# IN THE SUPREME COURT OF THE STATE OF NEVADA

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br>Petitioner,<br>vs.<br><br>THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, DEPARTMENT NO. XXVII,<br>Respondents,<br><br>ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDER-WRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION<br><br>Real Parties in Interest.[1] | Supreme Court No.<br><br>Dist. Ct. Case. No. A-14-711535-C<br><br>**PETITION FOR A WRIT OF MANDAMUS** |



[1]The individual defendants are the real parties in interest who have had judgment entered in their favor, but the corporate defendants are also affected, and thus are listed in the caption as real parties.

## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

Petitioner Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. has no parent company and is not publically traded. There is no publicly traded company that owns more than 10% of the stock of Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.

The attorneys who have appeared on behalf of petitioner in this Court and in district court are:

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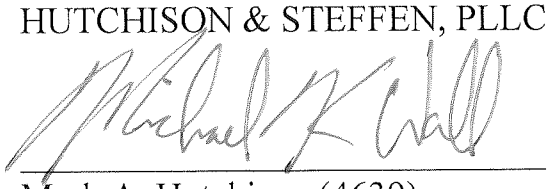
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 29 day of September, 2020.

HUTCHISON & STEFFEN, PLLC



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## PETITION

Petitioner the Commissioner of Insurance, receiver for Lewis & Clark LTC Risk Retention Group, by their attorneys, Mark A. Hutchison, Michael K. Wall and Brenoch Wirthlin, of Hutchison & Steffen, PLLC, petition this Honorable Court for a writ of mandamus.

The underlying action is pending in the Eighth Judicial District Court, Clark County, Nevada, before the Honorable Nancy L. Allf, Department XXVII, District Court Case No. A-14-711535-C. PA 1.

Petitioner seeks an order compelling the district court to allow plaintiff to file an amended complaint in response to this Court's opinion in *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020).

*Chur* substantively altered the law in Nevada and in this case, making the district court's prior rulings incorrect as a matter of the changed law. But the district court and the parties relied on the law as stated in *Shoen v. SAC Holding*, 122 Nev. 621, 137 P.3d 1171 (2006), and even though this Court in *Chur* referred to the law stated in *Shoen*–and relied on by numerous courts for many years, and in particular in this case–as dicta, *Shoen* represents far more than dicta in this case; the district court relied on it multiple times over years of litigation, and petitioner

relied on those rulings.

Now, on the eve of trial, this Court has changed the law. Rather than allowing petitioner to amend its complaint to bring it into compliance with the law as amended, or at the very least as clarified to the detriment of plaintiff, the district court has denied plaintiff's motion for leave to amend, and has dismissed plaintiff's complaint as to the primary defendants, the Directors of Lewis & Clark. That order removed the Directors entirely from the action below as parties, leaving only the corporate defendants, and putting petitioner in the position of proceeding to trial, hamstrung by an empty chair defense and without the primary defendants whose intentional misconduct caused Lewis & Clark's insolvency, and the damages sought. To say the least, the trial without the Director defendants will be a farce, a sham, and a waste of judicial time and resources, not to mention the resources of the Commissioner. Considerations of judicial economy and administration cry out for relief at this time. The issue is one of great importance to the State of Nevada, which this Court should consider now. Most importantly, this issue was put in motion by this Court's consideration and granting of the Director's petition for a writ in this action. Fundamental fairness dictates that this Court should address the issues raised by *Chur* now so that *Chur* will be properly

applied in the very case in which it was issued.

The district court's order is certifiable pursuant to NRCP 54(b) because of the removal of parties, and cries out for certification based on the standards set forth in *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 611, 797 P.2d 978, 981–82 (1990) (overruled on other grounds by *Matter of Estate of Sarge*, 134 Nev. 866, 432 P.3d 718 (2018)), but the corporate defendants opposed certification based on delay of the unfair trial with the empty chair, of which they are hope to be the beneficiaries. The district court refused certification based on the corporate defendants' objections.

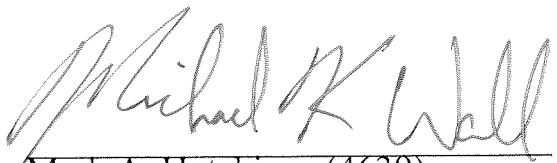
The district court's decisions with regard to the refusal to allow amendment in light of the extreme change in the law, granting of a judgment in favor of the Directors, and refusal to certify that judgment as final pursuant to NRCP 54(b) are abuses of discretion, if not errors of law. What is apparent based on the district court's refusal to certify its judgment as final pursuant to NRCP 54(b) is that petitioner has no remedy by appeal, and no plain, speedy and adequate remedy in the ordinary course of the law. An appeal following a mock trial against an empty chair with no real defendants is not an adequate remedy under the circumstances of this case, and will not serve the twin interests of judicial economy and sound

administration. This case must be heard now.

This petition is authorized by this Court's decisions in *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. ___, ___, 462 P.3d 677, 681–82 (2020), *International Game Technology, Inc. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *Scrimer v. Dist. Ct.*, 116 Nev. 507, 513, 998 P.2d 1190, 1193-94 (2000), and *Smith v. District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). It is based on the attached Points and Authorities, the appendix of documents from the underlying action, the affidavit of petitioner's counsel (because the issue is purely legal and the facts are within the knowledge of counsel), and the arguments of counsel at the oral argument in this matter, if oral arguments are conducted by this Court.

DATED this 29 day of September, 2020.

HUTCHISON & STEFFEN, PLLC



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## POINTS AND AUTHORITIES

## I. INTRODUCTION

When there is a significant change in the law, parties in ongoing litigation who have relied on the prior law, and have thrice prevailed in having the district court declare the law in their favor, should be afforded an opportunity to amend their complaint to bring it into compliance with the changed law.

In this case, petitioner pleaded claims sounding in gross negligence based on Nevada law stating that such claims are cognizable. The district court agreed three times. But this Court overruled the law on which the district court relied, in this very case, holding that the claims must be based on intentional conduct.

The conduct of the defendants was intentional as that term was defined by this Court. Petitioner sought to amend its complaint based on known and discovered facts to plead intentional conduct, which would have been to the prejudice of no one because all defendants knew of the allegations from the beginning of the case, and no new facts were alleged (as admitted by the defendants); the proposed amended complaint contained a proper characterization of the same facts already pleaded to support the amended claims. But the district court refused, nullifying five years of litigation effort and expense and leaving

petitioner, the Nevada Commissioner of Insurance, and the State of Nevada, holding the bag. This was a manifest abuse of discretion which only this Court can remedy in a timely and effective fashion.

## II. JURISDICTIONAL STATEMENT

The Nevada Constitution, Article 6, Section 4, provides this Court with original jurisdiction to issue writs. Statutory authority is provided in NRS 34.160. NRAP 21 sets forth the procedures for petitioning this Court for mandamus relief.

## III. ROUTING STATEMENT

This petition should be retained and decided by this Court under NRAP 17(a)(11) because this petition raises "as a principal issue a question of first impression involving . . . common law." Indeed, this is the first issue to arise under *Chur*, which was decided in this very case, and *Chur* represents a change in the common law, as it changes this Court's construction of a statute that is substantively the same as it was when it was previously construed. This Court has already entered into the affairs of this litigation, and is in the best position to address this issue arising directly from *Chur*.

## IV. STATEMENT OF FACTS

On December 23, 2014, petitioner/plaintiff, the Commissioner of Insurance,

as receiver for Lewis & Clark LTC Risk Retention Group, filed its initial complaint. PA 1. The complaint named as defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickles, the Directors of Lewis & Clark. *Id.* The complaint also named as defendants U.S. RE Corporation and Uni-Ter Underwriting Management Corporation, the corporate defendants.

The complaint alleged claims of gross negligence and deepening of the insolvency against the Directors, and a number of claims against the corporate defendants. PA 28-30. Only the claims against the Directors are relevant to this petition.

### A. The Directors' First Motion to Dismiss

On December 11, 2015, the Directors moved to dismiss the complaint. PA 134. The directors argued that directors must have committed intentional misconduct or fraud in order to be held liable under NRS 78.138, Nevada's business judgment rule. PA 139.

On January 15, 2016, plaintiff filed opposition to the Directors' motion, relying expressly on this Court's ruling in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), that "[w]ith regard to the duty of care, the

business judgment rule does not protect the gross negligence of uninformed directors and officers."[1] PA 147; 152-54.

On February 25, 2016, rejecting the Directors' arguments, the district court granted in part and denied in part the Directors motion to dismiss. PA 175. The district court concluded that a claim of gross negligence is cognizable in Nevada, but that the initial complaint stated only a claim for mere negligence. PA 176. The district court granted leave to amend to state a claim for gross negligence. *Id.*

### B. The Directors' Second Motion to Dismiss

On April 1, 2016, plaintiff filed its first mended complaint. PA 178. The first amended complaint contained the same causes of action against the Directors, and included additional allegations regarding gross negligence pursuant to the

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[1]In reaching this apparent holding, now deemed dicta, this Court relied on the following statement from *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled on other grounds by *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000): "Second, to invoke the rule's protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties. While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence." The statement from *Aronson* most certainly is not dicta.

district court's order. PA 214-18.

On April 18, 2016, the Directors moved to dismiss first amended complaint. PA 697. The Directors argued the first amended complaint did not contain sufficient allegations to support a claim of gross negligence, and that plaintiff's claims were barred by the applicable statutes of limitation. *Id.*

Because other defendants had filed a motion to dismiss on separate grounds, the district court had issued an order on May 4, 2016, instructing plaintiff to file a second amended complaint addressing issues unrelated to the issues in this petition. PA 724; 731. Accordingly, on June 13, 2016, plaintiff filed its second amended complaint. PA 832. The second amended complaint contained the same claims against the Directors that were contained in the original complaint and the first amended complaint.

On August 5, 2016, by stipulation of the parties, plaintiff filed its third amended complaint solely to correct exhibit numbers. PA 1359. The third amended complaint contained the same claims against the Directors as the prior versions of the complaint. As the Directors noted in their second supplement to their motion to dismiss first amended complaint, "[t]he body of the Third Amended Complaint has not changed since the Second Amended Complaint."

PA1921.

On October 10, 2016, the district court denied the Directors' second motion to dismiss. PA 1927.

On October 21, 2016, the Directors filed their answer to the third amended complaint. PA 1929.

### C. The Directors' Motion for Judgment on the Pleadings

On August 14, 2018, the Directors filed a motion for judgment on the pleadings pursuant to NRCP 12(c). PA 1953. In their motion, the Directors argued again that "NRS 78.138 precludes monetary claims against directors and officers absent intentional/fraudulent acts or a knowing violation of the law." PA 1958. The Directors also argued that amendments to NRS 78.138 by the Nevada Legislature in 2017 supported their position, despite the fact that the amendments did not overrule or address the operative language in *Shoen*. PA 1959. The directors did not cite the actual change made in 2017, or any legislative history of that amendment, opting instead to attach 200+ pages of legislative history of the change made in 2001, a version of the statute that was completely replaced in 2003. In fact, the 2017 amendment to NRS 78.138 made no change to the operative language relied on by *Shoen*.

In response, plaintiff again relied on this Court's ruling in *Shoen* that "the business judgment rule does not protect the gross negligence of uninformed directors and officers." PA 2239.

On November 2, 2018, the district court entered its order denying the Directors' 12(c) motion. PA 2723. The district court recognized the holding in *Shoen* that gross negligence was a basis for individual liability against directors. In fact, in its November 2018 Order, the district court relied on *Shoen* in denying the Directors' motion, recognizing that *Shoen* was the controlling case law:

> IT IS HEREBY ORDERED that the Director Defendants' Motion for Judgment on the Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was amended in 2017, the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), is still the controlling law regarding Directors' personal liability, even with the additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn Resorts v. Eighth Judicial District Court*, 399 P.3d 334 (Nev. 2017).

PA 2724; Transcript from October 11, 2018 hearing (filed 10/19/18), at 20:19-21:8, PA 2720.

### D. The Directors' Motion for Reconsideration

On November 29, 2018, the Directors filed a motion for reconsideration of the district court's November 2, 2018 Order, again arguing their interpretation of NRS 78.138. PA 2726. Plaintiff opposed the motion for reconsideration, again

relying on this Court's ruling in *Shoen*–confirmed and adopted by many other courts as well–regarding gross negligence by officers and directors. PA 2745.

On February 11, 2019, the district court denied the motion for reconsideration. PA 2795. In denying the motion, the district court found as follows:

> COURT FURTHER FINDS after review that a "director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-duty-of-care claim, or involve 'intentional misconduct, fraud, or a knowing violation of the law,' to state a duty-of-loyalty claim." *Jacobi v. Ergen*, No. 2:12-CV-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015), citing to *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640) (2006).
>
> COURT FURTHER FINDS after review that "[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence. . . .
>
> COURT FURTHER FINDS after review that Plaintiff's Third Amended Complaint has pleaded sufficient facts to rebut the business judgment rule and to state a cause of action for breach of the fiduciary duty of care pursuant to *Jacobi v. Ergen* and *F.D.I.C. v. Jacobs*.

PA 2795-97.[2]

The court in *Jacobi v. Ergen* held "[a] director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim, or involve''intentional misconduct, fraud, or a knowing violation of the law,' to state a duty-of-loyalty claim . . . ." *Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015). The court in *F.D.I.C. v. Jacobs* held that

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[2]These findings were drafted by the district court, not by the parties.

the business judgment rule "does not protect the gross negligence of uninformed directors and officers." *Fed. Deposit Ins. Corp. v. Jones*, 2014 WL 4699511, at *10 (D. Nev. Sept. 19, 2014).

### E. The Directors' Petition for a Writ of Mandamus.

On March 8, 2019, the Directors moved to stay the proceedings in district court pending their petition to this Court for a writ of mandamus. PA 2799. On March 13, 2019, the Directors petitioned this Court for a writ of mandamus. Supreme Court Case No. 78301. On March 14, 2019, at the hearing on the motion, the district court granted the motion, and stayed all proceedings at that time. PA 2865. On April 4, 2019, the district court entered its written order granting a stay. PA 2866.

On February 27, 2020, in a published opinion, this Court granted the Directors' petition for a writ. *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020). *Chur* disavowed the language in *Shoen* allowing a claim against a director based on gross negligence, labeling that language "dicta," and setting forth a new standard for determining the definition of "intentional" and "knowing" for determining whether a director's act or failure to act constitutes a breach of fiduciary duties. *See Chur* at ___, 458 P.3d at 1233 ("We agree with and

adopt the Tenth Circuit's definition of 'intentional' and 'knowing,' as enunciated in *Zagg*, for determining whether a 'director's or officer's act or failure to act constituted a breach of his or her fiduciary duties . . .' " The decision in *Zagg* was handed down in 2016. *See In re Zagg Inc., S'holder Derivative Action*, 826 F.3d 1222, 1232 (10th Cir. 2016). As noted above, plaintiff filed its initial complaint in December, 2014.

It is not the intent or purpose of this petition to reargue or call into question the holding of *Chur*. But it cannot be denied that *Chur* represents a significant change in the law in Nevada, even though the particular language disapproved by this Court was labeled dicta, and more importantly, that this litigation from its inception proceeded on the basis of Shoen, as interpreted by many court, and as interpreted multiple times by the district court in this very action. Plaintiff's reliance on *Shoen* and on the district court's contruction of *Shoen* was not only reasonable, it was plaintiff's only option. Dicta or not, the language of *Shoen* was the law of this case until changed by this Court in *Chur*. Plaintiff seeks only an opportunity to plead its claims under the new standards imposed by *Chur*. Basic fairness dictates that such an opportunity should be afforded to plaintiff.

### F. Plaintiff Moves to Amend the Complaint Because of *Chur*.

The district court's operative scheduling order entered January 29, 2019, provided that the deadline to move to amend or add parties was March 15, 2019. PA 2792. On March 14, 2019, the Directors' motion for a stay pending their petition for a writ was heard and granted by the district court. PA 2864. At that time, one judicial day remained for the parties to move to amend the pleadings.

On April 6, 2020, plaintiff filed a motion for clarification regarding the date the stay would be lifted. PA 2906. On April 27, 2020, the district court issued an order granting the motion for clarification, and stating, "the parties shall have to and including July 2, 2020, in order to move to amend pleadings." PA 2958.

This Court issued its notice in lieu of remittitur in *Chur* on June 16, 2020.

The district court lifted the stay on July 1, 2020 (the district court retained the stay in place at the request of defendants to allow time before the five year rule would again begin to run). Plaintiff filed its motion for leave to file a fourth amended complaint on July 2, 2020, within the deadline set by the district court and the one day remaining under the operative scheduling order. Other parties also filed a motion to amend on the same day, which the district court granted and did not find to be untimely. Any argument that plaintiff's motion was not timely

filed is therefore without basis.

In their opposition to plaintiff's motion to amend, the Directors acknowledged that the proposed fourth amended complaint was "not based on new facts." PA 3016, ln 9. Indeed, based on the facts already known and discovered, plaintiff argued that it could plead sufficient facts to meet the new standard of *Chur*. The motion was not denied based on any concept of insufficiency of the allegations to set forth a proper cause of action; it was denied solely based on timeliness and passage of time grounds. This Court should therefore accept as established that plaintiff's amended pleading was sufficient to set forth cognizable claims against the Directors.

### G. The District Court Denied Plaintiff's Motion to Amend.

On August 10, 2020, the district court denied plaintiff's motion to amend. PA 3324. The district court found that the plaintiff's motion was "untimely" and that granting the motion would "unduly prejudice defendants."[3] PA 3325. The issue before this Court is whether under the circumstances of this case, the district

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[3]At the hearing on reconsideration, the district court clarified that it had not ruled that the motion was untimely based on the scheduling order; the sole issue was the timing based on the age of the case: "THE COURT: When I said that -- Mr. Hutchinson, when I said untimely, I knew you filed it on the deadline, but, you know, the case is so old. That's what I meant." PA 3531, ln 11.

court abused its discretion in ruling that the prejudice to defendants due solely to the age of the case should deprive plaintiff of an opportunity to amend in response to a substantive change in the law.

On August 14, 2020, plaintiff moved for partial reconsideration of the order denying its motion to amend regarding the director defendants. PA 3330. In the motion, plaintiff noted that it had timely filed its motion to amend within the deadline set by the district court, in reliance on the district court's directive that such motions be filed on or before July 2, 2020. PA 3332. In addition, plaintiff noted that it "could not have moved to amend to conform to the *Chur* opinion before the *Chur* opinion was entered." PA 3331; 34.

In its order of September 9, 2020, the district court clarified that "[t]he court makes no findings as to the futility of the proposed Fourth Amended Complaint." PA 3685, Order at 6 ¶ 26. The decision was based entirely on the age of the case. The district court ruled:

> There has been a clarification by the Supreme Court of the *Shoen* case [See Shoen v. SAC Holding Corp., 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006)], that despite the existence of hardship to the Plaintiff, the Court finds that it would not be fair to the Director Defendants to have to defend a fourth amended complaint two months before the discovery deadline and with a five-year rule looming. Justice does not require granting leave to amend for Plaintiff to file the proposed Fourth Amended Complaint as to the Director Defendants because Plaintiff unduly delayed bringing said complaint and it would be unduly prejudicial for the Director Defendants to defend such theories of liability at this point.

PA 3686, Order at 7 ¶ 7. The transcript bears out that the sole reason the district court refused to allow amendment was the age of the case.

> Thank you all. This is a Motion for Reconsideration. And I realize that there's been a clarification by the Supreme Court of the *Shoen* case. And the reason I didn't grant the motion that was filed on July 2nd was simply because the complaint goes back to December 23 of 2014. And I just didn't think it was fair to the defendants to have to defend on a fourth amended complaint when it was two months before the discovery deadline[4] and we have a five-year rule looming.

PA 3543-44. Thus, the only issue on which the district court relied to deny the motion to amend was timeliness and alleged prejudice because of the impending five year deadline. It expressly did not address any issues of futility, including the asserted defense of statute of limitation. Plaintiff was denied the right to proceed to trial on properly amended pleadings solely because plaintiff was not clairvoyant enough to foresee the overruling of *Shoen* in *Chur*.

On August 13, 2020, the district court, in response to *Chur* and the district court's denial of plaintiff's motion for leave to amend its complaint, entered a judgment in favor of the Directors on all claims. PA 3703.[5] The order was certifiable pursuant to NRCP 54(b), but the district court denied plaintiff's motion for certification, having given plaintiff the Hobson's Choice of obtaining

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[4]The district court was mistaken. When the motion to amend was filed, more than five months remained for discovery.

[5]This document is out of chronological order at the end of the appendix.

certification and the right of immediate appeal without a stay pending appeal, or granting a stay pending plaintiff's pursuit of this petition for a writ.[6] Because an appeal after trial is no remedy and without a stay the five year deadline would expire, plaintiff was forced to forego certification.

On August 28, 2020, plaintiff filed a motion to stay proceedings to file the instant writ petition. PA 3549. On September 3, 2020, the district court orally granted the motion, finding plaintiff was entitled to a stay to seek the relief sought in the instant writ petition. A written order was entered on September 17, 2020. PA 3694.

Plaintiff believes that it is fundamentally unfair to pull the rug out from under its case five years after the case commenced without allowing plaintiff to amend its complaint and seek to prove its claims based on the changed pleading standard. The refusal of the district court to allow plaintiff any fair opportunity to respond to the change in the law announced in *Chur* was a manifest abuse of discretion.

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[6]The order denying certification has not yet been entered; we will provide it when it becomes available.

## V. STATEMENT OF THE ISSUE PRESENTED

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT IN RESPONSE TO *CHUR*.

## VI. SUMMARY OF ARGUMENT

Plaintiff adopts its Introduction, *supra*., as its summary of its argument.

## VII. STANDARD

### A. Writ Relief Is an Available Remedy.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). A writ of mandamus will not issue where the petitioner has a plain, speedy and adequate remedy in the ordinary course of the law. NRS 34.170. The district court manifestly abused its discretion in denying plaintiff's motion for leave to amend in light of *Chur*.

Plaintiff may have a remedy at law in the form of an appeal following a trial of the claims against the corporate defendants, still pending in the district court, but in light of the fact that the trial will be minus the primary defendants and plaintiff will unfairly face an empty chair defense, this remedy cannot be

considered adequate. An eventual appeal cannot remedy the damage being done by the district court's improper refusal to allow plaintiff to amend and proceed to trial against all defendants now. The complications of a second trial burdened by procedural issues caused by the first doomed trial militate in favor of resolution of this issue now, as a matter of judicial economy and sound administration.

The issuance of an extraordinary writ is discretionary with this Court. *See State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983). The primary standard in the determination of whether to entertain a writ petition is the interests of judicial economy and sound administration. *Id.* In addition, this Court exercises it original jurisdiction in cases of urgency or strong necessity, and when an important issue of law needs clarification. *See Nalder v. Eighth Judicial Dist. Court*, 136 Nev. ___, ___, 462 P.3d 677, 681–82 (2020). All of these factors militate in favor of consideration of this petition now. *See International Game Technology, Inc. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (cases may warrant extraordinary consideration even where an eventual appeal is available whenever this Court's review would promote sound judicial economy and administration).

## VIII. ARGUMENT

In its motion to file a fourth amended complaint, plaintiff set forth in great detail its allegations of intentional wrongdoing on the part of the Directors. The district court did not find that these facts were not sufficient to support the causes of action asserted. Instead, it found only that allowing amendment at the late stage of the proceeding would prejudice the defendants. Therefore, plaintiff will not repeat the grounds demonstrating the intentional misconduct of the defendants here. This Court should accept that the allegations were sufficient, and address only the timeliness issue relied on by the district court. That issue is not a sufficient basis to deny amendment; the cause for the amendment–the drastic change in the law–did not occur earlier, and the motion was timely.

### A. Amendment of Pleadings Should Be Freely Granted.

NRCP 15(a) states in relevant part:

> (2) In all other cases, a party may amend its pleading only with . . . the court's leave. The court should freely give leave when justice so requires.

The touchstone is justice.[7] *See Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d

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[7]"The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had." *Nutton v. Sunset*

1304, 1307 (1989) ("In order that justice be done, district courts should freely grant leave to amend . . . ."). This Court has stated that absent undue delay, bad faith or dilatory motives on the part of the movant or prejudice to the opponent, leave to amend should generally be freely given. *See Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000); *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 507 P.2 138 (1973). Although the district court has discretion regarding a motion for leave to amend, that discretion is abused if amendment is denied where justice requires it to be granted. *See Adamson v. Bowker*, 85 Nev. 115, 450 P.2d 796 (1969). This Court stated:

> While it is true that the granting of leave to amend is discretionary with the trial court, it is also true that leave to amend should be permitted when no prejudice to the [opposing party] will result and when justice requires it.

*Fisher v. Executive Fund Life Ins. Co.*, 88 Nev. 704, 706, 504 P.2d 700, 702 (1972); *see also Marschall v. City of Carson*, 86 Nev. 107, 111, 464 P.2d 494, 497 (1970)(the trial court should freely allow amendment to preserve movant's right to a full presentation of the merits).

Plaintiff has not engaged in any conduct that would preclude leave to amend. "Ordinarily, leave to amend pleadings should be granted regardless of the

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*Station, Inc.*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Ct. App. 2015).

length of time of delay by the moving party absent a showing of bad faith by the moving party or prejudice to the opposing party." *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981). Here, plaintiff diligently brought its motion on the first possible day after this Courts' decision in *Chur*.

Given this Court's change of the law in *Chur*, and plaintiff's prior reasonable reliance on Nevada law under *Shoen*, plaintiff submits it acted in good faith, and should have been allowed amend its complaint to allege knowledge of wrongdoing on the part of the Directors.

**B. *Chur* is a Substantive and Substantial Change in the Law.**

Although this Court labeled the language in *Shoen* "dicta," every other court that read the opinion believed that language was the holding of the case. Whether or not the language in *Shoen* is dicta or holding, *Chur* marks a dramatic change in the law in Nevada, and in law of this case.

In *Chur*, this Court noted that "federal courts in Nevada, as well as the district court in the case at bar, have relied on *Shoen* to imply a bifurcated tract for establishing breaches of the fiduciary duties of care and loyalty." *Chur* at 71, 458 P.3d at 339. That reliance was not unreasonable.

This Court stated in *Chur*: "We are concerned that our language in *Shoen*

has misled lower courts about the law surrounding individual liability for directors . . . ." *Id.* This is an understatement. Prior to *Chur*, every federal and state court in Nevada relied on *Shoen* for over 13 years. A partial list of cases relying on *Shoen* follows:

- [Chief Judge Du] *McDonald v. Palacios*, 2016 WL 5346067, at *20 (D. Nev. Sept. 23, 2016) (citing *Shoen* for the proposition that "the business judgment rule 'does not protect the gross negligence of uninformed directors and officers'").
- [Judge Dawson] *F.D.I.C. v. Johnson*, 2014 WL 5324057, at *3 (D. Nev. Oct. 17, 2014) (citing *Shoen* for the proposition that "the business judgment rule does not apply to claims of gross negligence, which constitutes a breach of the fiduciary duty of care").
- [Judge Dorsey] *F.D.I.C. v. Jones*, 2014 WL 4699511, at *10 (D. Nev. Sept. 19, 2014) (citing *Shoen* for the proposition that the business judgment rule "does not protect the gross negligence of uniformed directors and officers").
- [Judge Mahan] *F.D.I.C. v. Delaney*, 2014 WL 3002005, at *2 (D. Nev. July 2, 2014) (finding that *Shoen* and federal law work in tandem authorizing the "FDIC to sue directors for gross negligence").
- [Judge Jones] *F.D.I.C. v. Jacobs*, 2014 WL 5822873, at *4 (D. Nev. Nov. 10, 2014) (citing *Shoen* and finding that "[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence").
- [Judge Dorsey] *Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. March 30, 2015) (citing *Shoen* for the proposition that a "director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim").

In contrast, the Directors cannot cite a single decision prior to *Chur* finding that gross negligence did not state a claim against the Directors.

The district court was concerned that amendment late in the litigation

process would prejudice defendants; what about the prejudice to plaintiff of a substantive change in the law, and denial of an opportunity to cure a mere pleading matter? A court should grant leave to amend when a substantive change in the law has occurred which the parties could not have foreseen.

### C. The District Court Abused Its Discretion.

The Directors argued below that plaintiff acted in bad faith in delaying its proposed amendment. The crux of the Directors' argument was that plaintiff should have foreseen the overruling of *Shoen*, and proposed amendment sooner. The district court found that plaintiff delayed, and that the Directors would be prejudiced by amendment. PA 3686.

It is difficult to understand how the Directors believe plaintiff proceeded in bad faith. The basis for amendment was *Chur*, which disavowed prior Nevada law regarding whether gross negligence constituted a claim against directors. *Chur* substantially altered the law; more particularly, it altered the law of this case. Plaintiff responded immediately and in good faith. The proposed new complaint was filed on the heals of *Chur*. It contains the same common facts as the original complaint, and centers on the same failures of the Directors. The Directors admitted that the new complaint is "not based on new facts." PA 3016, ln 9. The

proposed amendment could not have been more timely.

The district court's finding of delay is clearly erroneous. Plaintiff could not have moved to amend to conform to *Chur* before *Chur* was decided. *Chur* incorporates the Tenth Circuit's decision in *In re Zagg*, which did not exist when plaintiff filed its complaint. A plaintiff cannot be expected to anticipate a change in the law in the future which did not exist at the time of the original complaint. The district court, and state and federal court in Nevada, uniformly accepted *Shoen*'s holding that gross negligence was an adequate basis for individual liability against directors.

When the underlying law is changed, it is fair to permit amendment. In *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009), the Court held:

> Plaintiffs contend that, if the Supreme Court's intervening decisions altered pleading standards in a meaningful way, and their complaint is found deficient under those standards, they should be granted leave to amend. Courts are free to grant a party leave to amend whenever "justice so requires," Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with "extreme liberality." . . . "'Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.' " *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir.2002) (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991)).

*See also Darney v. Dragon Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) ("Maine court's recent change in law relating to strict liability claims arising from blasting activity constituted good cause to allow homeowners leave to amend complaint to

add such a claim against operator of a cement-manufacturing plant near their home, even though leave was not sought until well after the scheduling order deadlines for amendment of the pleadings and designation of experts, beyond the close of the discovery period, and months after rulings on summary judgment issues"); *Gregory v. Harris-Teeter Supermarkets, Inc.*, 728 F. Supp. 1259 (W.D.N.C. 1990) (Civil rights plaintiff's motion to amend complaint and second motion to amend complaint would be granted where each motion was filed immediately after an apparent change in the law occurring after plaintiff had filed his complaint).

Here, there was no way for the federal courts, the district court, or plaintiff to foresee the *Chur* disavowal of *Shoen*, or the adoption of the new *Zagg* standard. To deny the right to amend after *Chur* is to hold plaintiff to a standard of anticipating what no one could have anticipated.

**D. The Directors Claim of Prejudice Lacks Merit.**

The district court denied the Directors' motions to dismiss on February 25, 2016. The Directors could have filed their writ petition any time after the denial. They did not. The Directors delayed for over three years, filing their writ petition on March 13, 2019. Any prejudice is of the Directors' own making; it is

disingenuous for the Directors to claim that plaintiff–who was relying on published and accepted law–is responsible for the timing of plaintiff's motion to amend. *See Jacobs v. McCloskey & Co.*, 40 F.R.D. 486, 488 (E.D. Pa. 1966) ("To the extent that the complaining party causes the prejudice, it is not, in the judgment of this Court, 'undue' within the meaning of the rule.").

Through discovery (available to the Directors), plaintiff had the documents and information necessary to assert valid allegations and claims that comply with *Chur*, which is the basis for plaintiff's motion to amend. The Directors have had notice of the charges against them since day one; the characterization of the conduct as intentional under the new definition stated in *Chur* would effect no real change in the litigation. *Cf. Deal v. 999 Lakeshore Ass'n,* 94 Nev. 301, 307, 579 P.2d 775, 779 (1978) (although the complaint, by itself, "may not have notified appellant as to the exact theory of liability upon which he ultimately was held liable, the pleadings generally gave fair notice of the fact situation from which the claim for individual liability arose.").

Below, the Directors failed to point to any real or specific prejudice that would result from granting leave to amend. They made ambiguous assertions, but failed to explain how granting leave would cause actual prejudice, or how the

alleged prejudice was more than the inherent prejudice that normally results from litigation and which does not, and cannot, constitute "undue prejudice" warranting denial of leave to amend. *See e.g., In re Lowenschuss*, 67 F.3d 1394, 1400–01 (9th Cir. 1995) ("The inconvenience of defending another lawsuit or the fact that the defendant has already begun trial preparations does not constitute prejudice."). The Directors are, and have been, aware of the facts that comprise plaintiff's proposed amended complaint. Indeed, the corporate defendants argued that "a mere correction of the allegations against the Director Defendants would not delay this matter . . . ." PA 3060.

This Court should also consider "whether denying the amendment would prejudice the movant." *See In re Norplant Contraceptive Prod. Liab. Litig.*, 163 F.R.D. 255, 257 (E.D. Tex. 1995). Clearly it would end the plaintiff's claims to the extreme prejudice of plaintiff. As the Second Circuit stated, delay alone is an insufficient basis on which to deny a motion to amend; there must also be a showing of prejudice or bad faith. *See State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981). In fact, the non-movant on a motion to amend "carries the burden of demonstrating that substantial prejudice would result were the proposed amendment to be granted." *Saxholm AS v. Dynal, Inc.*, 938 F.Supp.

120, 123 (E.D.N.Y.1996). Moreover, "[a]ny prejudice which the nonmovant demonstrates must be balanced against the court's interest in litigating all claims in a single action and any prejudice to the movant which would result from a denial of the motion." *Id.*

Finally, "[i]t is the policy of this state that cases be heard on the merits, whenever possible." *Schulman v. Bongberg-Whitney Elec., Inc.*, 98 Nev. 226, 228, 645 P.2d 434, 435 (1982) (citing *Hotel Last Frontier v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963)); *Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986) ("This court has repeatedly held that cases are to be heard on the merits if possible."). This case will never be heard on its merits because of a change in the controlling law if amendment is not allowed.

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## CONCLUSION

For the foregoing reasons, petitioner requests that this Court issue a writ of mandamus compelling the district court to allow petitioner to amend its complaint based on *Chur*.

DATED this 29 day of September, 2020.

HUTCHISON & STEFFEN, PLLC

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## AFFIDAVIT OF MICHAEL K. WALL

STATE OF NEVADA )
)§
COUNTY OF CLARK )

Michael K. Wall, being first duly sworn, upon his oath deposes and says:

1. I am a partner in the law firm of Hutchison & Steffen, PLLC. I am counsel for petitioner. I am authorized to act on behalf of petitioner for the purpose of pursuing this petition.

2. I have personally prepared this petition for a writ of mandamus, and I know the content thereof.

3. The facts stated therein are procedural and legal in nature, and are not within the knowledge of my clients. Instead, the facts and arguments are peculiarly within the knowledge of the petitioner's attorneys, including me.

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4. I certify that the statements of facts and of the procedural posture of the case are true and accurate, that I believe the petition for a writ of mandamus to present a meritorious claim for relief at this time, and that the petition is not interposed for any improper purpose.

Dated this 29 day of September, 2020.

Michael K. Wall

SUBSCRIBED and SWORN to before
me on this 29th day of September, 2020
by Michael K. Wall

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KAYLEE ANNE ELIZABETH CONRADI
Appt. No. 18-4454-1
My Appt. Expires Nov. 7, 2022

Notary Public

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **PETITION FOR A WRIT OF MANDAMUS** , 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I also certify that this brief complies with the formatting requirements of NRAP 21(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6). The font type is Times New Roman, font size is 14, the word count is 7,000 excluding the Disclosure Statement, Table of Contents, Table of Authorities, Affidavit, and required certificates (pursuant to NRAP 32(7)(C)).

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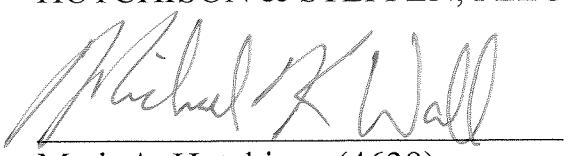
I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29 day of September, 2020.

HUTCHISON & STEFFEN, PLLC



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## CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **PETITION FOR A WRIT OF MANDAMUS** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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Further, a copy was mailed via U.S. Mail to the following:

The Honorable Nancy Allf
Eighth Judicial District Court
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Department XXVII
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DATED this 29th day of September, 2020.

An employee of Hutchison & Steffen, PLLC