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

RENEWED MOTION TO SEAL

Electronically Filed
Nov 16 2020 08:01 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appellants hereby file this Renewed Motion to Seal in response to the Court's November 9, 2020 Order Partially Granting Motion to Seal. Appellants have filed the opening brief under seal only because Appellants are obligated to do so under the trial court's protective order, given that the opening brief refers to material marked "Confidential" by Respondents and other third parties (not Appellants). While Appellants do not believe that the opening brief contains the kind of information that is typically sealed pursuant to Nevada Supreme Court Rule Part VII, now that Respondents have filed a motion to seal along with a redacted version of the opening brief, Appellants hereby re-file that same redacted brief out of an abundance of caution.

DATED: November 16, 2020

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

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

311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

Liaison Counsel

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

Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

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

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

_____ Via Email

__X__ Electronically through the Court's Electronic Filing System

DATED: November 16, 2020

/s/ Bryan Snyder
BRYAN SNYDER

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EXHIBIT 1

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PLAINTIFFS-APPELLANTS' OPENING BRIEF

[CONFIDENTIAL – FILED UNDER SEAL]

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

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

Counsel for Appellants

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a), and must be disclosed: none. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The undersigned counsel of record identifies the following firms whose partners or associates have appeared or are expected to appear in this court:

For *Plaintiffs-Appellants*:

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

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

For *Defendants-Respondents*:

BROWNSTEIN HYATT FARBER SCHRECK, LLP
ADAM K. BULT
MAXIMILIEN FETAZ
100 North City Parkway, Ste. 1600
Las Vegas, Nevada 89106

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

MERYL L. YOUNG
COLIN B. DAVIS
3161 Michelson Dr.
Irvine, CA 92612

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust ("Plaintiffs"), on behalf of a certified class of former shareholders of Newport Corporation ("Newport" or the "Company"), appeal from a final judgment and order entered in the District Court. Pursuant to NRAP 3A(b)(1), this Court has jurisdiction to hear this appeal.

NRAP Rule 4(a)(1) states that a notice of appeal must be filed no later than 30 days after service of written notice of entry of the judgment or order from which the appeal is made. The District Court entered its Findings of Facts, Conclusions of Law, and Order Granting Defendants' Motion for Summary Judgment on January 23, 2020.[1] On February 18, 2020, Plaintiffs timely filed their Notice of Appeal.[2]

Plaintiffs also appeal the District Court's June 4, 2019, Order Striking the Jury Demand and Amending the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call,[3] and the District Court's November 20, 2019, Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint,[4] neither of which was ripe for appeal until entry of the January 23, 2020 Order.

ROUTING STATEMENT

The Court has jurisdiction over this appeal because this case originated in business court. *See* NRAP 17(a)(9).[5]

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1 Volume 2 Joint Appendix at JA0448-60; JA0464-79 (hereinafter cited as [volume#]:JA____).

2 2:JA0480-82.

3 1:JA0206-16.

4 2:JA0327-39.

5 1:JA0001

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STATEMENT OF ISSUES PRESENTED

1. Where substantial evidence establishes that certain officers and directors of Newport knowingly committed fraud on Newport's Board of Directors ("Board"), and/or engaged in other intentional misconduct, in engineering the sale of Newport to another company, should summary judgment in favor of those officers and directors be reversed?

2. Do Plaintiffs have an inviolate constitutional right to a jury trial on tort claims for money damages that resulted from intentional breaches of fiduciary duty?

3. Did the District Court abuse its discretion in denying Plaintiffs' motion to amend their complaint, when the operative scheduling order in this action – which had been negotiated by the parties, and approved the District Court – established an express date for moving to amend, and Plaintiffs timely moved to amend by that date?

STATEMENT OF THE CASE

I. Nature of the Case

This is a shareholder class action brought by and on behalf of the former public shareholders of Newport. It alleges causes of action for breaches of fiduciary duty against Newport officers and directors in connection with the 2016 sale of the Company to MKS Instruments, Inc. ("MKS") for $23.00 per share in cash (the "Merger"). The evidence obtained through discovery shows that the Merger was the result of knowing fraud on the Board, and other intentional misconduct, by certain Newport officers and directors, and that Plaintiffs and the Class were damaged thereby.

II. Course of the Proceedings and Disposition Below

This action was commenced in March 2016. 1:JA0001-17. Plaintiffs filed their First Amended Complaint on October 24, 2016. 3:JA0483-514. On June 27, 2017, the District Court granted Defendants' motions to dismiss, with leave to amend. On July 28, 2017, Plaintiffs filed their Second Amended Complaint. 3:JA0515-57. On January 5, 2018, the District Court denied Defendants' renewed motions to dismiss.

On November 12, 2018, the District Court entered an order granting Plaintiffs' motion for class certification. That order certified a class of former Newport shareholders who held Newport stock at the time of the Merger.

On March 4, 2019, Defendants filed their Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call, seeking to strike Plaintiffs' jury demand. 1:JA0123-32. On June 4, 2019, the District Court entered its Order Striking the Jury Demand and Amending the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call. 1:JA0206-16.

On August 9, 2019, Plaintiffs served their Motion for Leave to Amend the Second Amended Complaint. 4:JA0770-85. On November 20, 2019, the District Court entered its Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint. 2:JA0327-31.

On August 23, 2019, Defendants filed their Motion for Summary Judgment. 4:JA0925-64. On January 23, 2020, the District Court entered its Findings of Facts, Conclusions of Law, and Order Granting Defendants' Motion for Summary Judgment. 2:JA0448-60.

On February 18, 2020, Plaintiffs filed their Notice of Appeal. 2:JA0480-82.

STATEMENT OF FACTS

I. Merger Discussions Were Instigated for an Improper Purpose

A. [redacted]

Prior to the Merger, Newport was a publicly traded technology company. It developed, manufactured and sold various products to health, defense, industrial, and other businesses worldwide. It had three operating groups: the Photonics Group, the Lasers Group and the Optics Group.

Robert Phillippy ("Phillippy") was Newport's President and CEO. He was also a member of the Company's Board.

In 2015, Phillippy's [redacted]. A July 20, 2015, email from Lyon Street Capital – a large Newport shareholder who thought Newport was worth [redacted] – sums it up. The email, sent to Newport's Chairman of the Board, Ken Potashner ("Potashner"), and entitled [redacted] says:

> [redacted][6]

Similar missives continued throughout 2015. A representative sample is set forth below:

- May 7, 2015: Lyon Street Capital wrote to Phillippy stating, [redacted][7]

- May 12, 2015: Lyon Street Capital wrote to Cargile, [redacted]

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[6] 18:JA4096-97. *See also* 18:JA4075; 18:JA4078-94. Unless otherwise indicated, all emphasis is added and all footnotes and citations are omitted.

[7] 18:JA4213.

[redacted][8]

- June 8, 2015: Phillippy referred to Lyon Street Capital's communications as [redacted] and that include [redacted] Phillippy also wrote that another correspondence [redacted][9]

- July 20, 2015: Lyon Street Capital wrote to Cargile, [redacted][10]

- October 21, 2015: Cargile wrote, [redacted][11] Those two stockholders consisted of Lyon Street Capital and Polar Securities.[12] Cargile confirmed that Lyon Street Capital [redacted][13]

- December 30, 2015: Lyon Street Capital wrote to Potashner, [redacted][14]

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[8] 18:JA4223-24.

[9] 18:JA4199.

[10] 18:JA4230.

[11] 18:JA4234.

[12] 18:JA4159-61.

[13] 18:JA4161.

[14] 18:JA4238.

Peter Simone ("Simone"), a Newport Board member, confirmed in deposition that [redacted]"[15] Newport CFO Chuck Cargile ("Cargile") testified that Lyon Street Capital [redacted][16]

B. Phillippy Was Financially Incentivized to Pursue a Merger

If the Board were to terminate Phillippy's employment, he would receive $1.2 million in "golden parachute" payments pursuant to his severance agreement.[17] But he would lose all of his unvested equity awards in the process.[18]

However, if Phillippy could engineer a sale of Newport before the Board fired him – thus triggering the "change in control" provisions of his separation agreement – he would instead receive $2.4 million in "golden parachute" payments.[19] Plus, all of his unvested equity awards would automatically vest in a merger – providing him with millions of dollars more in payments.[20]

Moreover, if he steered Newport into the hands of a buyer who was friendly towards him, he could cash in on Merger-related payments, while keeping his job or being given some other lucrative position with the acquiring company. So his strategy was clear – bring about a sale of Newport, and in the process favor any management-friendly buyer who might keep him in a position of power. That's what he did, [redacted]

[15] 18:JA4126-27.

[16] 18:JA4166-67.

[17] 29:JA6825-27.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[redacted] At that time, the Board had yet to formally retain JPM as financial advisor to any ongoing merger process.

C. [redacted]

[redacted]

[redacted][22] [redacted][23] [redacted][24] [redacted][25]

[redacted][26] [redacted]

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[21] 19:JA4369-70.

[22] 18:JA4128-29; 19:JA4376-77; 19:JA4423-25; 19:JA4353-54.

[23] 18:JA4259-60.

[24] 18:JA4261-63.

[25] 19:JA4464-65.

[26] 18:JA4234.

[redacted].[27]

On August 28, 2015, Phillippy partially informed the Board about the prior day's conversation. [redacted][28]

To Phillippy's dismay, [redacted] according to the testimony of Newport Board member Oleg Khaykin ("Khaykin"). The Board told Phillippy that [redacted][29] As Khaykin testified, [redacted][30] [redacted][31] Khaykin further wrote, in an August 29, 2015, email exchange with Potashner:

> [redacted][32]

Khaykin continued:

> [redacted]

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[27] 18:JA4271-72.

[28] 19:JA4373-74; 19:JA4343-45, 19:JA4355.

[29] [redacted]

[30] 19:JA4311-12.

[31] 19:JA4311-12.

[32] 19:JA4526-27.

[redacted][33]

As these events unfolded, the Board became concerned that [redacted] As Khaykin wrote: [redacted][34] Khaykin pointed out that the Board might have to consider [redacted][35]

From there, the pressure on Phillippy to sell the Company only grew worse. Newport's directors began discussing [redacted][36] To that end, [redacted][37] Khaykin testified that [redacted]

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[33] 19:JA4527.

[34] 19:JA4528.

[35] 19:JA4527 (parenthesis in original).

[36] 19:JA4310; 19:JA4350-52.

[37] 19:JA4367-68; 19:JA4360.

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[redacted].[38]

Thus, the heat on Phillippy to find a friendly merger partner continued to intensify.

D. [redacted]

In the face of [redacted], Cargile was asked by the Board [redacted][39]

Cargile's notes reflect that [redacted]:

[redacted][40]

Thus, Cargile [redacted][41] [redacted]

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[38] 19:JA4324.

[39] 19:JA4536 (parenthesis in original).

[40] *Id.*

[41] *Id.*

[redacted][42] And as the merger process unfolded, [redacted] As Newport Board member Cox testified, [redacted]:

> [redacted][43]

II. Phillippy and Cargile Created Two Sets of Projections [redacted] the Base Case Projections and [redacted]

Between August 2015 and February 2016, Phillippy and Cargile participated in the creation of several different sets of financial projections for Newport. One set of projections was created by Phillippy and Cargile, without input from the Company's business groups, for JPM to use in the merger process. This set of projections came to be known as the "Base Case Forecasts."[44]

[redacted]

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[42] As shown below, the District Court abused its discretion in denying Plaintiffs' Motion to Amend, which, among other things, sought to add Cargile as a defendant in this Action based on the intentional misconduct detailed herein.

[43] 19:JA[redacted]

[44] The Base Case Forecasts are also variously referred to in the documents, and herein, as the "Base Case," "Base Case Projections," and "Base Model."

[redacted] Both sets of projections are discussed more fully below.

A. The Base Case Projections Were Lowball Projections, Hastily Created to Sell the Company

Phillippy and Cargile needed a set of multi-year projections to justify selling the Company. So over the course of a couple of days in August 2015, they devised some.

On August 27, 2015, Cargile sent an initial draft of these projections to Phillippy, who had given Cargile specific instructions regarding the underlying assumptions he should use.[45] Per Phillippy's instructions, these projections were to be premised on "Organic Revenue Growth of 3%" per year,[46] even though [redacted].[47]

On the morning of August 31, 2015, Cargile and Phillippy finalized these projections and, that very same morning, sent them over to David Lubeck ("Lubeck") of JPM. The cover email stated that these projections were [redacted][48] Yet the 3% growth rate was never corrected, and became the centerpiece of the Base Case Projections.[49]

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[45] 20:JA4580-82.

[46] 20:JA4586; 20:JA4592; 20:JA4595.

[47] 20:JA4581 (all caps in original).

[48] 20:JA4613. Phillippy and Cargile also created a companion set of projections, known as the "Acquisition Forecasts," at the same time as the Base Case Forecasts. The Acquisition Forecasts included the same underlying low growth rate as the Base Case, but layered in an amount for potential future acquisitions.

[49] 26:JA6118; 26:JA6133; 26:JA6137.

Phillippy and Cargile did not prepare these Base Case Projections for standalone, ordinary course business purposes.[50] Instead, they prepared them specifically for JPM to shop Newport to prospective buyers, and to prepare a valuation analysis justifying a sale of Newport.[51] Nor did Phillippy and Cargile receive tangible input from the Business Groups or anyone else in Newport management when developing the Base Case Projections. In fact, [redacted][52]

B. The [redacted] Was Management's Plan for Act[redacted] the Company

In contrast to the hastily-created Base Case Projections, [redacted][53]

Jeffrey Parker ("Parker"), General Manager of Newport's Optics division, testified that [redacted][54] Dennis Werth

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50 [redacted]

51 20:JA4616-35; 20:JA4636-43; 20:JA4659; 20:JA4691; 18:JA4188-90.

52 20:JA4616-35.

53 21:JA4749-891 (Photonics [redacted] Presentation); 21:JA4905-55 (Lasers Group [redacted]sentation); 21-22:JA4956-5120 (Optics Gro[redacted] Presentation); 20:JA4648-49; 20:JA4680-81.

54 22:JA5129; 22:JA5160-61.

("Werth"), General Manager of Newport's Photonics division, similarly described [redacted][55] David Allen ("Allen"), General Manager of Newport's Lasers division, likewise explained that [redacted][56]

On November 13, 2015, Phillippy confirmed to Newport's division leaders that [redacted][57] Phillippy explained that [redacted][58] Phillippy provided [redacted][59] Phillippy personally circulated [redacted][60] By the time of the in-person meetings, [redacted]

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55 20:JA4679-80; 20:JA4711-12.

56 20:JA4667-69.

57 23:JA5372.

58 23:JA5372-75.

59 22:JA5124-47; 23:JA5371-80; 23:JA5381-403; 20:JA4647-48; 20:JA4679-81.

60 23:JA5382.

[redacted][61]

Werth, Allen, and Parker [redacted][62] Phillippy [redacted][63]

The week of [redacted] meetings concluded with a "Strategy Review/Discussion," which again included all general managers.[64] Subsequent to these [redacted] meetings, Phillippy personally updated the [redacted][65]

C. The [redacted] Were Significantly Hig[redacted]ojections

The consolidated [redacted] were as follows:[66]

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[61] 22:JA5149-51.

[62] 24:JA5520-22.

[63] 20:JA4670-71.

[64] 24:JA5522.

[65] 20:JA4728-29.

[66] 24:JA5606.

[redacted]

By comparison, the Base Case sales number for 2017 was $645 million [redacted]), and for 2018 was $665 million [redacted]).[67]

Newport management universally believed that the Base Case projections were too low. As Newport executive Coyne informed JPM, in November 2015, [redacted][68] Coyne was specifically describing the Base Case that was being presented to the Board and potential buyers, and was being used by JPM to value the Company.[69]

The same sentiment was echoed by Newport's division leaders. For example, documents from Newport's Lasers division state that the 3% growth rate used in the Base Case [redacted][70] Documents from the Photonics and Optics divisions similarly [redacted].[71]

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[67] 26:JA6108-11.

[68] 23:JA5341.

[69] 22:JA5227.

[70] 20:JA4628.

[71] 20:JA4634; 20:JA4642.

Historical data also confirmed that the Base Case was too low. While the Base Case assumed a 3% growth rate for Newport, internal Company documents show that [redacted][72]

III. Phillippy and Cargile Shared [redacted] Only with Their Favored Bidder, MKS

On December 4, 2015, according to Phillippy's notes, the CEO of MKS, Jerry Colella ("Colella"), informed Phillippy that [redacted][73] This was exactly the kind of management-friendly buyer Phillippy was looking for. As Phillippy's hand-written notes at a board meeting during Merger negotiations stated: [redacted][74]

On January 15, 2016, MKS submitted an offer letter for $23.00 per share in which MKS confirmed that it wanted to bring Newport's employees into the fold.[75] Along with that offer, on the same day, MKS stated to JPM that [redacted][76] This statement was confirmed in writing by both Phillippy and Cargile on January 16, 2016.[77] On January 18, 2016, MKS's advisers again stated that MKS [redacted]

[72] 23:JA5370.

[73] 23:JA5486.

[74] 23:JA5457.

[75] 9:JA1911.

[76] 24:JA5550-51.

[77] *Id.*

[redacted][78] Yet Phillippy [redacted][79]

Internally, [redacted][80] MKS expected that he would. Colella wrote on January 18th, [redacted][81] John Ippolito ("Ippolito"), an MKS representative, responded the following day: [redacted][82]

That, however, did not happen. [redacted] Instead, [redacted]

To that end, on January 22, 2016, [redacted][83] On January 27, 2016, Newport responded: [redacted]

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78 19:JA4445-46; 19:JA4448; 24:JA5565-66.

79 19:JA4382-83; 7:JA1449-64

80 24:JA5556-64.

81 24:JA5557.

82 *Id.*; 19:JA4451-52.

83 24:JA5571.

[redacted][84] Note that Newport [redacted]

Thereafter, Newport management – and Phillippy in particular – [redacted][85] Phillippy [redacted][86]

Regarding [redacted], on January 30, 2016, Phillippy explained to Cargile that:

> [redacted][87]

Cargile confirmed that he would.[88]

During a series of in-person diligence meetings between Newport and MKS from January 28, 2016 through February 2, 2016, Newport management, at Phillippy's direct instruction, [redacted].[89] As Willem Meintjes ("Meintjes"), Newport's Vice

[84] 24:JA5572-99.

[85] 20:JA4674; 20:JA4728-29; 20:JA4732-33; 20:JA4745.

[86] 24:JA5619-49; 24:JA5650-79.

[87] 24:JA5601.

[88] *Id.*

[89] 24:JA5614-18.

President and Corporate Controller, and a participant in these meetings, testified: [redacted][90] MKS likewise understood that [redacted][91]

After these meetings, on February 4, 2016, Newport noted: [redacted][92] Cargile later confirmed that, [redacted][93]

IV. Phillippy and Cargile Also Shared the [redacted] with JPM, but Intentionally Concealed It [redacted] and Shareholders

On February 16, 2016, Newport provided both the Base Case and [redacted] to JPM, noting that [redacted][94] Upon receipt, JPM asked [redacted]

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[90] 20:JA4742-43.

[91] 19:JA4442.

[92] 25:JA5775-805.

[93] 18:JA4196.

[94] 25:JA5981-85.

[redacted][95] Newport management expressly directed JPM to [redacted][96]

The instruction [redacted]. As Lubeck of JPM testified: [redacted][97] Yet that's exactly what happened here – Newport management [redacted][98]

Later that evening on February 16, 2016, JPM sent both projections back to Newport management, but this time, the [redacted].[99]

[redacted]

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[95] 25:JA5817-22.

[96] 25:JA5823; 18:JA4101-02.

[97] 18:JA4105-07.

[98] 18:JA4103-07; 25:JA5814-35; 26:JA6102-15.

[99] 26:JA6108-11.

JPM again circulated [redacted] two days later.[100] The very projection spreadsheet upon which JPM based its fairness presentation [redacted][101]

The Board met on February 11, 2016.[102] Phillippy and Cargile attended the meeting, but [redacted][103] [redacted][104] [redacted][105]

The Board met again on February 19, 2016.[106] [redacted][107] And again [redacted][108]

JPM made its fairness presentation to the Board at meetings on February 21 and 22, 2016. JPM provided a copy of its presentation materials to the Board in advance, and the Board minutes confirm that [redacted]

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[100] 26:JA6117.

[101] 26:JA6120-23.

[102] 8:JA1684-87.

[103] *Id.*

[104] *Id.*

[105] 19:JA4407; 23:JA5341; 19:JA4581.

[106] 8:JA1688-90.

[107] *Id.*

[108] 19:JA4407; 23:JA5341; 20:JA4581.

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[redacted][109] Those materials averred that, between January 18 and February 21, JPM had [redacted].[110]

[redacted]

This statement was obviously untrue. [redacted][111]

Indeed, [redacted][112] Board members also testified that [redacted]

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[109] 8:JA1691-94.

[110] 26:JA6136.

[111] 8:JA1691-94; 7:JA1449-64.

[112] 18:JA4121-22; 18:JA4124-25; 25:JA5981-85; 19:JA4408; 19:JA4410-11; 26:JA6102-115; 20:JA4576; 19:JA4365-66; 19:JA4320-21; 19:JA4326; 19:JA4432.

[redacted][113]

V. Newport Achieved Spectacular Results Post-Merger, and Phillippy and Cargile Got the Payoff They Were Looking For

In 2015, Newport's net sales were $602.7 million. Following the close, MKS reported that net sales for the Newport business it had acquired were $709 million for 2017 (***18%*** annual growth) and $814 million for 2018 (***15%*** annual growth). These former Newport businesses experienced similarly meteoric rises in gross profits, to $340 million in 2017 and $402 million in 2018. MKS disclosed Newport's post-Merger performance in the following chart:[114]

[redacted]

[113] 19:JA4407; 23:JA5341; 20:JA4581.

[114] [redacted]

MKS fully expected Newport to perform superbly following the close of the Merger based on the inherent strength of the business. An analyst asked MKS CEO Gerald Colella: "[W]hen you look at the Newport business growing as fast as it has, are you a little surprised that it's grown this fast just in the second year?"[115] He responded:

> I'm not surprised at all or we wouldn't have bought the company. I think we saw the potential in the products. They have a great customer base, excellent technology, outstanding employees, a great reputation. And we saw that there was some tremendous opportunity within the company itself with some management changes, some changes to sales and operations, breaking some of the bottlenecks, which were holding them back. We are pleasantly surprised, but not surprised about the growth at all. I think that's exactly what we saw in the company.[116]

MKS had, of course, [redacted].[117] [redacted].

As for Phillippy and Cargile, they successfully triggered the change in control provisions of their severance agreements. As a result, Cargile received a lump sum payment equal to twelve months salary, plus a lump sum payment equal to 100% of his annual bonus, plus automatic vesting of unvested restricted stock, restricted stock units and stock appreciation rights, for a total of over $2 million in "Golden Parachute Compensation," [redacted].[118] Phillippy did even better: he received a lump sum payment equal to

[115] 28:JA6485.

[116] 28:JA6485; *see also* 19:JA4490.

[117] 22:JA5178-91; 22:JA5192-205; 22:JA5205-19; 23:JA5409-42; 23:JA5460; 19:JA4358; 23:JA5463-71; 18:JA4274-75.

[118] 7:JA1476-81.

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twenty-four months' salary, plus a lump sum payment equal to 200% of his annual bonus, plus automatic vesting of unvested restricted stock, restricted stock units and stock appreciation rights, for a total of over $4 million in "Golden Parachute Compensation."[119] [redacted][120] All told, Phillippy received approximately as much in the Merger as he had made for the entirety of 2012-2014 combined.

VI. Plaintiffs and the Class Were Damaged by Phillippy's and Cargile's Misconduct

The record shows that the foregoing fraud and intentional misconduct damaged Newport stockholders. Plaintiffs' valuation expert, Ronald G. Quintero of Charter Capital Advisors, Inc., calculated the fair value of Newport common stock [redacted] at ***$25.96*** per share, representing damages of ***$2.96 per share*** in excess of the Merger price.[121]

SUMMARY OF THE ARGUMENT

The evidence detailed above establishes that Phillippy and Cargile repeatedly concealed, and had others conceal, material information in engineering the Merger and obtaining Board and shareholder approval. Thus, they knowingly committed fraud on Newport's Board and intentionally deceived the Company's shareholders. Under longstanding case law, such wrongdoing rebuts the business judgment rule, and epitomizes intentional misconduct and fraud. Accordingly, the Order Granting Defendants' Motion for Summary Judgment should be reversed, and this matter should be remanded for trial on the merits.

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[119] *Id.*

[120] 29:JA6827-28.

[121] 28-29:JA6668-821.

Moreover, the order striking Plaintiffs' demand for a jury trial should be reversed. Plaintiffs seek money damages on a tort claim for breach of fiduciary duty. There is an inviolate constitutional right to a jury trial on such claims in Nevada. The fact that the fiduciary in question is a corporate officer or director, as opposed to some other type of fiduciary, does not somehow transform into a case in equity what – with respect to every other type of fiduciary – is a case at law. Accordingly, the order denying Plaintiffs a jury trial should be reversed.

The District Court abused its discretion in denying Plaintiffs' Motion to Amend. The parties negotiated, and the District Court approved, a scheduling order that permitted Plaintiffs to amend their complaint at the conclusion of expert discovery. Such a scheduling order eliminates the need for serial motions to amend every time a significant document is produced and every time a significant piece of deposition testimony is obtained. Having negotiated and agreed to this schedule, Defendants' arguments regarding delay and prejudice are meritless; had they wanted to see Plaintiffs' amended complaint prior to submitting their expert reports, for example, they could and should have negotiated for an earlier date. But they did not. Plaintiffs timely filed their Motion to Amend, and it was unjust, and an abuse of discretion, for the District Court to deny leave to amend under these circumstances.

ARGUMENT

I. The Order Granting Defendants' Motion for Summary Judgment Should Be Reversed

An order granting summary judgment is reviewable de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.").

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A. Summary Judgment Is Inappropriate When There Are Genuine Issues of Material Fact

This Court has held that summary judgment may only be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* This Court has further held that "'disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Id.* at 730, 121 P.3d at 1030. This Court has also held that "when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029.

"The intent of parties is a question of fact that should also be resolved by the trier of fact." 1-19 Nevada Civil Practice Manual §19.05, Summary Judgment, Genuine Issue of Material Fact [1] (2019); *see also In Consol. Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("the question of good faith is a question of fact that should have been left to the jury"); *Mitchell v. Bailey & Selover, Inc.*, 96 Nev. 147, 150, 605 P.2d 1138, 1139 (1980) (reversing grant of summary judgment; "[t]he question of good faith is a question of fact").

Under these standards, summary judgment was improperly granted. The District Court's Order Granting Defendants' Motion for Summary Judgment should be reversed, and this case should be remanded for trial on the merits.

B. Corporate Officers and Directors Owe Fiduciary Duties to Shareholders

Directors and officers of Nevada corporations owe fiduciary duties of loyalty and good faith to the corporation's shareholders. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006), *clarified on other grounds by Chur v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev.

68, 458 P.3d 336 (2020). In the merger context, this Court has held that corporate shareholders may bring claims challenging a merger that "was accomplished through the wrongful conduct of . . . directors, or officers of the corporation and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 62 P.3d 720, 727 (2003). To that end:

> Challenges to the validity of a merger based on fraud usually encompass either or both of the following: (1) lack of fair dealing or (2) lack of fair price. Both involve corporate directors' general duties to make independent, fully informed decisions when recommending a merger and to fully disclose material information to the shareholders before a vote is taken on a proposed merger.
>
> * * *
>
> Lack of fair dealing involves allegations that the board of directors did not make an independent, informed decision to recommend approval of the merger. . . . Cases involving fair dealing frequently contain claims that directors, officers, or majority shareholders had conflicts of interest or were improperly compensated or influenced in return for their approval of the merger and that the shareholders lacked material information regarding the merger when they voted for it. These cases also frequently involve the timing of the merger, merger negotiations, how the merger was structured, and the approval process.
>
> Lack of fair price may involve similar allegations plus claims that the price per share was deliberately undervalued. . . .

Id. at 11-12, 62 P.3d 727-28.

Notably, *Cohen* relies heavily on the Delaware Supreme Court decision in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710-11 (Del. 1983), citing to *Weinberger* numerous times throughout the opinion. As discussed more fully below, *Weinberger* is highly relevant to the present action, and is one of a number of cases that demonstrate that summary judgment should have been denied, and should now be reversed.

C. Phillippy and Cargile Engaged in Fraud and Intentional Misconduct

Nevada law establishes a presumption that corporate officers and directors have acted "in good faith" and "on an informed basis" in making business decisions. NRS 78.138(3). Shareholders who rebut that presumption can recover money damages against a corporate officer or director who has breached his or her fiduciary duties through "intentional misconduct" or "fraud." NRS 78.138(7). This Court has held that shareholders can rebut NRS 78.138(3)'s presumption "by showing either that the decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching that decision." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 369, 377, 399 P.3d 334, 343 (2017).

Here, the evidence shows that Phillippy and Cargile, for self-interested reasons, engaged in fraud and other intentional misconduct that prevented the Board from making an informed decision on the Merger. Specifically, they:

- intentionally concealed from the Board [redacted];
- intentionally concealed from the Board [redacted]
- intentionally directed, and permitted, JPM to conceal from the Board [redacted]
- intentionally concealed from the Board [redacted]

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- intentionally concealed from the Board [redacted] and
- intentionally concealed all of the foregoing from shareholders who were asked to vote on the Merger.

Such fraud and intentional misconduct rebuts the presumption of NRS 78.138(3), and entitles Plaintiffs to recover money damages on their breach of fiduciary duty claims in this action under NRS 78.138(7).

The Delaware Supreme Court's decision in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989), is instructive in this regard. In *Mills*, Macmillan, Inc. ("Macmillan") was up for sale. *Id.* at 1264. Macmillan's chairman and chief executive officer, Edward Evans ("Evans"), and Macmillan's president and chief operating officer, William Reilly ("Reilly"), favored a management-friendly bidder, Kohlberg Kravis Roberts & Co. ("KKR") over another bidder. *Id.* at 1273.

During the merger process, Evans, Reilly and Macmillan's financial advisor "tipped" the other bidder's bids to KKR, thus allowing KKR to make the highest offer. *Id.* at 1275-76. Then, Evans and Reilly concealed those tips from Macmillan's board, which subsequently approved Macmillan's acquisition by KKR. *Id.* at 1277.

As the Delaware Supreme Court observed:

> [T]hrough its deliberations on September 27, Macmillan's board, whether justified or not, was under the impression that the two bids were the product of a fair and unbiased auction process, designed to encourage KKR and Maxwell to submit their best bids. The directors were not informed of Evans' and Reilly's "tip" to KKR on the previous day. Nor were they told of [the investment banker's tip to KKR]. Throughout the board meeting Evans and Reilly ***remained silent, deliberately concealing*** from their fellow directors their misconduct of tipping Maxwell's bid to KKR.

Id.

Examining these facts, the Delaware Supreme Court held:

> We have held that when a court reviews a board action, challenged as a breach of duty, it should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with particularity, or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board. Yet, this judicial reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries. . . .

Id. at 1279. The Delaware Supreme Court continued:

> Given the materiality of [the tips to KKR], and the ***silence*** of Evans, Reilly and [the investment advisor] in the face of their ***rigorous affirmative duty of disclosure*** at the September 27 board meeting, there can be no dispute but that such silence was misleading and deceptive. In short, it was a ***fraud upon the board.***
>
> Under 8 Del.C. § 141(e), when corporate directors rely in good faith upon opinions or reports of officers and other experts "selected with reasonable care," they necessarily do so on the presumption that the information provided is both accurate and complete. Normally, decisions of a board based upon such data will not be disturbed when made in the proper exercise of business judgment. However, when a board is ***deceived*** by those who will gain from such misconduct, ***the protections girding the decision itself vanish***. . . .

Id. at 1283-84.

Here, Phillippy and Cargile [redacted], but intentionally concealed it from the Board and shareholders, and had JPM do likewise. Then, while JPM falsely represented to the Board that [redacted][122] Phillippy and Cargile – like Evans and Reilly in *Mills* – sat silent

[122] 26:JA6136.

"in the face of their rigorous affirmative duty of disclosure." *Mills*, 559 A.2d at 1283. And, as in *Mills*, "there can be no dispute but that such silence was misleading and deceptive. In short, [Phillippy and Cargile committed] fraud upon the board." *Id.*

As noted above, this Court has held that "fraud" rebuts the presumption of NRS 78.138(3). And NRS 78.138(7) allows shareholders to recover money damages for "fraud" or "intentional misconduct." Given the fraud on the board perpetrated by Phillippy and Cargile, like in *Mills*, Plaintiffs have satisfied the requirements of NRS 78.138. At a minimum, sufficient genuine issues of material fact exist to warrant reversal of summary judgment and a remand for trial on the merits.

The Delaware Supreme Court's decision in *Weinberger* – a case repeatedly relied upon by this Court in *Cohen*, as mentioned *supra* – further demonstrates that summary judgment was wrongly granted in this case and should be reversed. In *Weinberger*, The Signal Companies, Inc. was attempting to purchase UOP, Inc. for $20-$21 per share. 457 A.2d at 705. Two UOP directors, using UOP data, prepared a "feasibility study" showing that UOP's projected value was up to $24 per share. *Id.* Those directors shared that feasibility study with Signal, but concealed it from their own board. *Id.* at 708. Without the benefit of the feasibility study, the UOP board approved a sale of the company for $21 per share.

Despite these facts, the trial court entered judgment for the defendants. On appeal, however, the Delaware Supreme Court reversed, holding that the actions of the two UOP directors in concealing the feasibility study from their fellow board members "hardly meets the fiduciary standards applicable to such a transaction." *Id.* at 708. The court continued:

> Certainly, this was a matter of material significance to UOP and its shareholders. Since the study was prepared by two UOP

> directors, using UOP information for the exclusive benefit of Signal, and nothing whatever was done to disclose it to the outside UOP directors or the minority shareholders, a question of breach of fiduciary duty arises. . . .

Id. at 709. The court held that: "[I]t is inevitable that the obvious conflicts posed by [the] preparation of [the] 'feasibility study', derived from UOP information, for the sole use and benefit of Signal, cannot pass muster." *Id.* at 711. "The outside UOP directors lacked one material piece of information generated by two of their colleagues, but shared only with Signal." *Id.* at 712. Consequently, the Delaware Supreme Court reversed the judgment that had been entered in favor of the defendants.

The facts here are very similar. Phillippy and Cargile, along with Newport management, [redacted]

Unquestionably, a set of financial projections that [redacted] – as opposed to a set of projections prepared [redacted], for the purpose of selling the Company – would be "a matter of material significance to [the Newport Board] and its shareholders." *Id.* at 709. Indeed, '"[w]hen management projections are made in the ordinary course of business, they are generally deemed reliable.'" *Chen v. Howard-Anderson*, 87 A.3d 648, 688 (Del. Ch. 2014) (quoting *Cede & Co. v. Technicolor, Inc.*, No. 7129, 2003 WL 23700218, at *7 (Del. Ch. July 9, 2004), *aff'd in part, rev'd in part*, 884 A.2d 26 (Del. 2005)).

To that end, courts repeatedly have held that, when corporate officers and directors provide lowball projections to their own board members while concealing from their board higher projections that were given to the buyer – [redacted] – those officers and directors have committed fraud upon their boards. For example, in *In re Dole Food Company, Inc. Stockholder Litigation*, No. CV 8703-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015), the evidence showed that Michael Carter ("Carter"), an officer and director of Dole, had provided lower projections to Dole's board while giving higher projections to representatives of the buyer. *Id.* at *2.

After trial, the Court of Chancery rendered a verdict in favor of the shareholder plaintiffs. Among other things, the court found that:

> [W]hat the [board] could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is ***fraud***. . . . [A]fter [the buyer] made his proposal, Carter provided the [board] with lowball management projections. The next day, in a secret meeting that violated the procedures established by the [board], Carter gave [the buyer's] advisors and financing banks more positive and accurate data.
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> * * *
>
> By taking these actions, [the buyer] and Carter deprived the [board] of the ability to negotiate on a fully informed basis and potentially say no to the Merger. [The buyer] and Carter likewise deprived the stockholders of their ability to consider the Merger on a fully informed basis and potentially vote it down. . . .

Id. As a result of this fraud, the court awarded nearly $3 per share in damages above the $13.50 per share merger price.

Here, as in *Dole*, the Newport Board and shareholders were given [redacted][123] – or, in the words of the *Dole* court, "lowball" – Base Case Projections that were below the Company's actual growth trajectory.

[123] 20:JA4581 (all caps in original).

Management [redacted], as did Phillippy and Cargile. But Phillippy and Cargile kept those concerns from the Board and shareholders. And, like Carter in *Dole*, [redacted], even though, like Carter in *Dole*, [redacted]. Thus, like in *Dole*, Phillippy and Cargile engaged in "fraud" and "deprived the [Board] of the ability to negotiate on a fully informed basis and potentially say no to the Merger." *Id.* Thus, Plaintiffs have established a "breach of . . . fiduciary duties" that "involved . . . fraud," as required by NRS 78.138(7).

A similar result was reached in *In re Emerging Communications, Inc. Shareholders Litigation*, No. Civ.A. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004). In that case, Delaware Supreme Court Justice Jack Jacobs, sitting as a trial judge by designation, rendered a verdict in favor of shareholder plaintiffs challenging the acquisition of Emerging Communications by its Chairman and CEO, Jeffrey Prosser ("Prosser").

The evidence showed that Prosser instructed Emerging Communications' CFO to prepare what the decision labels as the "June Projections." *Id.* at *7. The June Projections forecasted higher growth than a prior set of projections, which the opinion labels as the "March Projections." *Id.*

Justice Jacobs found that "Prosser withheld the June [P]rojections, and knowledge of their existence, from the [board] and its advisors . . . . As a consequence, [the board was] deprived of information that was essential to an informed assessment of the fair value of ECM. . . ." *Id.* at *35. Justice Jacobs further found that "[i]t is undisputed that the [board approved the merger]. The board's approval was not informed, however, because the voting board members were ignorant of the existence of the June Projections and of the inadequacy of the [investment advisor's] valuation that was based upon the March [P]rojections." *Id.* at *36.

For the same reason, Justice Jacobs found that the merger proxy sent to shareholders was materially misleading for failure to disclose the June Projections (and the fact that those projections were hidden from the Board). *Id.* at *37. For these and the other reasons set forth in the opinion, Justice Jacobs rendered judgment at trial in favor of the shareholder plaintiffs.

Here, the older Base Case Projections (like the March Projections in *Emerging Communications*) were lower than [redacted] (like the June Projections in *Emerging Communications*). Phillippy and Cargile – like Prosser in *Emerging Communications* – concealed from the Board and shareholders [redacted]. And here, like in *Emerging Communications*, "[t]he board's approval was not informed . . . because the voting board members were ignorant of the existence of [redacted] and of the inadequacy of the [JPM] valuation that was based upon the [Base Case] projections." *Id.* at *36.

In sum, under the foregoing authorities, the facts here reveal that Phillippy and Cargile breached their fiduciary duties by engaging in "fraud," which, under this Court's precedent, includes "a variety of acts involving breach of fiduciary duties imposed upon corporate officers [and] directors. . . ." *Cohen*, 119 Nev. at 14, 62 P.3d at 729. Accordingly, the presumption of NRS 78.138(3) is rebutted, and fraud is established under NRS 78.138(7).

Moreover, while fraud alone is sufficient, Phillippy and Cargile also engaged in "intentional misconduct" under NRS 78.138(7) – they "had knowledge that the alleged conduct was wrongful." *Chur*, 136 Nev. at 75, 458 P.3d at 342. Phillippy and Cargile's knowledge is evidenced – as in the cases discussed above – by their intentional concealment of material facts from the Board. In addition, Phillippy and Cargile then [redacted]

[redacted][124]; and [redacted][125]

Because the evidence in this case rebuts the presumptions under NRS 78.138(3) and establishes intentional misconduct and fraud by Phillippy and Cargile under NRS 78.138(7), Phillippy and Cargile are liable to Plaintiffs and the Class for damages, under NRS 78.138(7), and summary judgment on Plaintiffs' claims should be reversed.

D. Fraud on the Board Is Not Limited Only to the Concealment of Conflicts of Interest

The primary case relied upon by the District Court in granting summary judgment is the Delaware Chancery Court's opinion in *In re Towers Watson & Company Stockholders Litigation*, No. CV 2018-0132-KSJM, 2019 WL 3334521, at *1 (Del. Ch. July 25, 2019), *rev'd sub nom. City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702 (Del. 2020). *Towers Watson* involved a merger between Towers Watson & Co. ("Towers Watson") and Willis Group Holdings plc ("Willis Group").

The principal issue in the case was whether the business judgment rule was rebutted given the failure of the Towers Watson CEO to disclose certain post-merger employment discussions he had had with Willis Group. The Chancery Court held that:

> 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. A plaintiff can show this in one of two ways: by demonstrating that the conflicted director either

[124] 19:JA4508.

[125] 18:JA4292-94.

> "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. at *8. The Chancery Court held that:

> [The] facts alleged do not support a finding of deceptive silence, fraud on the board, or a conflicted negotiator gone rogue. Given what the Towers board knew and the nature of the [employment] proposal, Plaintiffs fail to establish that a reasonable director would consider the [employment] proposal to be significant when evaluating the merger.

Id. at *9. On appeal, the Delaware Supreme Court reversed *Towers Watson*, holding that the CEO had not fully disclosed the compensation discussions, and that such discussions would be significant to the board when evaluating the merger. *See Haley*, 235 A.3d 702.

Here, based on the Chancery Court's opinion in *Towers Watson*, the District Court found that, because Phillippy did not have, and therefore did not conceal from the Board, any significant post-merger employment discussions with MKS, Plaintiffs had failed to rebut the business judgment rule.[126] But this finding construes the law far too narrowly. Yes, the concealed fact in *Towers Watson* concerned the CEO's employment discussions. So of course the opinion there focused on whether that specific conflict of interest had been disclosed.

The law of fraud on the Board, however, as shown above, is ***far*** broader than just applying when a conflict of interest is concealed. Even the *Towers Watson* opinion relied upon by the District Court acknowledges this point. Specifically, in the very footnote providing the authority that the *Towers Watson* court relies on for its "fail[s] to disclose his interest in the transaction"

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[126] 2:JA0457.

(2019 WL 3334521, at *8) proposition – which the District Court seized upon in improperly granting summary judgment here – the *Towers Watson* court cites *Mills* and *Weinberger*, ***neither of which involved a failure to disclose an interest in the transaction!*** As the text of the footnote, quoted below, makes clear, *Mills* involved the failure to disclose bid tipping, and *Weinberger* involved the failure to disclose a feasibility study, as discussed above. Specifically, footnote 42 of the *Towers Watson* opinion states:

> *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279-81 (Del. 1989) (applying entire fairness standard of review where insider directors failed to disclose that they tipped off their favored bidder in a way that tainted and manipulated the board's deliberative process); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 707-09, 710-12 (Del. 1983) (applying entire fairness standard of review and determining unfair dealing where two insider directors failed to disclose that they conducted and shared a pricing analysis for the benefit of the acquirer).

Id. at 8 n.42.

The Seventh Circuit articulated this concept when reversing a trial court's judgment as a matter of law in *CDX Liquidating Trust v. Venrock Associates*, 640 F.3d 209, 212 (7th Cir. 2011). In that case, the defendants also argued that "there was no breach of loyalty because their conflict of interest was fully disclosed." *Id.* at 218. The Seventh Circuit squarely rejected that argument:

> The accusation is that the directors were disloyal. They persuaded the district judge that disclosure of a conflict of interest excuses a breach of fiduciary duty. It does not. It just excuses the conflict. . . . [Citing, *inter alia*, *Mills*, 559 A.2d at 1279-80; *Weinberger*, 457 A.2d at 703.]
>
> To have a conflict and to be motivated by it to breach a duty of loyalty are two different things – the first a factor increasing the likelihood of a wrong, the second the wrong itself. Thus a disloyal act is actionable even when a conflict of interest is not –

> one difference being that the conflict is disclosed, the disloyal act is not. A director may tell his fellow directors that he has a conflict of interest but that he will not allow it to influence his actions as director; he will not tell them he plans to screw them. If having been informed of the conflict the disinterested directors decide to continue to trust and rely on the interested ones, it is because they think that despite the conflict of interest those directors will continue to serve the corporation loyally.

Id. at 218-19. The court ultimately concluded that "[t]here is enough evidence that . . . [the] defendant directors did these things [including, 'deceive the board'] to create an issue for a jury to resolve." *Id.* at 219. So too here.

In sum, under the facts, and under the law, summary judgment should have been – and should be – denied. The evidence, when viewed in the light most favorable to Plaintiffs, establishes that, at a minimum, genuine issues of material fact exist regarding Phillippy and Cargile committing fraud on the Board. Accordingly, the District Court's Order Granting Defendants' Motion for Summary Judgment should be reversed, and this case should be remanded for a trial on the merits.

II. Plaintiffs Have an Inviolate Constitutional Right to a Jury Trial in This Action

An order denying a party the right to a trial by jury is reviewable de novo. *See Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007) ("Constitutional issues, such as one's right to a jury trial, present questions of law that we review de novo.").

A. In Nevada, the Right to a Jury Trial on a Tort Claim for Money Damages Is "Inviolate"

Article 1, Section 3 of the Nevada Constitution declares that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. Art. 1, §3. This inviolate right applies to all causes of action that would have been triable to a jury under "English common law as modified at the time of the Nevada Constitution's adoption" in 1864. *Aftercare of Clark Cty. v.*

Justice of Las Vegas Twp. ex rel. Cty. of Clark, 120 Nev. 1, 3, 82 P.3d 931, 932 (2004). And, under English common law as of 1864, tort claims for money damages were triable to a jury – and thus are triable to a jury today in Nevada. *See, e.g.*, *id.* at 10, 82 P.3d at 936-37 (Gibbons, J., dissenting, discussing English law as of 1864: "Tort actions involving a claim for money damages were generally triable to a jury at common law.").

B. In Nevada, a Breach of Fiduciary Duty Claim for Money Damages, Such as the One at Issue Here, Is a Tort Claim

Nevada courts have repeatedly confirmed that money damages claims for breaches of fiduciary duty are tort claims triable to a jury. For example, in *Clark v. Lubritz*, 113 Nev. 1089, 944 P.2d 861 (1997), Lubritz – one of the shareholders in a medical partnership that was subsequently incorporated – brought suit against the directors of the corporation for, among other things, breach of fiduciary duty stemming from those directors' failure to disclose material information to him, and their failure to make promised distribution payments to him. *Id.* at 1091-93, 944 P.2d at 862-63. The case was tried by a jury, which awarded compensatory damages, punitive damages, and attorneys' fees to Lubritz. *Id.* at 1093, 944 P.2d at 863

On appeal, this Court affirmed the jury verdict below, noting that "'it is well established that when a fiduciary duty exists between the parties, and the conduct complained of constitutes a breach of that duty, the claim sounds in tort regardless of the contractual underpinnings.'" *Id.* at 1098, 944 P.2d at 866 (quoting *Wagman v. Lee*, 457 A.2d 401, 404 (D.C. Cir. 1983)). This Court further held that "[i]n this case, there was sufficient evidence to show that the appellants breached [their fiduciary] duty" and that "[t]he evidence clearly indicated that the appellants did not disclose" material information to Lubritz or pay him what he was owed. *Id.* at 1096, 944 P.2d at 865. Therefore, this Court held that it would "not disturb the jury's award for breach of fiduciary duty."

Id. As for the jury's decision to award punitive damages in addition to compensatory damages, this Court held "that the breach of fiduciary duty arising from the partnership agreement is a separate tort upon which punitive damages may be based." *Id.* at 1098, 944 P.2d at 867.

This outcome is no surprise. Breach of fiduciary duty claims involve the same elements as all other tort claims in Nevada. To prove a general tort claim under Nevada law, a party must demonstrate (1) the existence of a duty; (2) a breach of that duty; (3) causation; and (4) damages. *Scott v. Equity Grp., Inc.*, 128 Nev. 933, 381 P.3d 660 (2012). To prove a tort claim for breach of fiduciary duty under Nevada law, a party must demonstrate (1) the existence of a (fiduciary) duty; (2) a breach of that duty; (3) causation; and (4) damages. *Stalk v. Mushkin*, 125 Nev. 21, 199 P.3d 838 (2009).

For this reason, it is also no surprise that claims for breach of fiduciary duty are routinely tried to juries in Nevada. *See, e.g., Brinkerhoff v. Foote*, 387 P.3d 880, 2016 WL 7439357 (Nev. Dec. 22, 2016) (unpublished disposition upholding jury verdict against company's chief financial officer for breach of fiduciary duty); *Broussard v. Hill*, 100 Nev. 325, 326-27, 330-31, 682 P.2d 1376, 1377, 1379 (1984) (agreeing that "the controversy should properly have been resolved by the jury" at trial because "there was sufficient evidence for a reasonable person to conclude that Hill breached his fiduciary duty"); *Ins. Co. of The W. v. Gibson Tile Co., Inc.*, 122 Nev. 455, 463, 134 P.3d 698, 703 (2006) (jury trial on breach of fiduciary duty claim; "[t]he insurer-insured relationship is fiduciary in nature, and a jury's finding of a breach of fiduciary duty may support the finding of bad faith"); *Powers v. United Servs. Auto. Ass'n*, 115 Nev. 38, 41, 979 P.2d 1286, 1288 (1999) ("we state unequivocally that the jury instruction given by the district court on breach of a fiduciary relationship was not error"); *Loomis v. Lange Fin. Corp.*, 109 Nev. 1121, 1124-

25, 865 P.2d 1161, 1163 (1993) (upholding jury verdict on breach of fiduciary duty claim).

In sum, plaintiffs asserting breach of fiduciary duty claims for money damages in Nevada, such as Plaintiffs here, have an inviolate right to a jury trial on those claims.

C. In Nevada, Corporate Fiduciaries Are Not Trustees – Unlike Delaware – so Claims Against Them Do Not Automatically Sound in Equity

The District Court struck Plaintiffs' jury demand because this Court, in *Cohen*, 119 Nev. 1, 62 P.3d 720, referred to shareholder claims as "equitable." *Id.* at 17, 62 P.3d at 731; 1:JA0207. *Cohen*, however, did not address whether shareholders bringing money damages claims for breaches of fiduciary duty should be denied their inviolate right to a jury trial – although Justice Rose ***did*** state, in his concurring and dissenting opinion, that Cohen's claims were "sufficient to entitle him to present his evidence ***to a jury***." *Id.* at 26, 62 P.3d at 736.

Rather, *Cohen* analyzed Nevada's dissenters' rights statute, NRS 92A.380, and held that the statute did not bar shareholder claims for "wrongful conduct in approving the merger and/or valuing the merged corporation's shares." *Id.* at 7, 62 P.3d at 724. In reaching this conclusion, this Court stated that "[f]ormer shareholders . . . cannot simply seek more money for their stock. They must assert and prove in an equitable action that the merger was improper." *Id.* at 17, 62 P.3d at 731.

This Court based its "equitable action" statement on a Delaware case, *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182 (Del. 1988), which had held that a shareholder plaintiff "is entitled to proceed simultaneously with its statutory [dissenters' rights] and equitable claims for relief." *Id.* at 1191. But borrowing the term "equitable" from Delaware jurisprudence and imputing it to Nevada shareholder claims is inconsistent with Nevada statutory and case law.

While, in Delaware, "[d]irectors of a corporation are ***trustees*** for the stockholders," *Lofland v. Cahall*, 118 A. 1, 3 (Del. 1922), in Nevada they expressly are ***not*** trustees. NRS 78.590 states that "[u]pon the dissolution of any corporation under the provisions of NRS 78.580, or upon the expiration of the period of its corporate existence, limited by its articles of incorporation, the directors ***become*** trustees thereof . . . ." If corporate directors already ***were*** trustees under Nevada law, instead of ***becoming*** trustees only in certain enumerated situations (none of which apply to this action), then NRS 78.590 would be rendered completely superfluous, which would violate basic rules of statutory interpretation. *See, e.g.*, *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011) ("'[T]his court must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory.'").

NRS 78.590 is not an isolated example. *See* NRS 78.035 (referring to "board of directors ***or*** trustees"); NRS 78.115 (referring to "board of directors ***or*** trustees"). These statutes too confirm that directors are ***not*** trustees in Nevada. *See Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 66, 412 P.3d 56, 60 (2018), *reh'g denied* (Apr. 27, 2018) ("'[t]he word "or" is typically used to connect phrases or clauses representing alternatives.' Moreover, 'courts presume that "or" is used in a statute disjunctively unless there is clear legislative intent to the contrary.'").

By contrast, claims against Delaware corporate fiduciaries "are governed by well-established and familiar rules of equity.'" *Lofland*, 118 A. at 7. In other words, such claims are ***always automatically*** equitable claims, because those officers and directors are trustees. *See McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987) ("At law a trustee, as the legal owner, may deal with trust property as his own. The rights of a beneficiary are only recognized in equity. Accordingly, an action predicated upon such rights is properly maintained in a court of equity and ***only*** a court of equity. ***A similar rationale underlies Chancery's traditional jurisdiction over corporate officers and directors***.").[127]

Because directors of Nevada corporations – unlike directors of Delaware corporations – are not trustees, claims against them do not sound in equity. They sound in law. Accordingly, money damages claims against corporate officers and directors for breaches of fiduciary duty, such as Plaintiffs' claims here, should, as with every other type of fiduciary in Nevada, be triable to a jury. The order striking Plaintiffs' jury demand should be reversed.

III. The District Court Abused Its Discretion in Denying Plaintiffs' Motion for Leave to Amend

An order denying leave to amend is reviewable for abuse of discretion. *See Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 191, 300 P.3d 124, 131 (2013). The District Court abused that discretion, as shown below.

A. Leave to Amend Should Be Freely Given

NRCP 15(a)(2) states that "[t]he court should freely give leave [to amend] when justice so requires." In applying this Rule, this Court has held that, "in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant – the leave should be

[127] The same is true in New York, Tennessee and Washington, the jurisprudence of which was also relied on in *Cohen,* 119 Nev. at 15 n.45, 62 P.3d at 729 n.45. *See, e.g., Winter v. Anderson*, 242 A.D. 430, 431, 275 N.Y.S. 373, 375-76 (App. Div. 1934) (New York: "The rule is well settled that the officers and directors of a corporation occupy positions of trust in relation to their company and to its stockholders"); *Kane v. Klos*, 50 Wash. 2d 778, 785, 314 P.2d 672, 677 (1957) (Washington: "'Directors, when elected to office, become trustees of the entire body of corporate owners.'"); *Hayes v. Schweikart's Upholstering Co.*, 55 Tenn. App. 442, 463, 402 S.W.2d 472, 482 (1965) (Tennessee: "'[I]t is the view frequently and broadly taken that the officers and directors of a corporation are, at least in substance and in many respects, trustees for the corporation or its stockholders.'").

freely given." *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973).

B. The Transcript of the Hearing on Plaintiffs' Motion to Amend Demonstrates the District Court's Abuse of Discretion

On November 20, 2018, the District Court entered the operative Amended Business Court Scheduling Order and Trial Setting Order. The deadlines set forth in that order were negotiated by the parties and approved the District Court, with the proviso that the parties were free to modify certain dates.

In April 2019, Defendants requested some minor deadline modifications, as follows:[128]

	Current Date	Proposed Date
Complete fact discovery	4/12/2019	5/10/2019
Expert witness lists	4/5/2019	5/3/2019
Supplemental EW lists	4/19/2019	5/17/2019
Opening expert reports	5/3/2019	5/31/2019
Rebuttal expert reports	6/7/2019	7/5/2019
Complete expert discovery	7/5/2019	8/2/2019
Deadline to amend complaint	7/12/2019	8/9/2019
File MSJs	8/2/2019	8/23/2019
File motions in limine	12/6/2019	12/6/2019
Status check	11/14/2019	11/14/2019
Pre-trial memorandum	1/21/2020	1/21/2020
Final PTC	1/23/2020	1/23/2020
Calendar call	1/23/2020	1/23/2020
Trial setting	1/27/2020	1/27/2020

Plaintiffs acceded to Defendants' request.[129]

[128] 15:JA3465-69.

[129] *Id.*

On August 9, 2019, Plaintiffs served their motion to amend, in accordance with the agreed schedule. Thereafter, at the hearing on Plaintiffs' motion, the District Court found that Plaintiffs' motion was timely: "I find the motion is timely."[130] The District Court also found that Plaintiffs were diligent: "I've already told you I don't believe you lack diligence in this case."[131] Having made these findings, under Nevada law, the District Court should have granted Plaintiffs motion, because "in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant – the leave should be freely given." *Stephens*, 89 Nev. at 105-06, 507 P.2d at 139.

It is not surprising that other courts invariably grant motions for leave to amend that are timely filed under a deadline for motions for leave to amend. *See, e.g., Gryzwa v. Alliance Mech., Inc.*, No. 2:11-cv-30-RCJ-RJJ, 2012 WL 504174, at *2-*3 (D. Nev. Feb. 15, 2012) (granting motion for leave to amend, finding that "Plaintiff timely filed the motion to amend within the period agreed to by the parties"); *Invensas Corp. v. Renesas Elecs. Corp.*, No. 11-448-GMS-CJB, 2013 WL 1776112, at *3 (D. Del. Apr. 24, 2013) ("The fact that the Motion was filed within this deadline, one agreed to by both parties, ***strongly supports*** a conclusion that the amendment was not untimely filed (and, relatedly, that its filing will not work to unfairly prejudice [Defendants])"); *Alcoa Inc. v. Alcan Rolled Products-Ravenswood LLC*, No. 06-451-JFB-SRF, 2017 WL 5957104, at *3 (D. Del. Dec. 1, 2017) (finding that a motion for leave to amend filed on a deadline "***generally precludes a finding of undue delay***").

Further colloquy at the hearing underscores the District Court's abuse of discretion in denying leave:

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[130] 2:JA0278.

[131] 2:JA0268.

> THE COURT: . . . if, in June when you completed [the Cargile] 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.[132]

The Court's statements show abuse of discretion. The scheduling order did not contain, and never contained, any sort of "pre-deadline" notice requirement. The arbitrary assertion by the District Court – post hoc, no less – of an unspoken pre-deadline notice requirement, and the denial of leave to amend for failure to comply with that unspoken notice requirement, was unjust, and an abuse of discretion warranting reversal.

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[132] 2:JA0278-79.

C. The Reasons Articulated in the District Court's Order Denying Leave Do Not Support Denial of Leave to Amend

The Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint ("Order Denying Leave") articulates several purported additional justifications for denying Plaintiffs leave to amend: that amendment would unduly delay the case, that amendment would be prejudicial to Defendants and Cargile, and that Cargile was not a necessary party to the litigation.[133] The first and second justifications are intertwined, and fail for the reasons discussed below, and the third was never raised or briefed by the parties, and in any event does not preclude amendment.

D. Amendment Would Neither Cause Undue Delay Nor Prejudice

As discussed above, the schedule negotiated by the parties, and approved by the District Court, set forth a deadline for Plaintiffs to amend their complaint.[134] Defendants were on notice of that deadline. The District Court was on notice of that deadline. Plaintiffs complied with that deadline.

Having full knowledge of that deadline – and indeed negotiating and agreeing to it – should foreclose Defendants from being able to argue that Plaintiffs' compliance with that deadline would cause "undue delay" or "prejudice." For example, if Defendants or the District Court truly had concerns about Plaintiffs' amended complaint impacting the parties' expert reports, the scheduling order could have imposed a deadline for amendment before, rather than after, expert reports. If, as another example, Defendants or the District Court truly had concerns about Plaintiffs' amended complaint impacting the summary judgment or trial schedule, the scheduling order could likewise have imposed an earlier deadline for amendment. And so on. But

[133] 2:JA0328-30.

[134] 15:JA3465-69.

with Defendants having negotiated, and the District Court having approved, the schedule as it was, Plaintiffs should not be penalized for having complied with it. Such an outcome would be – and is – unjust.

The argument over whether Plaintiffs had enough information on such and such a date to amend to assert this issue, and on another date to amend to assert that issue, and on some other date to amend to add in this party, or include that theory of liability, or claim this measure of damages, suffers from similar flaws. "It is not uncommon that facts disclosed in discovery lead to new claims, and courts may properly allow the plaintiff to amend the complaint in light of this new information." *Lanigan v. LaSalle Nat'l Bank*, 108 F.R.D. 660, 663 (N.D. Ill. 1985). Courts and treatises repeatedly recognize that this is proper. *See id.*; 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §1488 (3d ed. 2019) ("courts have not imposed any arbitrary timing restrictions on requests for leave to amend and permission has been granted" at "various stages" including "following discovery" and later). The rule in Nevada cannot instead be that every time a significant document is produced, a plaintiff must move to amend. And that every time a significant admission or other piece of testimony is obtained in deposition, a plaintiff must again move to amend. Imagine how bogged down the courts would become if such serial amendments were required, as is the logical conclusion of the arguments made against amendment here.

Instead, there is a rational and orderly way to handle this issue: include a deadline in the scheduling order for amendment of the complaint (as was done in this case). Such a deadline should obviate the need for serial amendments, and should (although unfortunately it did not here) eliminate the waste of judicial resources trying to parse out when, in the course of discovery, the scales tipped from not having enough information to bring a serial amendment, to having enough information to bring that amendment.

To that same end, forcing Plaintiffs to add in parties and claims prematurely – for fear of being denied the opportunity to do so later, once the record is developed – also promotes the waste of resources. Take the claim against Cargile as an example.

In Nevada, a plaintiff must plead that an alleged breach of fiduciary duty involved "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2). Had Plaintiffs added Cargile as a defendant earlier in the litigation – before the late production of crucial text messages, and before the existing Defendants testified that Cargile acted in self-interest – Cargile may have obtained dismissal with prejudice for failure to adequately plead a claim. The real prejudice, and waste of judicial and party resources, would have resulted from that scenario, as opposed to orderly amendment – after the facts have been gathered – as per the scheduling order in this case.

As the United States Supreme Court has ruled, in a holding adopted by this Court, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits" at trial. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 801 (1969) ("We subscribe completely to this interpretation of the intent and purpose of NRCP 15(a).").

In sum, Plaintiffs, in an orderly fashion, followed the scheduling order governing this case, and, in accordance with that order, timely moved to amend. The Order Denying Leave is unjust and should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the Order Granting Defendants' Motion for Summary Judgment, the Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint, and the Order Striking the Jury Demand, and remand this action to the District Court.

DATED: October 23, 2020

Respectfully submitted,

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

/s/ David C. O'Mara

DAVID C. O'MARA

311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

Liaison Counsel

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

Lead Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Under Nevada Rule of Appellate Procedure 28.2,

I, David C. O'Mara, certify as follows:

1. I have read this Plaintiffs-Appellants' Opening Brief;

2. To the best of my knowledge, information and belief, this brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

3. The brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the mater relied on is to be found; and

4. The brief complies with the formatting requirements of Rule 32(a)(4)-(6), as well as the type-volume limitations stated in Rule 32(a)(7), because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 14-point Times New Roman typeface and contains approximately 13,956 words.

Dated: October 23, 2020

Respectfully submitted,

THE O'MARA LAW FIRM, P.C.

/s/ David C. O'Mara

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