidence that would allow them to prove that you as the trier of fact can determine that they made the -- that the directors made a bad decision and that $23 per share was the bad decision. You can't even get there, because they can't get past the business judgment rule.

Any questions?

THE COURT: No.

MR. LUTZ: Thank you.

THE COURT: Thank you. All right. So the matter is now submitted. I am going to take it under advisement, but I am going to give you an idea of where I'm going.

Walking in today, my inclination was to grant the summary judgment with regard to everyone but Phillippy and possibly Potashner. My inclination after hearing the argument is that any allegations with regard to Mr. Potashner really are not material at this point. So my inclination is to dismiss him.

With regard to Phillippy, I'll take a second look at it, but the only thing I thought that the plaintiff may have made a *prima facie* case was with regard to self-interest -- not with regard to fraud or due care. But only with regard to self-interest.

So I am going to re-review with regard to Phillippy, and I'll

issue -- let me put this on a chamber's calendar. Because next week is a short week, it's going to have to be a little bit longer. I know that you're all anxious to get a decision. I'm going to put this on my chamber's calendar for the 10th of December. I can assure you, you will have a minute order so that you'll have certainty by the end of the year.

The winning party will be tasked with preparing findings of fact and conclusions of law.

So that's my inclination with regard to what has been a fairly difficult case, but so beautifully lawyered, so -- on both sides.

So I'm sorry that I can't give you a decision today, but at least you know where my inclination is. Were there any comments? Any last-ditch efforts to try to change my mind? I mean, I won't be offended.

MR. KNOTTS: Yeah. No, Your Honor. Just, you know, Mr. Lutz seemed to argue the notion that nothing at all ties Mr. Phillippy's conversations, you know, prior to the deal.

THE COURT: And that's what I'm going to look at again, based upon --

MR. KNOTTS: Yeah. It's -- it's in --

THE COURT: -- the supplement you gave me today.

MR. KNOTTS: And he wrote down in November, his own handwriting, as part of negotiating with the acquirer --

THE COURT: Well, I think the counterargument to that is that that was his intent. He had to manifest it in order to be culpable.

MR. KNOTTS: Right. And he manifested it when pushing for it and talking about it with respect to the rest of the Board.

THE COURT: And that's what I'm going to look for.

MR. KNOTTS: And absolutely. Yeah. It's --

THE COURT: I'm mindful that that's the issue. And that's the only issue at this point that I really see. And I'm going to see if you can make a *prima facie* case.

MR. KNOTTS: Okay. Thank you, Your Honor.

THE CLERK: And Your Honor, is the chamber's call on December 3rd?

THE COURT: December 10th. Yeah. Only because next week is a short week, and I don't want to promise something that I can't deliver.

So was -- did the Defendant have anything further?

And if Ms. Young is still on the phone -- I'm not sure.

Was there anything further from the Defendant?

MR. LUTZ: No, nothing further.

THE COURT: Very good.

MR. LUTZ: Thank you, Your Honor, for taking the time with us.

THE COURT: Thank you all. Thank you all. And don't forget.

MS. YOUNG: Thank you very much, Your Honor.

THE COURT: Thank you, Ms. Young.

Special settings, always special settings; okay?

Max knows, but I freak out when I've got 20 lawyers here and your clients are paying you to sit and listen to motions in limine on an accident case. Okay?

Thanks.

[Proceeding adjourned at 4:41 p.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.

Shannon Day
Transcriber

A-16-733154-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Business Court Matters **COURT MINUTES** **December 10, 2019**

A-16-733154-B Dixon Chung, Plaintiff(s)
vs.
Newport Corp, Defendant(s)

December 10, 2019 **3:00 AM** **Minute Order**

HEARD BY: Allf, Nancy **COURTROOM:** No Location

COURT CLERK: Nicole McDevitt

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- COURT FINDS after review that Defendant s Motion for Summary Judgment (the Motion for Summary Judgment) was filed on August 23, 2019.

COURT FURTHER FINDS after review that the Court heard oral arguments on the Motion for Summary Judgment on November 21, 2019. The Court took the matter under submission and set a Status Check for December 10, 2019 on Chambers Calendar for the Court to issue a Minute Order with its decision.

COURT FURTHER FINDS after review that under Nevada s business judgment rule, directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. See, NRS 78.138(3).

COURT FURTHER FINDS after review that the business judgment rule does not only protect individual directors from personal liability, rather, it expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision. Wynn Resorts, Ltd v. Eighth Jud. Dist. Ct., 133 Nev. 369, 375 (2017). Specifically, it prevents a court from

replac[ing] a well-meaning decision by a corporate board with its own decision. Id.; see also Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 21 Cal.4th 249, 87 Cal.Rptr.2d 237, 980 P.2d 940, 945 (1999) (A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors.).

COURT FURTHER FINDS after review in order to rebut Nevada s business judgment rule, the Plaintiffs must provide prima facie evidence that the Board s decision to approve the merger in the underlying case was either (1) the product of fraud, (2) the product of self-interest, or (3) that the directors failed to exercise due care in reaching its decision. Wynn Resorts, 133 Nev. at 377.

COURT FURTHER FINDS after review that despite Plaintiff s claims of self-interest, there is no direct material evidence against any of the Newport directors to rebut Nevada s business judgment rule.

COURT FURTHER FINDS after review that there is no material evidence that any of the directors, including Directors Potashner and Phillippy, failed to exercise due care. The merger came about following a nine-month sale process and with 16 board meetings, whether full board or committee meetings, which included financial and legal advisors to approve the sale. As such, the evidence supports that at least a minimum level of care was exercised in arriving at the merger decision.

COURT FURTHER FINDS after review that the merger was not the product of self-interest or fraud. With respect to Mr. Phillippy and Mr. Potashner, the Court does not find that material discussions regarding employment or related compensation with MKS took place. And, any post-close employment discussions after the signing of the merger are not relevant in the Court s analysis. Similarly, there is no material evidence regarding Phillippy s or Potashner s intent to deceive or defraud the Board.

THEREFORE, COURT ORDERS for good cause appearing and after review that the Motion for Summary Judgment is hereby GRANTED in its entirety as to Directors Potashner, Cox, Kadia, Khaykin, Simone, and Phillippy.

COURT FURTHER ORDERS for good cause appearing and after review that Defendants are directed to prepare and submit an order containing detailed findings of fact and conclusions of law (Order) based upon the Court s decision as clarified herein. Defendants are further ordered to provide opposing counsel with the proposed Order on or before January 3, 2020, from which date Plaintiffs shall have ten (10) days to review and approve said Order as to form before the Order is submitted to the Court.

COURT FURTHER ORDERS that the Status Check set for December 10, 2019 on Chambers Calendar is hereby VACATED.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Nicole McDevitt,

to all registered parties for Odyssey File & Serve. /nm 12/10/2019

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

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

FINDINGS OF FACT

A. Background of the Merger

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

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

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

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

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

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

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

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

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

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B. Newport's Financial Forecasts and Strategic Planning Process

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

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

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

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

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

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

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

C. Defendants' Post-Closing Roles and Related Discussions

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Legal Standard for Summary Judgment

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

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

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

B. Plaintiffs Cannot Overcome Nevada's Business Judgment Rule

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

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

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

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

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

1. The Newport Board Exercised Due Care

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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IT IS SO ORDERED.

DATED: Jan. 21, 2020

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	CASE NO.: A-16-733154-B (Consolidated with Case No. A-16-734039-B) CLASS ACTION
This Document Relates To: ALL ACTIONS.	**[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO STRIKE**

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

Rudman & Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, Esq., Meryl L. Young, Esq., and Colin B. Davis, Esq., of Gibson, Dunn & Crutcher LLP, and Maximilien D. Fetaz, Esq., of Brownstein Hyatt Farber Schreck LLP.

The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, hereby ORDERS, ADJUDGES, AND DECREES as follows:

Defendants' Motion to Strike is DENIED.

IT IS SO ORDERED.

DATED: Jan. 21, 2020

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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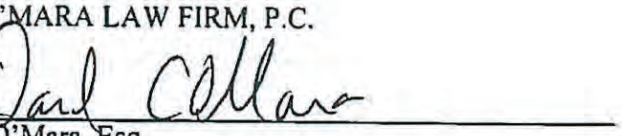

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

. . .

. . .

NOTICE OF ENTRY OF ORDER

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

DATED this 23rd day of January, 2020.

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/s/ Maximilien D. Fetaz

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CERTIFICATE OF SERVICE

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

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

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

FINDINGS OF FACT

A. Background of the Merger

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

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

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

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

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

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

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

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

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

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B. Newport's Financial Forecasts and Strategic Planning Process

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

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

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

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

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

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

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

C. Defendants' Post-Closing Roles and Related Discussions

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Legal Standard for Summary Judgment

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

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

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

B. Plaintiffs Cannot Overcome Nevada's Business Judgment Rule

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

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

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

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

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

1. The Newport Board Exercised Due Care

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

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IT IS SO ORDERED.

DATED: Jan. 21, 2020

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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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.	**NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that Plaintiffs Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust, by and through their counsel, David C. O'Mara, Esq., of the O'Mara Law Firm, P.C., appeal to the Supreme Court of Nevada from the following orders:

1. Findings of Fact, Conclusions of Law and Order Granting Defendants' Motion for Summary Judgment entered in this action on the 23rd day of January, 2020;

2. Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint entered in this action on the 20th day of November, 2019; and

3. Order Striking the Jury Demand and Amending the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call entered in this action on the 4th day of June, 2019.

AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above referenced matter does not contain the social security number of any person.

DATED: February 18, 2020

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s/ David C. O'Mara
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CERTIFICATE OF SERVICE

I, Bryan Snyder, hereby certify that I am an employee of The O'Mara Law Firm, P.C., and further certify that the foregoing document was electronically filed and served upon all parties via the Court's Electronic Filing system.

DATED: February 18, 2020

/s/ Bryan Snyder
BRYAN SNYDER