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**

PLAINTIFFS-APPELLANTS' REPLY BRIEF

[REDACTED VERSION]

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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.

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ARGUMENT

I. The Order Granting Defendants' Motion for Summary Judgment Was Erroneous

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.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005).[1] "[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* "'[D]isputes 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. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731. Applying these standards, summary judgment should be reversed.

A. Under Nevada's Two-Step Analysis, Fraud on the Board Rebuts the Business Judgment Rule, and Gives Rise to Individual Liability for the Officer or Director Who Committed that Fraud

Defendants-Respondents Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simon ("Defendants") spend much of Respondents' Answering Brief ("RAB") sowing (or perhaps just displaying) confusion regarding the "two-step analysis to impose liability on a director or officer" under NRS 78.138(7). *Chur v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. 68, 71 (2020)[2]; *accord Guzman v. Johnson*, __ P.3d __, 2021 WL 1152875, at *1

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[1] Unless otherwise indicated, all emphasis is added and all citations and footnotes are omitted.

[2] It should be noted that this analysis focuses on the liability of a single director or officer, not all or even a majority of the Board. This language, in the singular form, is straight out of the statute, which references "***a*** director or officer ... in ***his or her*** capacity as ***a*** director or officer" and discusses "***[t]he*** director's or officer's act or failure to act" being "a breach of ***his or her*** fiduciary duties as ***a*** director or officer…." NRS 78.138(7). Thus, any single officer or director can face liability to shareholders regardless of whether other officers or directors engaged in misconduct.

(Nev. Mar. 25, 2021) ("A shareholder who sues a corporate director individually for breach of fiduciary duty must, under NRS 78.138(7), rebut the business judgment rule and demonstrate that the alleged breach involved intentional misconduct, fraud, or a knowing violation of the law.").

Under the first step, "the presumptions of the business judgment rule … must be rebutted." *Chur*, 136 Nev. at 71. "The business judgment rule states that 'directors and officers, in deciding upon matters of business, are presumed to act in good faith [and] on an informed basis…." *Id.* If the evidence shows that the Board has not acted "on an informed basis," the business judgment rule – by its express terms – is rebutted.

In *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. 369 (2017), this Court expressed an additional formulation for rebutting the business judgment rule: "a plaintiff can 'rebut the presumption that a director's decision was valid by showing either that the decision was the product of fraud [*i.e*. deception] ***or*** self-interest ***or*** that the director failed to exercise due care in reaching the decision.'" *Id.* at 377.[3] To borrow Defendants' phrasing, "the *entire* board's decision-making process" would be affected by even a single defendant's fraud/misrepresentation on the Board. RAB at 18 (emphasis in original).

The second step of the analysis is that "the 'director's or officer's act or failure to act' must constitute 'a breach of his or her fiduciary duties'" involving "'intentional misconduct, fraud or a knowing violation of law.'" *Chur*, 136 Nev. at 71-72. It is tautological that, where an officer or director has committed fraud on the board, he has breached his fiduciary duties in a way that involves "fraud" or "intentional

[3] It should be noted that these are in the disjunctive. Self-interest is not required if there was fraud or a failure to exercise due care. Additionally, as this Court recently reiterated in *Guzman*, "a plaintiff may rebut the business judgment rule's presumption of good faith by, for instance, showing that ***the*** fiduciary had a personal interest in the transaction …." 2021 WL 1152875, at *4 (citing *Wynn Resorts*, 133 Nev. at 377).

misconduct" – fraud is fraud. Thus, he is "individually liable to … stockholders … for any [resulting] damages…." NRS 78.138(7).

In sum, where an individual officer or director has committed fraud on the Board, both steps of the *Chur* analysis are satisfied, and he is individually liable for damages.

B. A Rational Trier of Fact Could Find that Phillippy and Cargile Committed Fraud on the Board

In Plaintiffs-Appellants' Opening Brief ("AOB"), Plaintiffs-Appellants Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust ("Plaintiffs") cited to a number of cases in which individual officers and directors were found liable to shareholders because they committed fraud on the Board. The crucial fact about each of these cases is that material financial information was concealed from board members. In *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) – a case relied on by this Court in *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1 (2003) – it was a feasibility study showing that the target company was worth more than the board realized. In *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989), it was a tipped bid to a favored bidder. In *In re Dole Food Company, Inc. Stockholder Litigation*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) and *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745 (Del. Ch. June 4, 2004), [redacted] In each case, the concealment of this important financial information was a fraud upon the board.

Defendants first assert that only the concealment of a personal financial interest qualifies as fraud on the board. But, in each of the above cases, it was not personal financial interests that were hidden from the Board. Those were well known (in *Weinberger*, the directors were on the acquiring company's board; in *Dole* and *Emerging Communications*, officers/directors were the actual acquirers; and in *Mills*,

the officers/director openly preferred one bidder to the other, they just concealed that they tipped that bidder off).

Defendants next pivot to contending that the import of *Weinberger, et al.* was not that material financial information was concealed from the boards, but rather that the fraudsters had personal interests in the transaction. But a conflict via a personal financial interest and a breach of fiduciary duty are not necessarily the same thing: "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 ...." *CDX Liquidating Tr. v. Venrock Assocs.*, 640 F.3d 209, 219 (7th Cir. 2011).

[redacted]

And while Plaintiffs are confident that, under the evidence in this case (as detailed in Plaintiffs-Appellants' Opening Brief and below), a rational trier of fact could find [redacted]

> [T]he concept of interestedness is not limited to financial considerations…. "[G]reed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride." "Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation."

Coster v. UIP Cos., 2020 WL 429906, at *15 (Del. Ch. Jan. 28, 2020). In sum, regardless of their motives, [redacted]

[redacted]

C. [redacted]

Unable to get around the law, Defendants devote most of their efforts to attacking the facts. But in the process, they treat the evidence and inferences as if those were supposed to be viewed in ***their*** favor, not Plaintiffs'. That is improper. *Wood*, 121 Nev. at 729 ("the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party" on a summary judgment motion).

For example, Cargile and Phillippy [redacted].

[redacted]

[4] 26:JA6108-11.

[5] 24:JA5606.

[redacted]

[redacted]

[redacted]

6 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.

7 26:JA6136.

[redacted]

The court in *Weinberger* addressed a similar issue post-trial:

> None of UOP's outside directors who testified stated that they had seen this [feasibility study]. The minutes of the UOP board meeting do not identify the [feasibility study] as having been delivered to UOP's outside directors…. If Mr. Walkup had in fact provided such important information to UOP's outside directors, it is logical to assume that these carefully drafted minutes would disclose it.

Weinberger, 457 A.2d at 709. The same logic, based on the same evidence, also holds true here.

[redacted]

[redacted]

Based on this evidence, and viewing it in the light most favorable to Plaintiffs, [redacted] *See* *Chen v. Howard-Anderson*, 87 A.3d 648, 689 (Del. Ch. 2014) (denying motion for summary judgment because the reliability of undisclosed projections in a merger process is a question of fact).[9]

[8] 20:JA4656-58; 20:JA4664-66; 20:JA4669; 20:JA4674; 20:JA4699-701; 20:JA4713-15; 20:JA4726-27; 20:JA4732-33; 22:JA5155-59; 22:JA5164.

[9] [redacted]

D. Cargile and Phillippy Were Financially Incentivized to Sell Newport

In Nevada, "[t]he 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] (2020). Ignoring that rule, Defendants raise several factual quarrels regarding the motives of Phillippy and Cargile.

[redacted]

[redacted]

10 [redacted]

11 [redacted]

12 *See*, *e.g.*, 18:JA4161.

13 *See*, *e.g.*, 19:JA4310; 19:JA4350-52; 19:JA4367-68; 19:JA4360.

14 19:JA4527 (parenthesis in original).

[redacted] *See*, *e.g.*, *Kahn v. Tremont Corp.*, 694 A.2d 422, 430 (Del. 1997) (finding after trial that $10,000 per month consulting fee and $325,000 in bonuses were material); *Emerging Commc'ns*, 2004 WL 1305745, at *34 (finding after trial that consulting and director fees totaling $150,000 in one year and $170,000 in another were material).

[redacted]

[15] *See, e.g., In re Xura, Inc. Stockholder Litig.*, 2018 WL 6498677, at *13 (Del. Ch. Dec. 10, 2018) (sustaining allegations that a CEO was conflicted in a merger based on activist and board displeasure with the CEO personally); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 117 (Del. Ch. 2007) (describing liquidity and employment-related conflicts of a CEO in a merger).

[16] 29:JA6825-27.

[17] 23:JA5486.

[redacted]

As in *Mills*, the rest of the Board did not utilize available safeguards to protect shareholders. *See Mills*, 559 A.2d at 1279-80. [redacted]

[redacted]

[18] 23:JA5457.

[19] [redacted]

[20] 24:JA5556-64.

[21] 23:JA5295.

[22] 18:JA4282; 24:JA5505; 26:JA6096.

[23] 19:JA4440-41.

[redacted]

For all of the foregoing reasons, and those set forth in Plaintiffs-Appellants' Opening Brief, the Order Granting Defendants' Motion for Summary Judgment should be reversed.

II. The Order Striking Plaintiffs' Jury Demand Was Erroneous

A. Nevada's Constitution Determines the Right to a Jury Trial, and a Plaintiff Seeking Money Damages for Breach of Fiduciary Duty Claims Is Entitled to One

Nevada's Constitution provides for an inviolate right to a jury trial on tort claims for money damages. Breach of fiduciary duty claims are tort claims under Nevada law, so, if money damages are sought, a jury trial is mandatory.

Plaintiffs provided a number of examples of jury trials in such cases, including cases asserting claims for breach of fiduciary duty against corporate officers and directors. *See* AOB at 42-44, including *Clark v. Lubritz*, 113 Nev. 1089 (1997) (jury trial in breach of fiduciary duty action against corporate directors); *Brinkerhoff v. Foote*, 132 Nev. 950 (2016) (jury trial in breach of fiduciary duty action against corporate officer). Defendants' only response is that "nobody contested" a jury trial. But why would they when it is constitutionally mandated? Indeed, there is no appellate decision in Nevada denying such a right.

B. Non-Breach of Fiduciary Duty and Non-Nevada Cases Are Unavailing

Defendants attempt to argue that a breach of fiduciary duty claim "sounds in equity," therefore negating the right to a jury trial.[26] The cases Defendants cite,

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[24] 26:JA6189; 19:JA4361; 24:JA5518-19.

[25] 19:JA4440-41.

[26] To support this argument, Defendants assert that "the tort of fraud may sound in equity." RAB at 55. Yet Nevada case law is replete with examples of fraud claims being tried to juries. *See*, *e.g.*, *S. J. Amoroso Constr. Co. v. Lazovich & Lazovich*, 107

however, do not support their argument. The primary fraud case Defendants rely upon is *Hindenes v. Whitney*, 101 Nev. 175 (1985), from which they cherry-pick a passing reference to "an independent equitable action for fraud." *Id.* at 178. But when one actually reads *Hindenes*, one sees that the matter was tried to a jury, and the appeal involved an improper jury instruction regarding the burden of proof: "This appeal is from a final judgment in that action based on a jury verdict…. The jury found [liability] by four special verdicts…. [The jury instruction regarding the burden of proof] constitutes prejudicial and reversible error requiring a new trial." *Id.* at 177-78.[27]

Defendants' reliance on century-old nuisance and conversion cases also fails. As this Court has held, whether something "constitutes a nuisance remains a question of fact. It [is] therefore within the province of the jury to determine …." *Jezowski v. Reno*, 71 Nev. 233, 239 (1955), and "[w]hether a conversion has occurred is generally a question of fact for the jury." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606 (2000).

Defendants' argument that some states disallow juries in fiduciary duty cases is also meritless. *See* RAB at 56-57 and nn.12-13. How some other states handle jury rights in their own jurisdictions is irrelevant. Here, Nevada's Constitution controls, and guarantees an inviolate right to a jury trial on tort claims for money damages, including – in case after case – claims for breaches of fiduciary duty, even against corporate officers and directors.

Nev. 294, 298 (1991) ("This jury found fraud which resulted in damages to L&L."); *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 850-51 (1992) ("the jury received instructions on fraud that adequately informed it of the proper burden of proof…. The jury found five parties … guilty of fraud….").

[27] Defendants also cite, without discussion, *Costello v. Scott*, 30 Nev. 43, 63 (1908), in which the court observed that "[t]he case was treated by all parties as an equitable proceeding throughout," and *Hulley v. Chedic*, 22 Nev. 127, 143 (1894), where the court held the plaintiff "has simply an equitable right to demand that [the defendant] shall account for his debtor's property…." These cases in no way support the denial of a jury trial on Plaintiffs' breach of fiduciary duty claims in this case.

C. *Cohen* Did Not Hold that Shareholders Are Not Entitled to a Jury Trial in Breach of Fiduciary Duty Cases

In the end, Defendants are left with only one basis for arguing that the Order Striking the Jury Demand should be affirmed: the use of the word "equitable" in *Cohen*, 119 Nev. at 11. Importantly, *Cohen* in no way involved a determination of whether shareholders are entitled to jury trials in Nevada on breach of fiduciary duty claims involving a corporate merger (although, as noted in Plaintiffs-Appellants' Opening Brief, Justice Rose wrote, in his concurring and dissenting opinion, that Cohen's claims were "sufficient to entitle [Cohen] to present his evidence to a jury," *id*. at 26 – a fact that Defendants studiously ignore).

Instead, *Cohen* examined whether appraisal was the exclusive remedy for shareholders seeking to challenge a merger transaction, looked to how Delaware courts have handled the issue, and, citing Delaware case law, held that Nevada's dissenters' rights statute, NRS 92A.380, did not bar shareholder claims for "wrongful conduct in approving the merger and/or valuing the merged corporation's shares." 119 Nev. at 7. Delaware, of course, separates its courts into a court at law (its Superior Court) and a court of equity (its Chancery Court). Delaware's Chancery Court traditionally handles shareholder actions because Delaware considers corporate directors to be trustees. Under the Nevada Statutes, by contrast, corporate directors are expressly not trustees.[28]

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[28] *See* AOB at 44-46. Defendants incorrectly assert that Plaintiffs waived arguments distinguishing Nevada corporate directors, who are expressly not trustees pursuant to Nevada's statutory scheme codified in NRS Chapter 78, from directors of Delaware corporations, who expressly are trustees under Delaware law. Plaintiffs repeatedly distinguished Nevada's statutory scheme from Delaware jurisprudence in opposing Defendants' Motion to Amend the Order Setting Civil Jury Trial. *See*, *e.g.*, 1:JA0144, 148.

Moreover, Defendants continue, in their current briefing, to incorrectly claim that Nevada law regarding trustees is applicable to corporate directors. But their reliance on an unpublished 2013 opinion in *Hoffman v. Second Judicial Dist. Ct.*, 129 Nev. 1122, 2013 WL 7158424, at *1 (Nev. Dec. 16, 2013), is unavailing – there, the court unremarkably affirmed no jury on a claim arising ""'in relation to a trust"…."" Defendants similarly cite *Smith v. Gray*, 50 Nev. 56, 68 (1926) for the proposition that Nevada directors are trustees, like in Delaware. The full quote from *Smith*, however,

Under these circumstances, is it surprising that the Delaware cases cited in *Cohen* characterized the issue in terms of equity? No – Delaware's courts always do that.

Is it surprising that the *Cohen* Court, having looked at Delaware cases, used Delaware terminology in discussing the appraisal exclusivity issue? No.

Does that mean that the *Cohen* Court decided – in holding that appraisal is not an exclusive remedy – that all breach of fiduciary duty claims are equitable, and thus plaintiffs in such cases are not entitled to a jury? Of course not.

Does that mean the *Cohen* Court decided that, unlike every other type of breach of fiduciary duty case in Nevada, shareholder claims involving corporate mergers – and only shareholder claims involving corporate mergers – are equitable? Again, of course not.

In sum, Plaintiffs' claims for money damages in this Action are tort claims as to which they are entitled to a jury, notwithstanding the use of the term "equitable" in *Cohen*. Accordingly, the Order Striking the Jury Demand should be reversed.

III. The Order Denying Plaintiffs' Motion for Leave to Amend Was an Abuse of Discretion and Should Be Reversed

A. Rule 15's Liberal Amendment Standard Requires Reversal of the Order Denying Leave to Amend

Defendants concede that the liberal standard for amendment set forth in NRCP 15 applies here: "[w]here a plaintiff seeks leave to amend within a scheduling order's deadline, the 'amendment is governed by Rule 15.'" RAB at 44-45 (quoting *Miramontes v. Mills*, 2015 WL 13609449, at *2 (C.D. Cal. May 18, 2015)). Rule 15 states that "[t]he court should freely give leave [to amend] when justice so requires."

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does not support this assertion. Quoting from a 1918 treatise on equity jurisprudence by John Pomeroy, the *Smith* court wrote: "The directors and managing officers of a corporation, says Pomeroy, occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation with respect to the shares of stock." *Id*. (citing 3 Pomeroy Eq. Jur. (4th ed.) §1090). Whatever "quasi trustee" relationship Pomeroy refers to in his 1918 treatise, Nevada's statutory scheme makes clear that, under NRS Chapter 78, corporate directors are not trustees in Nevada.

NRCP 15(a)(2). Nevada cases applying Rule 15 "have 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 sought should be freely given." *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 105-06 (1973).

Here, having moved to amend in accordance with the date for doing so set forth in the scheduling order – which was negotiated by the parties and approved by the District Court – Plaintiffs, under the law, did not engage in any undue delay or bad faith, or act with a dilatory motive. *See*, *e.g.*, *Invensas Corp. v. Renesas Elecs. Corp.*, 2013 WL 1776112, at *3 (D. Del. Apr. 24, 2013) ("[t]he fact that the Motion was filed within [the] 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*, 2017 WL 5957104, at *3 (D. Del. Dec. 1, 2017) ("Although Pechiney filed its motion on the very deadline set by the scheduling order, it was, nonetheless, timely. Because Pechiney's motion for leave to amend was filed within the deadline set forth in the amended scheduling order, this generally precludes a finding of undue delay."); *Miramontes*, 2015 WL 13609449, at *10 n.60 (where the plaintiff moved to amend within the deadlines set by the court, "the court cannot find that he unreasonably delayed seeking leave to amend"); *Trueposition, Inc. v. Allen Telecom, Inc.*, 2002 WL 1558531, at *2 (D. Del. July 16, 2002) ("Trueposition filed its motion to amend in compliance with the May 31 deadline imposed by the court. Therefore, the court will not deny the motion to amend on the basis of bad faith."); *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, 2012 WL 2365905, at *2 (D. Del. June 21, 2012) ("The instant motion to amend was filed timely and, therefore, there can be no unfair prejudice to defendant.").

Defendants' attempts to distinguish these cases are unavailing. Whether amended complaints were filed in this Action prior to the entry of the operative

scheduling order, and whether the scheduling order here contemplated a later amendment deadline than in some other cases, is irrelevant to whether the motion to amend was timely (it was, and therefore it was not unduly delayed, dilatory, or in bad faith, under the foregoing authority).

Indeed, the parties tied the amendment deadline to the close of discovery for a reason: "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). As the court held in *Evonik Degussa GMBH v. Materia Inc.*, 2011 WL 13152274 (D. Del. Dec. 13, 2011), "[p]laintiff[s] should not be penalized because [they] prudently waited to obtain key deposition testimony before filing [their] proposed amendment." *Id*. at *4.

By contrast, none of the cases relied upon by Defendants support the District Court's denial of leave to amend, given Plaintiffs' compliance with the amendment deadline set forth in the scheduling order. Defendants cite to at least 38 cases in the section of their Answering Brief addressing Plaintiffs' appeal of the Order Denying Plaintiffs' Motion for Leave to Amend. Of those 38 cases, not a single one denied leave to amend where, pursuant to a negotiated and court-ordered schedule, the plaintiff had timely moved to amend – not a single one.

One would assume that if such a case existed – anywhere – Defendants would have cited to it. But they did not, and Plaintiffs certainly are not aware of any such case. This appears to be the only known occurrence, in the annals of American jurisprudence, where a motion to amend was denied despite being timely filed in

accordance with a court-ordered deadline. Such an anomalous order should not be upheld.

B. Defendants Misstate the Record, and the Law, in Defending the District Court's Denial of Leave to Amend

Defendants make a series of arguments that attempt to paint Plaintiffs as dilatory, and Plaintiffs' proposed amendments as otherwise improper. Each of those arguments fail, as demonstrated below.

1. Defendants Present a Misleading Picture of the Action's Procedural History

Defendants complain that this Action has been pending for years. But if anyone is responsible for how long the litigation has taken to date, it is Defendants – not Plaintiffs. A brief look at the Action's chronology underscores this point.

The Merger was announced on February 22, 2016.[29] But due to motion to dismiss practice, the case was not at issue until on February 20, 2018, when Defendants answered Plaintiffs' Second Amended Complaint ("SAC").[30] Plaintiffs promptly served full merits discovery, and Defendants and various third parties began producing documents in April 2018. Defendants, however, failed to comply with the September 2018 document production deadline contained in the District Court's initial scheduling order. Because of Defendants' delay, the schedule was adjusted. Defendants ultimately did not complete their document productions until May 2019.

Meanwhile, Plaintiffs discovered evidence indicating that Defendants had used text messages to discuss the Merger, and asked that those messages be produced. Defendants vociferously denied the existence of any such text messages, forcing Plaintiffs to move to compel. On February 20, 2019, the Court granted Plaintiffs' motion to compel. Phillippy and Potashner thereafter produced more than 250 highly relevant text messages in February and March 2019. Evidence from these text

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29 7:JA1416.

30 *See*, *e.g.*, 3:JA0558.

messages is featured throughout the Third Amended Complaint ("TAC"). Fact depositions, 15 in all, began on February 15, 2019 and continued through May 29, 2019.[31]

Only a few weeks later, and in compliance with the schedule negotiated by the parties and approved by the District Court – as extended on more than one occasion because of delays by Defendants – Plaintiffs timely moved to amend.

2. Almost All of the Facts Alleged in the TAC, Including Key Facts About Intentional Misconduct and Fraud on the Board, Were Unknown to Plaintiffs When They Filed the SAC in 2017

When evaluating undue delay, courts look to "'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'" *EMI April Music, Inc. v. Keshmiri*, 2012 WL 5986423, at *2 (D. Nev. Nov. 28, 2012). Here, through no fault of Plaintiffs, over 80% of the documents produced by Defendants, and 100% of the documents produced by various third parties, were not produced until well after – in some cases, nearly two years after – the SAC was filed in July 2017.[32] Also, 15 (of the 17 total) fact depositions conducted in the Action did not take place until a year and a half to two years after the SAC was filed.[33]

Moreover, a review of the TAC, which contains nearly 500 footnotes citing the evidentiary support for the allegations contained therein, also demonstrates that the vast majority of facts underlying the TAC's allegations were discovered well after the SAC was filed.[34] Clearly, Plaintiffs did not have sufficient facts to allege the claims in the TAC at the time they filed the SAC.

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31 17:JA3876.

32 17:JA3878-79.

33 17:JA3876.

34 4:JA0790-919.

Yet Defendants are falsely claiming that Plaintiffs "conced[e] that 'the facts alleged [in the TAC] were contained in productions from Newport in April and July of 2016.'" RAB at 44. This is a ***highly*** misleading partial quote from paragraph 280 of the TAC that leaves out the crucial word "some." The full text says:

At the end of the day, what Plaintiffs knew and when is a question of fact for the jury. As Nevada's courts have repeatedly held, """[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact."" *In re AMERCO Derivative Litig.*, 127 Nev. 196, 228 (2011); *accord Millspaugh v. Millspaugh*, 96 Nev. 446, 448-49 (1980) (whether a party had enough information to "trigger[] the statute of limitations … is a question of fact to be determined by the jury or trial court after a full hearing where, as here, the facts are susceptible to opposing inferences").

As the foregoing demonstrates, Plaintiffs did not unreasonably delay filing their Motion for Leave to Amend, and whether their claims against Cargile are futile on statute of limitations grounds remains a question of fact unsuitable for resolution at this stage of the litigation.

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[35] 4:JA0901.

3. Rescissory Damages Are Available at This Stage of the Litigation, and Plaintiffs Properly Notified Defendants of Them

Rescissory damages are not foreclosed in this Action. First, Plaintiffs timely disclosed their rescissory damages calculations under the stipulated, Court-ordered schedule. In complex corporate cases involving detailed calculations of damages, expert disclosures are meant to articulate and explain specific calculations and methods of damages under NRCP 16.1(a)(2)(B), not the initial disclosures under NRCP 16.1(a)(1). Plaintiffs' initial disclosures under NRCP 16.1(a)(1) explicitly stated that the calculation of damages would be provided in expert discovery.[36] Defendants did not object.

Thereafter, Plaintiffs' initial expert report and disclosure under NRCP 16.1(a)(2)(B), timely served under the agreed-upon schedule on June 4, 2019, included a seven-page section entitled, "Rescissory Damages."[37] [redacted]

Defendants had ample notice of the rescissory damages calculation and, in fact, Defendants submitted a rebuttal report [redacted] Accordingly, Plaintiffs adequately and timely disclosed their rescissory damages calculations.

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36 16:JA3604.

37 29:JA6735-42.

38 29:JA6742.

39 17:JA3891-99.

Second, it is not too late for Plaintiffs to seek rescissory damages. As the court explained in *In re Orchard Enters., Inc.*, 88 A.3d 1 (2014), in rejecting an argument similar to the one Defendants are making here, the Delaware Supreme Court:

> held in 1981 that rescissory damages should be awarded for a transaction that closed in 1974, seven years earlier[;] … held in 1983 that … rescissory elements of relief, could be awarded for a transaction that closed in 1978, five years earlier[;] … stated in 1988 that rescission would be a possible post-trial remedy for a transaction that took place in 1983, five years earlier[;] … [and] reiterated in 1993 that rescissory damages could be awarded if the transaction, then ten years in the past, failed the test of fairness.

Id. at 40-41. The cases relied upon by Defendants are inapposite, as they involved situations where the plaintiffs had let the litigation languish despite admonishments from the courts overseeing those cases. No claim has been, or could be, made that Plaintiffs have let this case languish.

4. Defendants Will Not Be Prejudiced By Plaintiffs' Amendment, but Plaintiffs Have Been and Will Be Prejudiced by Denial of Leave to Amend

Defendants' assertions that they will be prejudiced by amendment are without merit. First, Defendants agreed to an amendment deadline that was after the close of discovery and shortly before the summary judgment deadline. As noted above, they cannot claim prejudice from a deadline they acceded to.

Second, Defendants' own case law concedes that "[t]he fact that a defendant must take some additional discovery related to newly asserted claims does not alone demonstrate prejudice or weigh against granting leave to amend given the early stage of the litigation." *Miramontes*, 2015 WL 13609449, at *4 (*see* RAB at 45). As here, Defendants "suggest[] that additional discovery will be required, … but [they] fail[] to explain precisely the additional discovery that [they] will need." *Butcher & Singer, Inc. v. Kellam*, 105 F.R.D. 450, 453 (D. Del. 1984); *see also Yates v. W. Contra Costa Unified Sch. Dist.*, 2017 WL 57308, at *3 (N.D. Cal. Jan. 5, 2017) (where defendant argued it would be prejudiced because it would incur the "'expense for filing a

responsive pleading to the amended pleading … and the need for additional discovery,'" the court found defendant's arguments were insufficient to show defendant would suffer substantial prejudice as a result of the proposed amendment).

Third, Defendants to date have conducted no affirmative discovery of their own in this Action, other than minimal discovery as to Plaintiffs. That track record hardly supports the notion that allowing amendment would now force them to expend any real effort, especially since the post-merger evidence Plaintiffs utilized in the TAC came from publicly available sources and from documents and deposition testimony Plaintiffs already obtained from MKS in discovery (both of which Defendants have equal access to). In short, the vague, unspecified burden of which Defendants complain is, under the foregoing case law, insufficient to show prejudice.

Plaintiffs and the Class, on the other hand, will be greatly prejudiced if the Order Denying Leave to Amend is not reversed. [redacted]

Because Plaintiffs' Motion for Leave to Amend was denied, those claims were not adjudicated by the Order Granting Summary Judgment. Rather, they are still live claims that Plaintiffs should be allowed to pursue. As the United States Supreme Court has ruled, in a holding adopted by the Nevada Supreme 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 (1969) ("We subscribe completely to this interpretation of the intent and purpose of NRCP 15(a).").

For all of these reasons, the Order Denying Plaintiffs' Motion for Leave to Amend should be reversed.

CONCLUSION

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

DATED: March 30, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Nevada Rule of Appellate Procedure 28.2,

I, Joel Z. Schwarz, certify as follows:

1. I have read this Plaintiffs-Appellants' Reply 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 6,998 words.

DATED: March 30, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2021, I submitted the foregoing **PLAINTIFFS-APPELLANTS' REPLY BRIEF** for filing via the Court's eFlex electronic filing system to all parties of record.

Judy Estrada

Judy Estrada, an employee of H1 Law Group