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.

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APPEAL

From the Eighth Judicial District Court, Department XXVII
The Honorable Nancy Allf
District Court Case Nos. A-16-733154-B, A-16-734039-B

RESPONDENTS' ANSWERING BRIEF

[REDACTED]

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NRAP 26.1 DISCLOSURE

The following are persons and entities as described in NRAP 26.1 and must be disclosed: none. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Because the Respondents are individuals, no corporate ownership disclosure is required. The undersigned counsel of record identifies the following firms whose partners or associates have appeared or are expected to appear in this Court:

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INTRODUCTION

Plaintiffs allege that Newport Corporation's directors breached their fiduciary duties in approving a merger with MKS Instruments, Inc. at a 53% premium to Newport's pre-announcement stock price. Plaintiffs initially sought to enjoin the merger, but they later withdrew their motion for injunctive relief and instead pursued a post-merger damages claim. After three years of discovery and motion practice, the district court struck Plaintiffs' jury demand, denied Plaintiffs' motion for leave to file a Third Amended Complaint ("TAC"), and granted summary judgment in favor of Defendants. This Court should affirm each decision.

In Nevada, the strategic decisions of a company—including whether to sell the company—are left to the company's board of directors, and courts do not interfere with a corporate board's decision absent extraordinary circumstances. This bedrock principle is known as the business judgment rule. Unless the plaintiffs can clear the high hurdle of rebutting the business judgment rule, the board's decision to sell the company must be upheld.

Here, the Newport board's decision to sell the company was unanimous. Five of Newport's six directors were independent directors who had no conceivable self-interest in the transaction, and Plaintiffs do not argue otherwise on appeal. Plaintiffs focus entirely on the actions of Newport's President and CEO, Robert Phillippy, who supposedly wanted the deal to happen for selfish reasons—even though it is undisputed that he lost his job as a result of the merger—and Newport's CFO, Charles Cargile, who was not a defendant or Newport director. Even if Phillippy had some self-interested reason for favoring the merger (a finding unsupported by the record), it would make no difference because there is no indication whatsoever that he held any sway over the other five directors, all of whom voted in favor of the merger. That is the end of the matter, and this Court should affirm the district court's summary judgment ruling on that basis.

Plaintiffs ignore that a clear majority of Newport's directors were disinterested, were not controlled by Phillippy, and approved the sale of the company at a 53% premium. Instead, Plaintiffs focus on allegations of Phillippy's supposed interest in the transaction. These arguments about one director are irrelevant because Plaintiffs cannot rebut the protection of the business judgment rule afforded to the entire Board. In any event, Plaintiffs attempt to create disputed factual issues where none exist. According to Plaintiffs, Phillippy [redacted] and thus engineered a merger between Newport and MKS to benefit himself over Newport's shareholders. The undisputed evidence shows the opposite: [redacted], Newport's shareholders received a 53% premium for their shares, and Phillippy lost his job as a result of the merger. Thus, as the district court found, the record evidence makes clear that the merger was not the product of fraud or self-interest—by Phillippy or anyone else—

and the Board exercised due care in approving the merger. In addition, the district court properly granted summary judgment because, even if Plaintiffs could rebut the business judgment rule, they cannot demonstrate that (1) Phillippy breached his fiduciary duties *and* (2) the breach involved intentional misconduct, fraud, or a knowing violation of law—*both* of which are required to prove a breach of fiduciary duty under Nevada law.

The district court also acted within its discretion in denying Plaintiffs' request to file a *fourth* complaint three years into litigation and just weeks before Defendants' summary-judgment motion was due. It correctly found that Plaintiffs' request to add new theories of liability, a new defendant, and a new request for rescissory damages was unduly delayed and prejudicial. Even though Plaintiffs knew the facts and the damages theory underlying their proposed amendments in 2016, they did not seek to add these facts and damages theory until August 2019 after the close of fact discovery. And the amendments would have required additional discovery and motion practice, thus delaying trial.

Finally, the district court properly concluded that Plaintiffs are not entitled to a jury. If this Court affirms the orders granting summary judgment and denying leave to amend, this issue becomes moot. Regardless, because Plaintiffs' only cause of action is equitable rather than legal in nature, Plaintiffs have no constitutional right to a jury.

STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1), and this appeal is timely under NRAP 4(a)(1).

ISSUES PRESENTED

1. Whether the district court properly granted summary judgment where Plaintiffs failed to overcome the business judgment rule, no director breached his or her fiduciary duties, and no director engaged in intentional misconduct, fraud, or a knowing violation of law.

2. Whether the district court abused its discretion in denying Plaintiffs' motion for leave to amend where Plaintiffs unduly delayed requesting amendment, the amendment would prejudice Defendants, and adding a defendant would be futile.

3. Whether the district court properly granted Defendants' motion to strike Plaintiffs' jury demand where Plaintiffs assert only equitable claims.

STATEMENT OF FACTS

I. Background Of The Merger

Before it merged with MKS, Newport was a publicly traded technology supplier. 7-JA1430. Newport's executive team was led by CEO Robert Phillippy and CFO Charles Cargile. The company's Board of Directors consisted of Phillippy; Kenneth Potashner (independent Board Chairman); and Christopher Cox, Siddhartha

Kadia, Oleg Khaykin, and Peter Simone (independent non-employee Board members). 7-JA1449, 7-JA1477.

Beginning in mid-2015, Newport considered various merger transactions with nine companies. 7-JA1449–1460, 7-JA1607–1614. In November 2015, Newport received an unsolicited inquiry from MKS. 7-JA1456. The next month, MKS proposed to acquire Newport for $20.50/share in cash. *Id.* After negotiation, MKS revised its offer to $23.00/share in cash, representing a 65% premium over Newport's then-current stock price. 7-JA1457. In February 2016, the Board agreed to grant MKS 12 days of exclusivity. 7-JA1459.

On February 22, 2016, J.P. Morgan delivered its fairness opinion, the Board unanimously approved the merger at a 53% percent premium and recommended that Newport stockholders vote in favor of the merger, and the parties signed the merger agreement. 7-JA1460, 8-JA1698, 8-JA1706, 9-JA1937. The parties announced the merger the next day. 9-JA1937.

On April 27, 2016, 99.4% of Newport's voting stockholders voted to approve the merger, which closed two days later. 7-JA1620–1621.

II. Newport's Financial Forecasts And [redacted]

In late 2015, Newport management prepared two sets of five-year financial forecasts to evaluate a potential merger: the "Base Case" and "Acquisition" Forecasts. 7-JA1470–1476. [redacted]

[redacted]

The Board used the Base Case Forecasts to evaluate the merger.

A. The Base Case And Acquisition Forecasts

Although Newport typically did not publicly project future financial performance, it created the Base Case and Acquisition Forecasts for purposes of evaluating the merger.

The Base Case Forecasts projected potential revenues if Newport grew without acquisitions, estimating a compound annual growth of 3% that assumed Newport would increase its profit margins. 8-JA1734, 9-JA1984. This projected growth rate exceeded Newport's recent performance even *with* acquisitions. *See* 9-JA1983, 9-JA1988–1989.

As Newport explained in public filings, it created the Acquisition Forecasts "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 during the period." 7-JA1471. The Acquisition Forecasts estimated a compound annual growth of 10% and assumed that Newport would acquire at least one company each year. *Id.*; 8-JA1734. The Acquisition Forecasts were even more optimistic than the Base Case Forecasts and "assumed the completion of highly uncertain acquisitions of unidentified and unknown parties by the Company, as well as other additional risks and uncertainties." 7-JA1471.

Newport disclosed both forecasts to its stockholders, explaining that they "were prepared on a different basis, for a different purpose and at a different time than the Company's public guidance as to its annual financial performance and on a different basis, for a different purpose and at a different time than other internal financial forecasts that Company management may prepare for its own use or for the use of the Company Board in evaluating the Company's business." 7-JA1471. Specifically, the Base Case and Acquisition Forecasts "were prepared in connection with the Company's consideration of a possible transaction." *Id.*

The Board and J.P. Morgan primarily relied on the Base Case Forecasts in evaluating the merger and issuing the fairness opinion, respectively, "[b]ecause 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." 7-JA1471.

B. [redacted]

[redacted] 5-JA990–992, 6-JA1191, 6-JA1273–1274. In November 2015, [redacted]

[redacted]. *See* 9-JA2091–2112, 10-JA2113–2362, 11-JA2363–2468. [redacted] 6-JA1278, 6-JA1285–1286.

During due diligence, MKS requested an update on [redacted]. In December 2015, Newport responded that [redacted] 11-JA2470. Newport nonetheless [redacted] 6-JA1294. Newport [redacted] *Id.* MKS ultimately [redacted] 5-JA1070, [redacted] 5-JA1073.

[redacted] 6-JA1288. Newport also updated the Base Case Forecasts to incorporate the 2016 numbers contained in its annual operating plan, which J.P. Morgan relied upon to issue its fairness opinion. *See* 7-JA1471–1472. [redacted] *See* 6-JA1282–1285.

III. Post-Closing Events

Following the merger, the Board disbanded, and all of Newport's directors and senior officers lost their jobs. Plaintiffs do not argue on appeal that Newport's five independent directors had *any* self-interest in the merger or were retained by MKS in any capacity. Rather, Plaintiffs focus solely on Phillippy and Cargile (who is neither a defendant nor director).

After the merger, Phillippy lost his job as Newport's CEO and was not retained as an MKS employee. *See* 5-JA1082–1083. MKS briefly retained Phillippy as a consultant to assist in the transition and appointed him to the MKS Board for two years, but Phillippy's compensation for these roles was a small fraction of what he earned as Newport's CEO. The record demonstrates that [redacted]

[redacted]. *See* 5-JA1077–1078, 5-JA1081–1082, 6-JA1238–1241, 6-JA1248–1250.

PROCEDURAL HISTORY

1. In March 2016, Dixon Chung and Hubert Pincon filed separate complaints seeking to enjoin Newport's merger with MKS. 1-JA1, 1-JA48. Chung sought to rescind the merger if it closed or, alternatively, rescissory damages. 1-JA15. Pincon sought rescission. 1-JA74.

After Newport filed its definitive proxy statement, Pincon moved for expedited discovery in anticipation of a motion to enjoin the stockholder vote. *See* 1-JA78–79. The district court granted expedited discovery and consolidated the Chung and Pincon actions. *See id.* After Newport produced nearly 22,000 pages of documents, Plaintiffs withdrew their preliminary-injunction motion, noting their "inten[t] to file a post-close complaint for money damages." 1-JA79.

2. In October 2016, Plaintiffs filed their First Amended Complaint, which sought "damages" but not "rescissory damages." *See* 3-JA483–513. The FAC asserted a single breach of fiduciary duty claim against all Newport directors and a single aiding and abetting claim against Newport and MKS. 3-JA510–512. The district court granted the defendants' motions to dismiss the FAC in June 2017.

In July 2017, Plaintiffs filed the operative Second Amended Complaint, which dropped Newport and MKS as defendants. *See* 3-JA519. The SAC asserts a separate breach of fiduciary duty claim against each of Newport's directors. 3-JA543–555. It seeks "damages" but not "rescissory damages." *See* 3-JA515–556.

In April 2018, Plaintiffs filed their NRCP 16.1 statement, which did not include any request for rescissory damages. 15-JA3584–3597, 16-JA3598–3606. Plaintiffs said they "w[ould] supplement" their statement regarding damages, 16-JA3604, but never did so.

3. In March 2019, Defendants moved to amend the district court's order setting a jury trial. 1-JA123. In June 2019, the district court granted Defendants' motion because "[e]ach of Plaintiffs' claims is for breach of fiduciary duty brought by former shareholders of an acquired company against corporate directors of the acquired company related to a cash-out merger." 1-JA207. The court recognized that "[u]nder Nevada law, such claims are equitable in nature," and "[b]ecause this is a case in equity, 'there is no right to a jury trial,' NRCP 39(a), and the case must be tried to the Court." *Id.*; *see* 1-JA184 (hearing transcript).

4. In August 2019—after discovery closed and three weeks before Defendants' summary-judgment motion deadline—Plaintiffs sought leave to file a Third Amended Complaint that would assert new theories of liability, add Cargile as a defendant, and seek rescissory damages. 4-JA770, 4-JA790, 4-JA918. In October 2019, upon hearing argument and "careful consideration," the district court denied the motion. 2-JA277–278. The court entered an order finding that:

- Although Plaintiffs' motion for leave was timely under the parties' scheduling stipulation, "the proposed amendment would cause undue delay to the resolution of this case, and it would be prejudicial to Defendants and Mr. Cargile";

- Plaintiffs' initial complaints "contained prayers for rescission and/or rescissory damages," but Plaintiffs subsequently abandoned that requested relief;

- Plaintiffs did not notify Defendants—through their NRCP 16.1 initial disclosures or otherwise—"that they would be claiming rescissory damages in this case . . . until after fact discovery had closed, when their expert addressed rescissory damages in his opening report";

- "Plaintiffs acknowledge that 'post-merger performance is crucial' to proving rescissory damages . . . , but Plaintiffs abandoned their prayer for rescissory damages and sought to resurrect it only after fact discovery had closed." Thus, Defendants were unable "to develop evidence regarding issues relevant to rescissory damages. . . . Adding a prayer for rescissory damages at this late stage . . . would unduly delay resolution of this case, which has been pending for more than three-and-a-half years, and would prejudice Defendants";

- Plaintiffs' requested amendment would require additional fact and expert discovery, and additional motion practice; and

- Cargile "is not a necessary party," and Plaintiffs had "extensive information concerning [his] conduct" for "more than three years." Thus, Plaintiffs' request to add Cargile was "unduly delayed" and "prejudicial."

2-JA329–330.

5. In January 2020, the district court granted Defendants' motion for summary judgment. 2-JA448–459. The court found that Plaintiffs could not rebut the business judgment rule because the Board exercised due care and the merger was not the product of self-interest or fraud. The court found *no material evidence* for Plaintiffs' allegations that: (i) "any of the directors failed to exercise due care"; (ii) "Newport's five independent directors . . . had any financial interest in the Merger other than as stockholders of Newport"; (iii) "Phillippy controlled or dominated the Newport Board"; (iv) "Phillippy failed to disclose a material interest in the Merger to the Newport Board"; (v) Phillippy had "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"; (vi) "Phillippy's employment as Newport's CEO ever was at risk"; (vii) "Phillippy . . . intended to deceive the Board, or that the Merger was the product of fraud"; (viii) "Phillippy believed that the strategic plan numbers were complete or reliable and nonetheless intentionally withheld them from the Newport Board and stockholders"; or (ix) "Phillippy had a self-interested motive to conceal the strategic plan numbers from anyone." 2-JA456–458.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's rulings.

First, the district court properly granted summary judgment because Plaintiffs established no disputed issues of material fact supporting their claim that Defendants are liable for breach of fiduciary duty. Nevada courts analyze such claims in two steps. At Step One, Plaintiffs must rebut the business judgment rule by showing that the Board's decision to approve the merger was the product of fraud or self-interest.

The issue is not, as Plaintiffs would have it, whether a single director's actions were improper. The record shows that Newport's independent directors—who held five of six Board seats—had no self-interest in the transaction whatsoever. Indeed, Plaintiffs do not even *argue* on appeal that Newport's five independent directors were self-interested. Plaintiffs rely instead on the alleged self-interest of a single director, Newport's CEO Phillippy. But a lone director's alleged self-interest is insufficient to overcome the business judgment rule. And, in any event, the record shows that Phillippy was *not* interested in the transaction: the merger resulted in Phillippy losing his job. In light of Plaintiffs' inability to overcome the business judgment rule, the case ends at Step One, and this Court should go no further.

Regardless, at Step Two, Plaintiffs cannot show that Phillippy breached his fiduciary duty *and* engaged in intentional misconduct or fraud—both of which are required for Plaintiffs to prevail. Plaintiffs claim that Phillippy [redacted]. But both contentions are unsupported by the record. The Board knew [redacted], just as it was every year; Phillippy [redacted]. Phillippy [redacted]. Likewise, Phillippy did not conceal the nature of the Base Case Forecasts, nor did he [redacted]. To the contrary, the record establishes that Phillippy kept the Board well informed and [redacted].

Second, the district court did not abuse its discretion in denying leave to amend. Despite already filing three complaints, Plaintiffs sought to file a fourth complaint asserting several new theories of liability, adding a new defendant, and resurrecting a long-abandoned form of relief. Trial courts have discretion to deny leave to amend where proposed amendments are unduly delayed, prejudicial to another party, or futile. The district court made factual findings that Plaintiffs' proposed amendments were unduly delayed and prejudicial. Despite being aware of the facts underlying their proposed amendments by mid-2016, Plaintiffs waited until August 2019 to seek leave to amend. And the proposed amendments would prejudice Defendants by requiring additional discovery, necessitating additional briefing, and delaying trial. Further, naming Cargile as a defendant would be futile because the three-year statute of limitations against Cargile expired in April 2019.

Third, this Court need not reach the jury demand issue if it affirms the orders granting summary judgment and denying leave to amend. Regardless, the district court properly struck Plaintiffs' jury demand because breach of fiduciary duty claims challenging a merger—the only type of claim asserted here—are equitable in nature. The Nevada Constitution does not require a jury trial for equitable claims.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment, as well as the constitutional right to a jury. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005) (summary judgment); *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618–21 (2007) (jury right). 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). The movant bears the initial burden of showing the absence of any genuine dispute. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602 (2007). Then the burden shifts to the non-movant to provide sufficient admissible evidence to permit a reasonable fact-finder to return a verdict in its favor. *Id.*

This Court reviews the district court's denial of a motion for leave to amend for abuse of discretion. *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105 (1973). And it "review[s] a district court's factual findings for an abuse of discretion and will uphold them if they are supported by substantial evidence. Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment." *In re Guardianship of N.M.*, 131 Nev. 751, 754 (2015) (citations and quotation marks omitted).

ARGUMENT

I. The District Court Properly Granted Summary Judgment For Defendants

A. Nevada's Two-Step Framework and the Business Judgment Rule

In Nevada, claims challenging actions taken by a corporate board of directors are governed by a statutory "two-step" framework. *See Chur v. Eighth Judicial Dist. Ct.*, 136 Nev. 68, 71 (2020) (citing NRS 78.138).

***Step One*:** First, Plaintiffs must rebut the business judgment rule by establishing that the Board's decision was the "product of fraud or self-interest" or the board "failed to exercise due care in reaching the decision." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 377 (2017).

The business judgment rule provides that, "in deciding upon matters of business," corporate directors "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). This "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*, 133 Nev. at 376, 378. Courts generally "may not inquire into the merits of a determination," and "will not second-guess" corporate directors' decisions. *Id.* at 377 (quotation marks, citation, and brackets omitted). Indeed, "even a bad decision is generally protected by the business judgment rule[]." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636 (2006), *abrogated on other grounds* *by Chur*, 136 Nev. 68.

The business judgment rule is overcome only when the board's decision was "the product of fraud or self-interest," or if the board "failed to exercise due care in reaching the decision." *Wynn*, 133 Nev. at 377. Where (as here) a plaintiff challenges a corporate board's decision, issues that do not affect the *entire* board's decision-making process cannot rebut the business judgment rule because the entire board's decision must be "the product of" fraud or self-interest. *See Wynn*, 133 Nev. at 373, 377; *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 13 (2003) (plaintiff challenging "the validity of the merger . . . based upon improper actions during the merger process must allege wrongful conduct that goes to the [board's] approval of the merger").

Thus, and contrary to the premise of Plaintiffs' appeal, the existence of one conflicted director cannot rebut the business judgment rule unless that director "control[led] or dominate[d] the board as a whole" or "failed 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 valuation of the proposed transaction." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) (brackets and emphases omitted); *accord Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).

Step Two*:** Only if plaintiffs produce evidence showing a genuine factual dispute about whether the business judgment rule is rebutted does the court evaluate the merits of the defendants' actions. Here, Plaintiffs must show a genuine factual dispute about whether the directors breached their fiduciary duties ***and the breach involved "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)–(2); *Chur*, 136 Nev. at 71–72; *Wynn*, 133 Nev. at 375. Gross negligence and "factual knowledge" are insufficient to establish liability. *Chur*, 136 Nev. at 69, 74. Instead, the terms "intentional misconduct" and "knowing violation" require "knowledge of wrongfulness." *Id.* at 74–75 (citation omitted).

B. Step One: Plaintiffs Cannot Rebut The Business Judgment Rule

The district court properly granted summary judgment because Plaintiffs cannot establish a genuine dispute that the Board's decision approving the merger was the product of fraud or self-interest, or that the Board did not exercise due care. Because the business judgment rule remains unrebutted, this Court should affirm at Step One.

On appeal, Plaintiffs acknowledge the governing framework, but they immediately skip to Step Two, arguing that Phillippy's and Cargile's "fraud and other intentional misconduct . . . rebuts the presumption of NRS 78.138(3)." OB 30–31. Plaintiffs overlook Step One: establishing that the *entire Board's* approval of the merger was "the product of fraud or self-interest," *Wynn*, 133 Nev. at 377,[1]

[1] Plaintiffs do not argue that the Board failed to exercise due care.

and instead argue that Phillippy's allegedly improper conduct is sufficient. To do so, Plaintiffs must show that (1) "a majority of the director defendants have a financial interest in the transaction," (2) "a materially interested director" "dominated or controlled" the majority, or (3) an "interested director failed 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." *Orman*, 794 A.2d at 22–23 (brackets and emphases omitted); *see also Schoen*, 122 Nev. at 636–37. The undisputed facts show that none of these three circumstances exist.

Plaintiffs do not even argue that either of the first two prongs of Step One are satisfied. They have abandoned any allegations that five of Newport's six directors had *any* self-interest in the transaction, and rest on Phillippy alone. Nor do Plaintiffs argue that Phillippy dominated or controlled a majority of Newport directors.

To the extent Plaintiffs attempt to rebut the business judgment rule at all, they focus only on the final prong. Plaintiffs first argue that the district court applied the wrong test in evaluating whether the business judgment rule was rebutted (it did not). Next, Plaintiffs wrongly contend that Phillippy was interested in the merger, that he failed to disclose this interest, and the existence of Phillippy's interest would have been material to the Board in making their decision. Plaintiffs also claim that Phillippy engaged in fraud and intentional misconduct, but these allegations are properly analyzed at Step Two—only after Plaintiffs rebut the business judgment rule, which they cannot do.

1. The District Court Applied The Correct Standard

Plaintiffs suggest the district court applied the wrong legal standard, OB 38–41, but the district court correctly articulated Nevada law, which is consistent with Delaware law: "'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.'" 2-JA456 (quoting *In re Towers Watson & Co. S'holders Litig.*, 2019 WL 3334521, at *8 (Del. Ch. July 25, 2019)).

In *Towers Watson*—cited by the district court—the plaintiffs alleged that a director-CEO had discussions regarding his post-merger employment with the acquiring company and that his failure to disclose those discussions was a material conflict affecting the entire board. 2019 WL 3334521, at *1. The trial court disagreed, concluding that a reasonable director would not have considered the discussions to be significant when evaluating the merger, and thus the lack of disclosure did not rebut the business judgment rule. *Id.* at *9.

The Delaware Supreme Court reversed. *See City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 705 (Del. 2020). The court applied the same legal standard as the trial court but concluded that the director-CEO's failure to disclose certain details of his post-merger employment negotiations *was* material. It held that the director-CEO "was materially interested in the merger, that he failed to disclose his interest" to the board, "and that a reasonable Board member would have regarded the existence" of the negotiations "as a significant fact in the evaluation of the merger." *Id.* at 724.

Plaintiffs here contend that the legal standard articulated in *Towers Watson* (and applied by the district court) is wrong, and that "fraud on the board is not limited only to the concealment of conflicts of interest." OB 38 (capitalization altered). Plaintiffs cite three cases in support—*Fort Myers*; *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989); and *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)—but each decision is consistent with *Towers Watson*.

Fort Myers did not announce a new legal standard; rather, it disagreed with *Tower Watson*'s application of the standard to the facts. 235 A.3d at 724. Indeed, the Delaware Supreme Court in *Fort Myers* focused on the director-CEO's alleged self-interest. Because the director-CEO failed to disclose his material interest to the board prior to approval of the merger, the court held that plaintiffs rebutted the business judgment rule. *Id.*

As *Fort Meyers* held, *Mills* and *Weinberger* stand for the "uncontroversial" and "basic principle" that "material information about a potential director conflict should be disclosed to the board." 235 A.3d at 718–19. Both cases involve self-interested directors' failure to disclose material information regarding a transaction and thus do not help Plaintiffs.

In *Mills*, "self-interested" directors "clandestinely . . . skewed" a sale of control of their company toward a preferred bidder by tipping confidential bid details to the preferred bidder. 559 A.2d at 1279, 1281. The court explained that the defendants, "as participants in the leveraged buyout, had significant self-interest in ensuring the success of a[n] [acquiring company's] bid. *Given this finding*, [the defendant directors'] deliberate concealment of material information from the . . . board must necessarily have been motivated by an interest adverse to [the company's] shareholders." *Id.* at 1279–80 (emphasis added). Thus, evidence of the defendants' self-interest was a necessary predicate to finding that tipping their preferred buyer was material information that required disclosure. *See Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.4 (Del. Mar. 15, 2018) (discussing "iconic cases, such as [*Mills*], that are premised on independent board members not receiving critical information from conflicted fiduciaries").

Similarly, in *Weinberger*, self-interested directors who stood on both sides of a proposed transaction failed to disclose a "feasibility study" regarding the transaction, which the court found was significant to the board and thus should have been disclosed. 457 A.2d at 708. This lack of "full disclosure" from self-interested directors meant the board's decision was not entitled to the business judgment rule.

Id. at 709.

As *Mills* and *Weinberger* make clear, self-interest is a necessary predicate for allegations of "fraud on the Board" to rebut the business judgment rule and follows from the well-settled rule that fraud requires a showing of wrongful intent. *See Chur*, 136 Nev. at 75. Establishing self-interest is thus critical to proving the wrongful intent aspect of fraud.[2]

* * *

The district court applied the correct standard. To rebut the business judgment rule by relying on the alleged conflicts of a single director, Plaintiffs must allege that those conflicts affected the majority of the board. This is common sense: a conflict that does not impact the majority of the board could not have impaired the *board*'s ability to manage the affairs of the company. Plaintiffs have failed to rebut this rule—there is no evidence that Phillippy was interested in the merger, but even if he was, there is no evidence that he controlled the board or that his self-interest would have been material to the board's decision to approve the merger.

2. Phillippy Was Not Interested In The Merger

Given the absence of evidence that Phillippy controlled the Board, had undue influence over the independent directors, or failed to disclose an interest that would

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[2] *CDX Liquidating Trust v. Venrock Associates*, 640 F.3d 209, 219 (7th Cir. 2011) (cited at OB 40), explained that merely disclosing a *portion* of a conflict does not absolve a director's other actions that are disloyal to the company's best interests.

have been material to the Board when considering the merger, Plaintiffs cannot overcome the business judgment rule even if Phillippy himself did something improper or had improper motives. For that reason, the Court need not (and should not) analyze Phillippy's own motives or actions. But even if it does, the undisputed evidence establishes that Phillippy had no interest in the merger.

Plaintiffs claim that Phillippy (a) [redacted]; (b) [redacted]; and (c) received compensation due to the merger that was higher than it would otherwise have been. Each theory contravenes the undisputed evidence.

a. [redacted]. Plaintiffs claim that Phillippy [redacted], which motivated him to find a merger partner. OB 3–6. Even if [redacted], this would not rebut the business judgment rule because [redacted]. Plaintiffs acknowledge, for example, that a July 2015 email [redacted] was "sent to Newport's Chairman of the Board." OB 4; *see id.* at 5 (citing December 2015 email sent to Board chairman); *id.* at 6 ("Peter Simone . . . , a Newport Board member, confirmed in deposition that [redacted]). Because the Board knew about these [redacted], Phillippy did not "fail[] to disclose" this information to the Board.

Regardless, record evidence establishes the Board [redacted]. *See* 5-JA1127 (director Kadia: the Board [redacted]); 6-JA1157 (director Khaykin: the Board [redacted]); 7-JA1389 (director Simone: he could not "recall" the "[B]oard [redacted]). Accordingly, Plaintiffs' citations of [redacted] (OB 4–5) do not create a triable issue of fact.

Plaintiffs also suggest that [redacted]. OB 7–9. But again, record evidence demonstrates that "the [B]oard in the 2015 and 2016 time frame" [redacted] 6-JA1159.

b. ***Discussions Regarding Benefits From MKS.*** Plaintiffs suggest that Phillippy [redacted], rendering Phillippy interested in the merger. OB 17, 25, 26. Here, too, record evidence shows the opposite.

In evaluating allegedly interested directors' conduct vis-à-vis post-merger benefits, courts consider the date the merger agreement was signed. *English v. Narang*, 2019 WL 1300855, at *12 (Del. Ch. Mar. 20, 2019). Thus, any benefits-related discussions with MKS that occurred after the merger was signed are irrelevant.

Phillippy's only alleged "interests" in the merger were his temporary post-closing consultancy with MKS and his appointment to the MKS board. Undisputed evidence establishes that [redacted]. *See* 5-JA1082 (MKS representative: [redacted]); 5-JA1077 (MKS representative: [redacted]); 6-JA1239–1240 (Phillippy: discussions regarding [redacted]); 6-JA1248–1250 (Phillippy: [redacted]).

Neither MKS nor Phillippy [redacted]—and he was not. *See* 5-JA1083 (MKS representative: [redacted]); 6-JA1309 (Phillippy: [redacted]). Phillippy lost his job. His temporary post-closing roles with MKS—[redacted]—do not render him "interested" in the transaction.

c. ***Compensation.*** Finally, Plaintiffs suggest that Phillippy was interested as a result of the change-in-control compensation he received under his preexisting severance agreement and compensation he received for post-merger consulting work and serving on MKS' board. OB 25–26. But Phillippy's change-in-control benefits were agreed to in 2008, and Phillippy would have received them in connection with *any* change-in-control transaction resulting in his termination. 5-JA1058. And Phillippy's post-merger compensation for consulting work and MKS director compensation paled in comparison to the compensation he would have received had he remained as Newport's CEO. *Compare* 11-JA2496 (Phillippy earned $2,335,386 as Newport's CEO), *with* 11-JA2570 (Phillippy received $375,569 from MKS in 2016), *and* 11-JA2603 (Phillippy received $248,377 from MKS in 2017).

Regardless, no evidence shows that these benefits were material to Phillippy. "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 (quotation marks and citation omitted, ellipsis and emphasis in original). As Plaintiffs' executive compensation "expert" conceded, there is no evidence of Phillippy's "financial circumstances" that would permit a determination that any benefits were material, let alone more favorable than remaining as Newport's CEO. *See* 5-JA1063–1064.

C. Step Two: There Is No Triable Issue Of Fact On Whether Phillippy Breached His Fiduciary Duties And Engaged In Intentional Misconduct Or Fraud

Because Plaintiffs cannot overcome the business judgment rule by showing that the Board's decision was the product of fraud or self-interest, this Court should not go any further. Even if this Court disagrees, Plaintiffs still must satisfy Step Two by demonstrating that Phillippy breached his fiduciary duties and that such breach involved "intentional misconduct, fraud or a knowing violation of law." N.R.S. 78.138(7)(b)(2); *Wynn*, 133 Nev. at 375.[3] Plaintiffs cannot do so.

Plaintiffs argue that Phillippy was self-interested and engaged in several actions that they claim constitute intentional misconduct or fraud. According to Plaintiffs, Phillippy [redacted] (1) [redacted], (2) the fact that the Base Case Forecasts understated Newport's prospections, and (3) [redacted]. OB 30–31.[4]

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[3] Plaintiffs make similar allegations regarding Cargile, but Cargile is not a director or defendant. Moreover, on appeal, Plaintiffs dispute the district court's ruling only as to Phillippy.

[4] Plaintiffs discuss these allegations as part of Step One, but whether a director committed "intentional misconduct, fraud or a knowing violation of law" under

Each claim rests on the false premise that Phillippy had a secret interest in the merger, and each misrepresents undisputed evidence. The lack of a genuine factual dispute regarding whether Phillippy breached his fiduciary duties and engaged in intentional misconduct or fraud under any of these claims provides an alternative basis for affirmance.

1. Plaintiffs' Theories Regarding The [redacted] Are Inconsistent With the Record Evidence

Plaintiffs argue that Phillippy engaged in various misconduct regarding the [redacted]. Record evidence demonstrates otherwise.

a. Phillippy did not intentionally conceal the existence of the [redacted] from the Board

Phillippy did not intentionally conceal the [redacted] "existence" from the Board. OB 30. Indeed, the Board knew of the [redacted] existence for several reasons. First, [redacted]. 6-JA1285. Second, [redacted]. 12-JA2808. Third, Phillippy testified that [redacted]

N.R.S. 78.138 is evaluated at Step Two—*after* the business judgment rule is rebutted. N.R.S. 78.138(7)(b)(1)–(2); *Chur*, 136 Nev. at 71–72.

[redacted] 6-JA1277.

[redacted]. 6-JA1285–1286 (Phillippy: [redacted]); 6-JA1278 ([redacted]); 6-JA1168 (director Khaykin: the Board [redacted]). And because [redacted], Phillippy did not commit fraud by not presenting it to the Board or stockholders. *See Hewlett v. Hewlett-Packard Co.*, 2002 WL 818091, at *11 (Del. Ch. Apr. 30, 2002) ("There is no reason for management to disclose preliminary reports that are generated early in a planning process[.]"). Moreover, there is no evidence that Phillippy [redacted]. *Cf. In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *13 (Del. Ch. Feb. 29, 2012) ("Delaware law does not require disclosure of inherently unreliable or speculative information.").

b. Phillippy did not intentionally conceal the fact that [redacted], nor did he direct J.P. Morgan to conceal this fact

Next, Plaintiffs claim that Phillippy intentionally concealed (and directed J.P. Morgan to conceal) [redacted]. OB 30. But record evidence demonstrates [redacted]. No evidence suggests that Phillippy intentionally hid this from the Board or instructed J.P. Morgan to do so.

In December 2015, MKS requested that [redacted]. 12-JA2696. Internally, Phillippy emphasized that [redacted] 12-JA2694. Newport's general counsel communicated this to MKS: [redacted] 11-JA2470. Phillippy explained that [redacted]

[redacted] 6-JA1294.

There is no evidence that Phillippy intentionally concealed this from the Board. To succeed at Step Two, Plaintiffs must establish that Phillippy "kn[ew] that the alleged conduct was wrongful in order to show a 'knowing violation of law' or 'intentional misconduct' pursuant to NRS 78.138(7)(b)." *Chur*, 136 Nev. at 75. Phillippy's lack of self-interest means Plaintiffs cannot show any motive to fraudulently conceal [redacted]. Moreover, that Phillippy [redacted] belies Plaintiffs' claim that Phillippy engaged in intentional wrongdoing.[5]

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[5] Plaintiffs cite no evidence supporting their claim that Phillippy instructed J.P. Morgan to conceal [redacted]. Although Newport [redacted] 6-JA1291, J.P. Morgan [redacted] 6-JA1278. Moreover, J.P. Morgan did not falsely tell the Board that [redacted] OB 23. [redacted] 6-JA1278.

MKS [redacted]. *See* 5-JA1070 (MKS representative: [redacted]). MKS [redacted] 5-JA1073. When MKS was [redacted] 5-JA1074.[6]

[6] Plaintiffs' cases involve otherwise-interested directors who acted in their self-interest to share information with the acquiring company. In *Mills*, self-interested directors tipped information to their preferred bidder. Key to the court concluding that this conduct was improper was its earlier finding that the directors "had significant self-interest in ensuring the success of a[n] [acquiring company's] bid." 559 A.2d at 1279–80. In *Weinberger*, the directors who withheld a feasibility study from the rest of the board were self-interested because they stood on both sides of the transaction. 457 A.2d at 709. *In re Dole Food Co. Stockholder Litigation*, 2015 WL 5052214, at *1–2 (Del. Ch. Aug. 27, 2015) similarly involved a controlling and self-interested shareholder-director and his "right-hand man" director who "made false disclosures" to a special committee of the board that was evaluating the proposed transaction. Finally, *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745, at *33 (Del. Ch. May 3, 2004), involved a controlling shareholder-chairman-CEO, and it was "undisputed that [he], whose wholly-owned entity was the acquirer of [the company's] minority interest, was conflicted."

2. Phillippy Did Not Conceal That The Base Case Forecasts Understated Newport's Prospects

Plaintiffs next argue that Phillippy knew that the Base Case Forecasts understated Newport's business prospects and concealed that fact from the Board. Plaintiffs waived that argument by failing to present it to the district court and, in any event, the record evidence is again to the contrary.

Plaintiffs never argued below that Phillippy engaged in fraud or intentional misconduct by concealing management's view that the Base Case Forecasts understated Newport's prospects. Instead, Plaintiffs claimed the *entire Board* engaged in fraud by instructing J.P. Morgan to use the Base Case Forecasts in connection with its fairness opinion. *See* 3-JA544 (alleging that Phillippy engaged in fraud and intentional misconduct by advising J.P. Morgan to disregard the Acquisition Forecasts in its fairness opinion); 3-JA548, 3-JA549, 3-JA551, 3-JA552, 3-JA554 (same for each other director). Plaintiffs' new argument is therefore waived. *See FDIC v. Rhodes*, 130 Nev. 893, 897 (2014); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52 (1981).

Regardless, Plaintiffs' argument rests on a false premise that the Base Case Forecasts understated Newport's prospects. As detailed above, Newport created five-year financial forecasts—the Base Case and Acquisition Forecasts—to evaluate potential merger transactions. 7-JA1471. The Base Case Forecasts estimated a compound annual growth of 3% without acquisitions, which exceeded Newport's recent performance even *with* acquisitions. *See* 9-JA1983, 9-JA1988–89. It also assumed that Newport would increase profit margins. 9-JA1984, 8-JA1734. The Acquisition Forecasts estimated a compound annual growth of 10%, assumed that Newport would acquire one or more companies at certain financial metrics annually, and provided Newport "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 during the period." 7-JA1471, 8-JA1734. Thus, the evidence establishes that the Base Case Forecasts did not understate Newport's prospects and was presented to the Board together with a more aggressive outlook on Newport's future.[7]

Ultimately, the Board used the Base Case Forecasts to evaluate the merger because Newport's independent directors [redacted]. 5-JA1124 (director Kadia: [redacted]); 5-JA1132 (director Kadia: [redacted]); 6-JA1326 (Board Chairman

[7] Plaintiffs' argument also undercuts their theory of the case. If Phillippy were self-interested and looking to sell Newport quickly and "shop Newport to prospective buyers," OB 13, he would not fabricate "[l]owball [p]rojections" underselling Newport's potential, OB 12.

Potashner: [redacted]); 5-JA1052 (director Cox: [redacted]); *cf.* 6-JA1154 (director Khaykin: [redacted]).

Plaintiffs point to certain "'opinion[s]'" of "Newport's division leaders" and executives that [redacted] OB 16 (quoting 23-JA5341). But those individuals' opinions do not create a triable issue of material fact because they shed no light on whether *Phillippy* engaged in intentional wrongdoing or fraud.

3. Phillippy Did Not [redacted]

Finally, Plaintiffs claim that Phillippy "intentionally concealed" [redacted] OB 18, 31. In reality, Phillippy kept the Board well informed, and [redacted].

Newport first received an unsolicited \$20.50/share offer from MKS in November 2015. 7-JA1456. A month later, MKS proposed to acquire Newport in an all-cash transaction for \$20.50/share. *Id.* After further negotiation, on January

15, 2016, MKS increased its offer to $23.00/share in cash, representing a 65% premium over Newport's then-current stock price. 7-JA1457.

Plaintiffs highlight (at 17) that the day after MKS submitted its $23.00/share indication of interest to Newport on January 15, 2016, J.P. Morgan reported that [redacted] 12-JA2814 (emphasis added). Nevertheless, on February 5, 2016, after MKS conducted all-day diligence meetings, its CEO informed Phillippy that [redacted]. *See* 9-JA1914–1918, 9-JA1922 [redacted] (emphasis added). Phillippy immediately reported this to Newport's chairman, who indicated the same day that [redacted]. *See* 12-JA2825 [redacted].

The full Board met a few days later, and [redacted] 8-JA1686. The Board determined that [redacted]. *Id.* [redacted]

[redacted] *Id.* Newport granted exclusivity to MKS on February 12, 2016. 7-JA1459.

This evidence demonstrates that Phillippy did not engage in intentional misconduct or fraud by [redacted]—rather, he "acted specifically in accordance with the board's direction." 6-JA1305. Plaintiffs fail to identify any evidence showing that the Board was not informed of [redacted]. Phillippy reported [redacted] to the Board chairman, and the *Board* decided [redacted]. As a substantial Newport stockholder, Phillippy had no motivation to undersell Newport. Plaintiffs' contrary theory—that he [redacted] to quickly close the deal that resulted in him losing his job as CEO—is nonsensical.

* * *

Plaintiffs cannot rebut the business judgment rule because they cannot show a triable factual issue about whether the Board's approval of the merger was the product of fraud or self-interest. Five of six directors were independent and had *no* conceivable self-interest whatsoever in the transaction. And Phillippy, who lost his job as a result of the merger, was not self-interested either. Under Nevada law, this Court must defer to the Board's business judgment and thus should affirm the district court's decision.

II. The District Court Did Not Abuse Its Discretion In Denying Leave To Amend

Except for certain amendments not relevant here, plaintiffs must obtain "the opposing party's written consent or the court's leave" to amend their complaint. NRCP 15(a)(2). Courts should grant leave to amend only "when justice so requires"; otherwise, they may exercise their discretion to deny leave. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239 (2018) (citation and quotation marks omitted). Leave should be denied where the proposed amendment is unduly delayed, futile, or prejudicial to the opposing party. *Kantor v. Kantor*, 116 Nev. 886, 891 (2000); *Stephens*, 89 Nev. at 105–06; *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991).

By August 2019, Plaintiffs had amended their complaint twice. Then—more than three years after initiating this action, after discovery had closed, and less than a month before Defendants' summary-judgment motion was due—Plaintiffs requested leave to file a *third* amended complaint adding a new defendant, new theories of liability, and a long-abandoned request for rescissory damages. 4-JA770. Defendants opposed the request as unduly delayed, futile, and prejudicial. 13-JA2883. The district court agreed that Plaintiffs' request was unduly delayed and prejudicial to Defendants and thus denied leave to amend (without addressing futility). 2-JA329–330. Both findings are supported by substantial evidence and within the district court's discretion. Either finding alone is sufficient to deny leave to amend. *Kantor*, 116 Nev. at 891; *MEI-GSR*, 134 Nev. at 239.

A. Plaintiffs Unduly Delayed Seeking Leave To Amend

Undue delay exists where "the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990) (denying leave to amend where plaintiffs "cite[d] no facts or theories gleaned from the additional discovery period" that could not have been alleged earlier).[8] Plaintiffs' proposed TAC would add new theories of liability, a new defendant, and new relief. But Plaintiffs knew the facts underlying these amendments months or even *years* before requesting leave to amend.

1. Plaintiffs unduly delayed asserting a claim for rescissory damages. Although Nevada law is silent on the availability of rescissory damages, under Delaware law they are available only when rescission of a merger is warranted but impracticable. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d

[8] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority" regarding the Nevada Rules of Civil Procedure. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002) (quotation marks omitted).

1059, 1072 (Del. Ch. 2003).[9] Thus, plaintiffs who delay asserting a claim to enjoin or rescind a transaction generally forfeit the right to rescission or rescissory damages. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1249 (Del. 2012) ("[I]f rescission itself is unwarranted because of the plaintiff's delay, so are rescissory damages."); *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 815 (Del. Ch. 2011) (same). Foregoing this rule would "enable[] a plaintiff otherwise to 'sit back and "test the waters,"' opportunistically waiting to see whether the defendants achieve an increase in the value of the company." *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996).

Consistent with this Delaware authority, Nevada law requires plaintiffs to disclose "a computation of each category of damages claimed" "without awaiting a discovery request." NRCP 16.1(a)(1)(A)(iv). Such disclosures "enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265 (2017). With certain exceptions not relevant here, plaintiffs who fail to disclose computation of damages under Rule 16.1 are "not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial." NRCP 37(c)(1); *cf. Apple, Inc. v. Samsung Elecs. Co.*, 2012 WL 3155574, at *5 (N.D. Cal.

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[9] This Court "frequently looks to the Delaware Supreme Court and the Delaware Courts of Chancery" for guidance when not inconsistent with Nevada law. *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008).

Aug. 2, 2012) (refusing to allow new damages theories asserted in expert report after close of fact discovery).

Here, Plaintiffs did not just delay their claim for rescissory damages—they affirmatively abandoned it. Plaintiffs' original complaints in March 2016 requested rescission or rescissory damages. 1-JA15, 1-JA74. But for the next three years, Plaintiffs chose *not* to seek rescission or rescissory damages—neither the FAC nor SAC nor Rule 16.1 statement included such requests.

Aside from the complaints Plaintiffs originally filed in early 2016—which were quickly amended to omit any request for rescissory damages—Plaintiffs' *only* reference to rescissory damages occurred three years later when Plaintiffs' expert discussed rescissory damages in his July 2019 report. 15-JA3480. As the Plaintiffs' FAC, SAC, Rule 16.1 report, and discovery requests make clear, rescissory damages were *never* at issue between October 2016 (when they were abandoned) through July 2019 (when they appeared in Plaintiffs' expert report).

2. Plaintiffs' proposed TAC also would raise at least four new theories of liability for breach of fiduciary duty not found in prior complaints: (i) Phillippy breached his duty based on MKS's post-close performance [redacted] 4-JA897–901, 4-JA908; (ii) Potashner [redacted], 4-JA881–882, 4-JA910; (iii) Potashner [redacted], 4-JA829–

831, 4-JA866, 4-JA888, 4-JA911; and (iv) Khaykin [redacted], 4-JA867–871, 4-JA915.

"[L]ate amendments to assert new theories are not reviewed favorably when"—as here—"the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986). Plaintiffs do not dispute that they knew the facts underlying each of these four theories by mid-2016. *See* 4-JA901 (conceding that "the facts alleged [in the TAC] were contained in productions from Newport in April and July of 2016"). Indeed, documents relating to [redacted] were produced in 2016 and were discussed in 2016 depositions. *See* 17-JA3820–3821, 15-JA3482–3582, 16-JA3612–3637. And *all* discovery productions in this case occurred no later than early 2019—well before Plaintiffs' August 2019 motion for leave to amend. "A party that contends it learned 'new' facts to support a claim should not assert a claim that it could have pleaded in previous pleadings." *Lochridge v. City of Tacoma*, 315 F.R.D. 596, 600 (W.D. Wash. 2014).

Plaintiffs focus almost entirely on the stipulated case schedule providing that Plaintiffs could seek leave to amend their complaint to "incorporate[] additional evidence obtained in discovery" no later than August 9, 2019. 15-JA3469; OB 47. But compliance with a stipulated schedule is not dispositive of timeliness. Where a plaintiff seeks leave to amend within a scheduling order's deadline, the "amendment is governed by Rule 15." *Miramontes v. Mills*, 2015 WL 13609449, at *2 (C.D. Cal. May 18, 2015). Except for certain amendments not at issue here, NRCP 15 places leave to amend squarely within the court's discretion. *See* NRCP 15(a)(2).

This Court's decision in *MEI-GSR* is instructive. There, the district court denied leave to add a new defendant and new claims based on "newly discovered information following depositions" 18 months after the plaintiffs filed suit. 134 Nev. at 239. This Court affirmed, noting how long the case had been pending, that discovery was about to close, and that the "alleged newly discovered information" was available from prior investigation into the defendant. *Id.* This case had been pending for twice as long as that in *MEI-GSR*, Plaintiffs waited until *after* discovery was closed to seek leave to amend, and Plaintiffs obtained the information underlying their proposed TAC months or years prior. Plaintiffs ignore *MEI-GSR* and other cases in which this Court has affirmed denials of leave to amend in similar situations.[10]

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[10] *See Deutsche Bank Nat'l Tr. Co. v. NV Eagles, LLC*, 2019 WL 3484013, at *1 n.1 (Nev. July 24, 2019) (defendant "was aware of the additional parties and potential claims it sought to add at the time it filed its answer and counterclaim"); *Nev. Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988 (2004) (discovery already had closed and plaintiff knew relevant information nine months before); *see also Kantor*, 116 Nev. at 891–92; *Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789 (1991); *Stephens*, 89 Nev. at 105; *Ennis v. Mori*, 80 Nev. 237, 234 (1964); *Quan v. S.F. Police Dep't*, 2011 WL 2470477, at *4 (N.D. Cal. June 21, 2011).

3. Finally, Plaintiffs unduly delayed adding Cargile as a defendant. When Plaintiffs filed this action in March 2016, they knew that Cargile was Newport's CFO. Plaintiffs discussed Cargile in their initial complaints, but did not name him as a defendant. *See* 1-JA10, 1-JA20, 1-JA23. The consolidated FAC and SAC likewise make many allegations about Cargile without naming him as a defendant. They quote and reference his participation in earnings calls. 3-JA503, 3-JA537–538. They reference his knowledge of Newport's acquisition strategy. 3-JA500–504, 3-JA532–533. They identify him as a member of the "Executive Management team" involved with developing the [redacted] 3-JA533, 3-JA537–539. They discuss his involvement in various discussions with MKS. 3-JA496, 3-JA527–529, 3-JA533. And they allege that he had self-interested motives based on [redacted]. 3-JA488–490, 3-JA497–498, 3-JA520, 3-JA522, 3-JA527–528. Thus, Plaintiffs knew of "the facts and the theory" against Cargile since July 2017 when they filed the SAC. *Acri*, 781 F.2d at 1398. Further, Plaintiffs deposed Cargile in April 2019, assuring him that he was not a defendant, 16-JA3805–3806, then sought to add him as a defendant four months later. "If new facts came to light during the depositions, that was the proper time to seek to amend the Complaint." *Quan*, 2011 WL 2470477, at *5.

Plaintiffs' cited cases are distinguishable. *See* OB 48, 51. None involved the combination that exists here: a proposed *third* amendment that adds new theories of liability, a new defendant, and new requested relief more than three years into litigation, which would require the court to reopen discovery and delay trial. *See Gryzwa v. Alliance Mech., Inc.*, 2012 WL 504174, at *2 (D. Nev. Feb. 15, 2012) (*first* motion for leave to amend; defendant did not object on timeliness grounds); *Invensas Corp. v. Renesas Elecs. Corp.*, 2013 WL 1776112, at *3 (D. Del. Apr. 24, 2013) (discovery still open; amendment contained no new theories of liability); *Alcoa Inc. v. Alcan Rolled Prods.-Ravenswood LLC*, 2017 WL 5957104, at *3 (D. Del. Dec. 1, 2017) (*first* motion for leave to amend; distinguished motions for leave to amend that were filed multiple times, in response to summary-judgment motions, or after discovery closed); *Lanigan v. LaSalle Nat'l Bank*, 108 F.R.D. 660, 663 (N.D. Ill. 1985) (recognizing that undue prejudice arises from amendments that add new parties and require expensive and time-consuming new discovery).

B. Granting Leave To Amend Would Prejudice Defendants

The district court did not abuse its discretion in finding that amendment would prejudice Defendants. An amendment is unduly prejudicial when (as here) it requires the defendant to expend significant additional resources on discovery and trial preparation, and would significantly delay the dispute's resolution. *See Ponsoldt*, 939 F.2d at 799 (denying leave to amend where defendant "would have been unreasonably prejudiced by the addition of numerous new claims so close to trial, regardless of [plaintiff's] argument that they were 'implicit' in the previously pleaded claims"); *Kaplan v. Rose*, 49 F.3d 1363, 1369–70 (9th Cir. 1994) (undue prejudice exists where amendment would alter plaintiff's legal theory, add claims, or require parties to engage in further discovery); *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (the "need to reopen discovery and thereby delay the proceedings" supports finding of prejudice).

Here, Plaintiffs sought leave to amend after discovery closed, just weeks before Defendants moved for summary judgment, and just months before trial. Plaintiffs' FAC, SAC, and discovery requests focused on events leading up to and immediately following Newport's merger announcement—but *not* events after the merger. Thus, Defendants' motion for summary judgment focused on that timeframe. The TAC indisputably would require Defendants to incur the time and expense of additional discovery (focused on the *five-year period* between the close of the transaction and the present, under Plaintiffs' rescissory damages theory), new summary-judgment briefing, and delayed trial. This Court has affirmed the denial of motions for leave to amend in similar circumstances, where the motion was filed "three years after the original complaint" interfered with summary judgment briefing. *Burnett*, 107 Nev. at 789; *see Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (proposed new claims "would have greatly altered the nature of the litigation and . . . required defendants to have undertaken, at a late hour, an entirely new course of defense").

Plaintiffs do not dispute that, unlike the FAC and SAC, the TAC would focus on events *after* the merger closed. Plaintiffs did not request documents regarding post-closing events, and such discovery indisputably would need to occur if Plaintiffs filed the TAC. That is just the type of eve-of-trial discovery courts repeatedly have disallowed as prejudicial. *See Kaplan*, 49 F.3d at 1369–70; *Lochridge*, 315 F.R.D. at 600; *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991) (affirming denial of leave to amend after summary judgment briefing because defendant would be prejudiced by additional discovery).[11]

C. Adding Cargile As A Defendant Would Be Futile

Plaintiffs' proposed TAC is also futile. The district court did not make any factual finding as to futility, 2-JA330, but futility provides an alternative basis for this court to affirm, *see Pack v. LaTourette*, 128 Nev. 264, 267–71 (2012) (affirming district court on alternative grounds).

Proposed amendments are futile if they would assert "an impermissible claim." *Halcrow, Inc. v. Eighth Judicial Dist. Ct.*, 129 Nev. 394, 398 (2013); *MG&S*

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[11] Plaintiffs, by contrast, suffered no prejudice from the denial of leave to amend. In resolving Defendants' summary-judgment motion, the district court considered Plaintiffs' voluminous "separate statement of material facts and evidence" which included the facts Plaintiffs sought to add in their proposed TAC. *Compare* 17-JA3962–4047 (statement of facts), *with* 4-JA790–919 (proposed TAC). The district court denied Defendants' motion to strike Plaintiffs' separate statement on the basis that it already had begun considering the facts therein, 2-JA351, and thus granted summary judgment for Defendants even *after* considering those facts.

Enter., LLC v. Travelers Cas. Ins. Co. of Am., 2018 WL 6819422, at *2 (Nev. Dec. 21, 2018) (affirming denial of leave to amend where plaintiff's proposed claims "in no way implicated liability on the part of [the defendant]"); *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287 (1993) (affirming denial of leave to amend on futility grounds). A claim is impermissible if it would not survive a motion to dismiss. *Emanuele v. Anderson*, 2012 WL 2047935, at *2 (D. Nev. June 5, 2012).

Here, amendment is futile because the three-year statute of limitations against Cargile expired on April 29, 2019 at the latest. *See Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 799 (1990) (breach of fiduciary duty claims have three-year statute of limitations). When the merger closed on April 29, 2016, Defendants had produced thousands of pages of documents containing all the information necessary to form (specious) allegations against Cargile. *See* 17-JA3820–3821, 13-JA2946–2985, 16-JA3639–3640. Many of these facts appeared in Plaintiffs' SAC. *See* 3-JA527–528, 3-JA532–534, 3-JA537–539. Plaintiffs sought leave to amend in August 2019, *after* the three-year statute of limitations expired.

Neither the "discovery rule" nor the "relation-back rule" allows Plaintiffs to evade the statute of limitations. The discovery rule does not apply where (as here) information was available but a party failed to review it. *See Nev. Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1306 (9th Cir. 1992) (applying Nevada law). By mid-2016, Plaintiffs had all the information required to make a claim against Cargile. Their acknowledged failure to conduct "a full review" of those documents when Defendants produced them, 4-JA901, does not excuse their delay.

The relation-back rule also is inapplicable. An amended pleading that adds a party relates back to the original pleading only if the new defendant receives actual notice of the action, knows that it is the proper party, and has not been prejudicially misled by the amendment. *Badger v. Eighth Judicial Dist. Ct.*, 132 Nev. 396, 403 (2016); NRCP 15(c)(2).

Here, Plaintiffs knew of Cargile's role in 2016, yet chose not to name him as a defendant. *Badger*, 132 Nev. at 404; *Garvey v. Clark Cty.*, 91 Nev. 127, 129 (1975) (statute of limitations barred addition of new defendant that plaintiffs "consciously elected not to name" in original complaint). They waited three years to serve Cargile with a subpoena, 16-JA3779–3780, and they deposed him as a third party, assuring him he was not a defendant, 16-JA3805–3806. Adding Cargile to the case more than three years after Plaintiffs could have done so would be prejudicial.

The disclosure of Phillippy's text messages in early 2019 does not change the analysis. *See* OB 52; 4-JA901–902, 4-JA905. At most, those messages provide additional color on [redacted]. Plaintiffs indisputably were on notice of the facts underlying those allegations no later than when they deposed Potashner and Phillippy in summer 2016. *See* 14-JA3161–3170 (Potashner [redacted]); 14-JA3178 (Phillippy d[redacted]); 15-JA3483–3495 [redacted] sent from Cargile to Phillippy); 15-JA3511–3523 (email from Phillippy re same); 16-JA3609–3610 (memo from Cargile re [redacted]); 16-JA3768 (email from Cargile to Phillippy [redacted]).

III. The District Court Properly Struck Plaintiffs' Jury Demand

If this Court affirms the district court's grant of summary judgment and denial of leave to amend, it need not reach the jury demand issue because any purported error would be harmless—no disputed factual issue would remain to be decided. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602 (2010) (advisory opinions are impermissible).

If the Court reaches this issue, it should affirm. The district court correctly determined that Plaintiffs are not entitled to a jury because they assert only equitable claims. *See* 1-JA206–208. For more than a century, this Court has been clear: Nevada's jury right applies to legal claims but not to "equitable matters" or "equitable claims," *Awada*, 123 Nev. at 618, which are "purely for the court," *Close v. Isbell Constr. Co.*, 86 Nev. 524, 529 (1970); *accord Musgrave v. Casey*, 68 Nev.

471, 474 (1951); *Harmon v. Tanner Motor Tours*, 79 Nev. 4, 20 (1963); *Lake v. Tolles*, 8 Nev. 285, 289 (1873).

Breach of fiduciary duty claims challenging a merger are "equitable in nature" even when they seek damages. *Cohen*, 119 Nev. at 15 n.45; *accord EXX, Inc. v. Stabosz*, 2013 WL 6431989, at *1 (Nev. Dist. Ct. July 11, 2013) (striking jury demand because breach of fiduciary duty claims arising out of merger are equitable). *Cohen* and *EXX* comport with the general rule that allegations of "breaches of fiduciary duty by . . . trustees" are "equitable claims." *Hoffman v. Second Judicial Dist. Ct.*, 129 Nev. 1122, 2013 WL 7158424, at *1 (Nev. Dec. 16, 2013).

Cohen and *EXX* also comport with other jurisdictions, including Delaware, which has no "right to trial by jury" in "action[s] for breach of fiduciary duty" because they are "equitable in nature." *Damage Recovery Sys., Inc. v. Tucker*, 2005 WL 388597, at *2 (D. Del. Feb. 2, 2015); *Del. Open MRI Radiology Assocs. v. Kessler*, 898 A.2d 290, 311 (Del. Ch. 2006) (challenge to "conflicted merger" involving "fiduciaries [who] breached their duties" is "equitable"); *see also Rupp v. Thompson*, 2004 WL 3563775, at *6 (Minn. Dist. Ct. Mar. 17, 2004) (citing *Cohen* for proposition that claims challenging an "unfair or corrupt merger process that resulted in . . . shareholders receiving an unfair price for their shares" are "equitable").

Here, Plaintiffs assert only one type of claim in their challenge to the merger: breach of fiduciary duty. 3-JA543–555. The district court recognized that this issue begins and ends with *Cohen*, which makes clear that plaintiffs challenging a merger have no right to a jury trial for breach of fiduciary duty claims. The fact that Delaware law compels the same result underscores that the district court got it right.

None of Plaintiffs' contrary arguments are persuasive.

First, Plaintiffs argue that Nevada's constitutional right to a jury is "inviolate." OB 41. But as Plaintiffs concede, the relevant issue is how courts interpreted the right to jury trials when the Nevada Constitution was enacted in 1864. *Awada*, 123 Nev. at 619. In 1864, the right to a jury trial did not extend to equitable claims. *Id.* A challenge to a merger under a breach of fiduciary duty theory is an equitable claim. *Cohen*, 119 Nev. at 15 n.45; *EXX*, 2013 WL 6431989, at *1. The Delaware Chancery Court's decision in *PNB* is also instructive. The court resolved an "equitable challenge" to an allegedly "unfair" merger because the directors "breached their fiduciary duties"—exactly the type of equitable challenge Plaintiffs bring here. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *1 (Del. Ch. Aug. 18, 2006).

Second, Plaintiffs argue that a breach of fiduciary duty is a tort, and that tort claims were tried to a jury in 1864. OB 42 (citing *Clark v. Lubritz*, 113 Nev. 1089, 1098 (1997); *Aftercare of Clark Cty. v. Justice of Las Vegas Twp. ex rel. Cty. of*

Clark, 120 Nev. 1 (2004)). But neither *Clark* nor *Aftercare* involved a disputed merger, as did *Cohen*. *Clark* predated *Cohen* and concerned a dispute over whether an entity's president followed certain bylaws. 113 Nev. at 1093. *Aftercare* concerned automobile accident-related tort claims and thus did not grapple with *Cohen*'s statement that breach of fiduciary duty claims challenging a merger are equitable. 120 Nev. at 3.

As the *Aftercare* dissent Plaintiffs cite recognizes, the Nevada Constitution "does not *extend* the right to a jury trial, but merely *preserves* the right to trial by jury as it existed at common law." 120 Nev. at 10 (Gibbons, J., dissenting) (emphases in original). There was no right to a jury for equitable claims in 1864, and there is no such right today. Moreover, just because torts "were generally triable to a jury at common law" does not mean that *all* torts are tried to a jury. *Id.* For example, Nevada law recognizes that the tort of fraud may sound in equity. *See Hindenes v. Whitney ex rel. Vogelheim*, 101 Nev. 175, 178 (1985) (discussing burden of proof in "an independent equitable action for fraud"); *accord Costello v. Scott*, 30 Nev. 43 (Jan. 2, 1908), *mod. on reh'g* (Mar. 7, 1908); *Hulley v. Chedic*, 22 Nev. 127 (1894). Other torts are actionable in equity as well. *See State ex rel. Edwards v. Wilson*, 50 Nev. 141 (1927) (public nuisance); *Martin v. Dixon*, 49 Nev. 161 (1925) (conversion).

Other jurisdictions are in accord. In fact, most jurisdictions that do not require a jury for fiduciary duty claims also characterize those claims as torts. Defendants have identified 24 jurisdictions that have held or suggested that fiduciary duty claims do not necessarily give rise to a jury trial right.[12] Of those, 19 jurisdictions have held or suggested that breach of fiduciary duty claims are torts.[13] Thus, the clear

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[12] *See Ex Parte Holt*, 599 So. 2d 12, 13 (Ala. 1992); *Fancher v. Home Sav. & Loan Ass'n*, 1990 WL 10515477, at *7 (Alaska 1990); *In re Estate of Newman*, 196 P.3d 863, 876–77 (Ariz. Ct. App. 2008); *Interactive Multimedia Artists, Inc. v. Super. Ct.*, 62 Cal. App. 4th 1546, 1556 (1998); *Kaitz v. Dist. Ct.*, 650 P.2d 553, 555 (Colo. 1982); *U.S. Tr. Co. v. Bohart*, 495 A.2d 1034, 1043 (Conn. 1985); *Actrade Fin. Techs. Ltd. v. Aharoni*, 2003 WL 22389891, at *5 (Del. Ch. Oct. 17, 2003); *Boyce v. Hort*, 666 So. 2d 972, 973 (Fla. Dist. Ct. App. 1996); *Martin v. Heinold Commodities, Inc.*, 608 N.E.2d 449, 452–53 (Ill. App. Ct. 1992); *Weltzin v. Nail*, 618 N.W.2d 293, 302 (Iowa 2000); *Kann v. Kann*, 690 A.2d 509, 516 (Md. 1997); *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 526 (1997); *Uselman v. Uselman*, 464 N.W.2d 130, 137 (Minn. 1990); *500 Columbia Tpk. Assocs. v. Haselmann*, 275 N.J. Super. 166, 171 (App. Div. 1994); *In re Estate of Coyle*, 34 A.D.2d 612, 613 (1970); *Grant v. Nyman*, 2004 WL 1769150, at *2 (R.I. Super. July 19, 2004); *Johnson v. S.C. Nat'l Bank*, 285 S.C. 80, 81–82 (1985); *Hyatt Bros., Inc. ex rel. Hyatt v. Hyatt*, 769 P.2d 329, 334 (Wyo. 1989); *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 61–62 (1st Cir. 2003); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 299–300 (2d Cir. 2006); *In re Hutchinson*, 5 F.3d 750, 757 (4th Cir. 1993); *Borst v. Chevron Corp.*, 36 F.3d 1308, 1324 (5th Cir. 1994); *Bostic v. Goodnight*, 443 F.3d 1044, 1049 (8th Cir. 2006); *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 837 (9th Cir. 1963).

[13] *See Hensley v. Poole*, 910 So. 2d 96, 106 (Ala. 2005); *Shields v. Cape Fox Corp.*, 42 P.3d 1083, 1090 (Alaska 2002); *Orca Commc'ns Unlimited, LLC v. Noder*, 314 P.3d 89, 97 (Ariz. Ct. App. 2013); *Taylor v. Wright*, 159 P.2d 980, 987 (Cal. Ct. App. 1945); *Accident & Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658, 663 (Colo. 2012); *Chioffi v. Martin*, 186 A.3d 15, 34 (Conn. 2018); *Doe v. Evans*, 814 So. 2d 370, 376 (Fla. 2002); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 138 (Iowa 1996); *Woodward Sch. for Girls, Inc. v. City Of Quincy*, 13 N.E.3d 579, 600

consensus among other states—just as in Nevada—is that characterizing breach of fiduciary duty as a tort does not give rise to a jury right.

Third, Plaintiffs shift their focus from the claim asserted to the relief requested. OB 42. According to Plaintiffs, their request for money damages entitles them to a jury. *Id.* But the right to a jury "depends upon the nature of the litigation," *Musgrave v. Casey*, 68 Nev. 471, 474 (1951), meaning that "the prayer for relief in a particular case is not conclusive," *C & K Eng'g Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 9 (1978). None of Plaintiffs' cases hold that a plaintiff challenging a merger under a breach of fiduciary duty theory is entitled to a jury.[14] Plaintiffs

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(Mass. 2014); *Uselman*, 464 N.W.2d at 137 (Minn.), *superseded by statute on other grounds*; *In re Estate of Lash*, 776 A.2d 765, 769 (N.J. 2001); *MacDonald v. Clinger*, 84 A.D.2d 482, 486 (N.Y. App. Div. 1982); *Zuba v. Pawtucket Credit Union*, 941 A.2d 167, 173 (R.I. 2008); *Moore v. Moore*, 599 S.E.2d 467, 475 (S.C. Ct. App. 2004); *Miller v. U.S. Bank of Wash., N.A.*, 865 P.2d 536, 543 (Wash. Ct. App. Jan. 10, 1994), *as corrected* (Feb. 22, 1994); *Hagar v. Mobley*, 638 P.2d 127, 139 (Wyo. 1981); *Cordi-Allen v. Halloran*, 470 F.3d 25, 30 (1st Cir. 2006); *S & K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 848 (2d Cir. 1987); *Bresler v. Wilmington Tr. Co.*, 761 F. App'x 160, 161 (4th Cir. 2019); *FDIC v. Dawson*, 4 F.3d 1303, 1307 (5th Cir. 1993); *Sorayama v. Robert Bane Ltd.*, 380 F. App'x 707, 708 (9th Cir. 2010).

[14] Plaintiffs' remaining cases (OB 42–43) did not involve a disputed jury demand or a disputed merger. Most cases—*Broussard v. Hill*, 100 Nev. 325 (1984); *Powers v. United Services Automobile Ass'n*, 115 Nev. 38 (1999); and *Loomis v. Lange Financial Corp.*, 109 Nev. 1121 (1993)—predated *Cohen* and are distinguishable. *Broussard* concerned disputed payments from an escrow fund. *Powers* concerned an insurer's liability for a sunken boat. *Loomis* concerned a dispute between landowners and their real estate broker. The unpublished disposition in *Brinkerhoff v. Foote*, 387 P.3d 880, 2016 WL 7439357 (Nev. Dec. 22, 2016), "does not establish mandatory precedent." NRAP 36(c)(2).

attempt to distinguish *Cohen* on the basis that it "did not address whether shareholders bringing money damages claims for breaches of fiduciary duty" are entitled to a jury. OB 44. But this Court held that "[f]ormer shareholders" like Plaintiffs "cannot simply seek more money for their stock. They must assert and prove in an equitable action that the merger was improper." *Cohen*, 119 Nev. At 17. Plaintiffs do not meaningfully dispute that *Cohen* is the clearest expression of this Court's view that breach of fiduciary duty claims challenging a merger (regardless of the relief requested) are equitable. Nor do they dispute that equitable claims enjoy no jury guarantee.

Fourth, Plaintiffs raise a new argument on appeal—that corporate fiduciaries are not trustees and thus claims against them are not "[a]utomatically" equitable. OB 44. The argument is both waived, *Rhodes*, 130 Nev. at 897, and wrong. This Court long has recognized that "a trust relation plainly exists between the stockholders and the directors." *Smith v. Gray*, 50 Nev. 56, 60 (1926). And even if directors were not trustees, Plaintiffs cite no Nevada authority holding that claims against Nevada corporate directors "do not sound in equity." OB 46. Indeed, *Cohen* and *EXX* hold the opposite.

Regardless, *Brinkerhoff* concerned a breach of contract dispute. Finally, *Insurance Co. of the West v. Gibson Title Co.*, 122 Nev. 455 (2006), concerned a dispute over whether a surety owes a fiduciary duty to its principal.

CONCLUSION

The Court should affirm the orders on appeal.

Dated: January 29, 2021

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ATTORNEY CERTIFICATION

1. I hereby certify that Respondents' Answering Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Times New Roman typeface.

2. I further certify that Respondents' Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,986 words.

3. Finally, I hereby certify that I have read Respondents' Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing Respondents' Answering Brief with the Clerk of Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on January 29, 2021.

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