IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Petitioner, vs. 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, Respondents, 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 Real Parties in Interest	Supreme Court No. Dist. Ct. Case. No. A-19-797331-C **APPENDIX TO PETITION FOR A WRIT OF MANDAMUS VOLUME 4 OF 10**

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Clerk of Supreme Court

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4	Transcript re: Directors' Motion to Dismiss, hearing held on 1/27/2016	1	PA000163-PA000171
5	Notice of Entry of Order Granting in Part and Denying in Part Motion to Dismiss, filed 2/26/2016	1	PA000172-PA000177
6	First Amended Complaint, filed 4/1/2016	1	PA000178-PA000696
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20	Opposition to Motion for Judgment on the Pleadings, filed 9/19/2018	4, 5	PA002233-PA002584
21	Reply to Motion for Judgment on the Pleadings, filed 10/4/2018	6	PA002585-PA002700
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23	Order Denying Motion for Judgment on the Pleadings, filed 11/2/2018	6	PA002723-PA002725
24	Motion for Reconsideration, filed 11/29/2018	6	PA002726-PA002744
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49	Opposition to Motion for Leave to File Fourth Amended Complaint [Directors'], filed 7/17/2020	7	PA003014-PA003044
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54	Amended Answer to Third Amended Complaint [Uni-Ter Underwriting Management Corp.], filed 8/7/2020	9	PA003290-PA003306
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59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
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25	Opposition to Motion for Reconsideration, filed 12/27/2018	6	PA002745-PA002758
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56	Order Denying Motion for Leave to File Fourth Amended Complaint, filed 8/10/2020	9	PA003324-PA003329

29	Order Denying Motion for Reconsideration, filed 2/11/2019	6	PA002795-PA002798
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21	Reply to Motion for Judgment on the Pleadings, filed 10/4/2018	6	PA002585-PA002700
51	Reply to Motion for Leave to file Fourth Amended Complaint, filed 7/21/2020	8	PA003073-PA003245
59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
26	Reply to Motion for Reconsideration, filed 1/4/2019	6	PA002759-PA002772
33	Reply to Motion for Stay Pending Petition, filed 3/13/2019	7	PA002857-PA002863
10	Reply to Motion to Dismiss First Amended Complaint, filed 5/19/2016	2	PA000821-PA000831
38	Response to Motion to Lift Stay, filed 7/10/2019	7	PA002893-PA002897
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15	Uni-Ter Claims Services Corp.’s Answer to Third Amended Complaint, filed 8/12/2016	3	PA001904-PA001919

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPENDIX TO PETITION FOR A WRIT OF MANDAMUS VOLUME 4 OF 10** 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:

George F. Ogilvie III, Esq. (3352)
McDonald Carano LLP
2300 West Sahara Ave., Ste. 1200
Las Vegas, NV 89102

Attorney for Uni-Ter Defendants

Angela T. Nakamura Ochoa, Esq. (10164)
Lipson Neilson
9555 Hillwood Dr., 2nd Floor
Las Vegas, NV 89134

Attorney for Director Defendants

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

The Honorable Nancy Allf
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Department XXVII
Las Vegas, Nevada 89155

DATED this 28th day of September, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

Amendment No. 1079.

Amend section 1, page 1, by deleting lines 12 and 13 and inserting: "*(b) A court of competent jurisdiction finds that:*".

Amend sec. 3, page 3, by deleting lines 21 and 22 and inserting: "*in his capacity as a director or officer unless it is proven that:*".

Amend sec. 4, page 3, line 38, by deleting "and" and inserting "~~[and]~~".

Amend sec. 4, page 3, line 39, after "(e)" by inserting: "*The name and street address of the resident agent of the corporation; and*

(f)".

Amend sec. 4, page 3, lines 45 and 46, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 16, page 9, lines 32 and 33, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 20, page 11, line 15, by deleting "and" and inserting "~~[and]~~".

Amend sec. 20, page 11, line 16, after "(e)" by inserting: "*The name and street address of the resident agent of the limited-liability company; and*

(f)".

Amend sec. 20, page 11, line 29, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 29, page 15, line 5, by deleting "and" and inserting "~~[and]~~".

Amend sec. 29, page 15, line 6, after "(e)" by inserting: "*The name and street address of the resident agent of the registered limited-liability partnership; and*

(f)".

Amend sec. 29, page 15, lines 8 and 9, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 33, page 17, line 5, by deleting "and" and inserting "~~[and]~~".

Amend sec. 33, page 17, line 6, after "(e)" by inserting: "*The name and street address of the resident agent of the limited partnership; and*

(f)".

Amend sec. 33, page 17, lines 8 and 9, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 37, page 19, line 12, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 42, page 21, line 13, by deleting "*an affidavit*" and inserting: "*a declaration under penalty of perjury*".

Amend sec. 47, page 23, by deleting lines 36 through 40 and inserting: "fiduciaries . ~~[and are subject to the insulation from liability provided for directors of corporations by the laws of this state.]~~ The members of the executive board are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business-judgment rule.".

Amend sec. 48, page 25, by deleting lines 2 through 14 and inserting:

"3. ~~[All fees]~~ *From each fee* collected pursuant to paragraph (d) of subsection 2 *:*

(a) The entire amount or $50, whichever is less, of the fee collected pursuant to subparagraph (1) of that paragraph and half of the fee collected pursuant to subparagraph (2) of that paragraph must be deposited with the state

treasurer for credit to the account for special services of the secretary of state in the state general fund. Any amount remaining in the account at the end of a fiscal year in excess of $2,000,000 must be transferred to the state general fund. Money in the account may be transferred to the secretary of state's operating general fund budget account and must only be used to create and maintain the capability of the office of the secretary of state to provide special services, including, but not limited to, providing service:

~~[(a)]~~ *(1)* On the day it is requested or within 24 hours; or

~~[(b)]~~ *(2)* Necessary to increase or maintain the efficiency of the office.

Any transfer of money from the account for expenditure by the secretary of state must be approved by the interim finance committee.

(b) After deducting the amount required pursuant to paragraph (a), the remainder must be deposited with the state treasurer for credit to the state general fund.".

Amend the bill as a whole by deleting sec. 58 and adding a new section designated sec. 58, following sec. 57, to read as follows:

"Sec. 58. Notwithstanding any provision of NRS 225.140 to the contrary:

1. The state controller shall, without obtaining the approval of the interim finance committee and in addition to any amounts transferred pursuant to that section with the approval of the interim finance committee, transfer from the account for special services of the secretary of state to the secretary of state's operating general fund budget account:

For the fiscal year 2001-2002.....$300,000

For the fiscal year 2002-2003.....$250,000

2. The secretary of state may expend the amounts transferred pursuant to subsection 1 for such additional personnel, equipment, supplies, office space and other costs as are necessary to carry out the provisions of this act.".

Amend sec. 59, page 27, by deleting lines 22 through 32 and inserting:

"Sec. 59. 1. This section and sections 1, 2, 3, 8, 9, 47 and 55 to 58, inclusive, of this act become effective upon passage and approval.

2. Section 48 of this act becomes effective at 12:01 a.m. on July 1, 2001.

3. Sections 4 to 7, inclusive, 10 to 46, inclusive, and 49 to 54, inclusive, of this act become effective:".

Amend the title of the bill, second line, after "fees" by inserting: "and revising certain requirements".

Senator James moved the adoption of the amendment.

Remarks by Senator James.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Senator James moved that Senate Bill No. 577 be placed on third reading and final passage.

Motion carried.

For the full text of this reprint, go to http://www.leg.state.nv.us/71st/bills/SB/SB577_R1.pdf

REQUIRES TWO-THIRDS MAJORITY VOTE (§§ 4, 6, 7, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53)

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT **S.B. 577**

SENATE BILL NO. 577–SENATORS JAMES, RAGGIO, O'DONNELL, AMODEI, RAWSON, JACOBSEN AND MCGINNESS

MAY 24, 2001

Referred to Committee on Judiciary

SUMMARY—Limits common-law and statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to business associations; limiting the common-law and statutory liability of the stockholders, directors and officers of a corporation; increasing the fees and revising certain requirements for filing certain documents with the secretary of state; requiring certain fees charged by the secretary of state for special services to be deposited in the state general fund; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation formed under the laws of this state is individually liable for a debt or liability of the corporation, without regard to whether a court determines that the stockholder, director or officer should be considered the alter ego of the corporation or that the corporate fiction of a separate entity should be disregarded for any other reason, unless:

(a) Otherwise provided in an agreement to which the stockholder, director or officer is a party; or

(b) A court of competent jurisdiction finds that:

(1) The corporation is influenced and governed by the stockholder, director or officer;

THIS BILL IS 28 PAGES LONG.
CONTACT THE RESEARCH LIBRARY FOR A COPY OF THE COMPLETE BILL.

GENERAL FILE AND THIRD READING

Senate Bill No. 427.

Bill read third time.

Roll call on Senate Bill No. 427:

YEAS—19.

NAYS—None.

Excused—Neal, O'Donnell—2.

Senate Bill No. 427 having received a constitutional majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

Senate Bill No. 577.

Bill read third time.

Remarks by Senators James, Care, Titus, Coffin and Porter.

Senator James requested that the following remarks be entered in the Journal.

* (The remarks will be in the final Journal.)

Senators Rhoads, Townsend and Rawson moved the previous question.

Motion carried.

The question being on the passage of Senate Bill No. 577.

Roll call on Senate Bill No. 577:

YEAS—18.

NAYS—Coffin.

Excused—Neal, O'Donnell—2.

Senate Bill No. 577 having received a two-thirds majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

UNFINISHED BUSINESS

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the President pro Tempore and Secretary signed Senate Bills Nos. 39, 112, 115, 221, 223, 227, 237, 238, 252, 274, 289, 311, 337, 380, 381, 397, 406, 467, 483, 499, 519, 557; Senate Concurrent Resolution No. 49; Assembly Bills Nos. 7, 29, 33, 44, 74, 92, 165, 171, 180, 192, 199, 201, 245, 253, 257, 264, 267, 294, 302, 344, 402, 431, 440, 446, 463, 488, 491, 501, 536, 547, 563, 576, 601, 604, 622, 628, 636, 649.

Senator Raggio moved that the Senate adjourn until Monday, May 28, 2001 at 10:30 a.m.

Motion carried.

Senate adjourned at 5:01 p.m.

Approved:

LAWRENCE E. JACOBSEN
President pro Tempore of the Senate

Attest: CLAIRE J. CLIFT
Secretary of the Senate

*ATTACHED

Senate Bill No. 577.

Bill read third time.

Remarks by Senators James, Care, Titus, Coffin and Porter.

Senator James requested that the following remarks be entered in the Journal.

SENATOR JAMES:

Thank you, Mr. President pro Tempore. Let me give a brief discussion of this bill because it is an important measure for a number of reasons. First of all, the substantive changes in the bill to Nevada law would codify existing case law to specify that the corporate veil cannot be pierced to hold the stockholder, director or officer individually liable for a debt or liability of the corporation unless the liability is otherwise provided for in an agreement in which the stockholder, director or officer is a party to or the court finds that the corporation is influenced by the stockholder, director or officer and the corporation director and officer are inseparable, and to maintain the corporation as a separate entity under the circumstances would sanction fraud.

Senate Bill No. 577 also provides that directors and officers are not individually liable for damages in their personal capacity for an act or failure to act unless it is proven that their actions or failure to act constituted a breach of fiduciary duty and that breach involved intentional misconduct, fraud or knowing violation of the law. I would point out, Mr. President pro Tempore, that if there is a fraud such as a securities scheme or anything of that nature, then under the circumstances, this law would make those people liable for that fraudulent or intentional conduct.

Currently, Nevada law authorizes corporations to opt into this type of limitation on personal liability in the articles of incorporation. However, according to testimony this provision generally benefits those corporations, many of them large corporations who have the benefit of experienced legal counsel in setting up their Nevada corporations. This would make this protection generally available to all of those people including small business people who may not have that sophisticated legal advice.

Finally, Senate Bill No. 577 allows directors and officers of corporations to rely on information and data provided to them by financial advisors, evaluation advisors, such as a fairness opinion, and investment bankers in addition to the other professionals currently in statute that may be relied upon by directors, boards of directors or committees of boards of directors.

The other major portion of Senate Bill No. 577 increases certain fees. Senate Bill No. 577 increases fees for certain documents that are filed with the Secretary of State by corporations, foreign corporations, limited liability companies, partnerships, limited partnerships and business trusts. The changes in fees include an increase from $85 to $165 for the filing of what is called the initial list of officers and directors. Thereafter, when the annual list is filed, that fee remains at $85. When this list is now filed, they will also provide a declaration under penalty of perjury that the company has complied with the provisions of Nevada's business tax laws which includes the paying of a $25 business license fee, which according to the research of the committee, is rarely paid. It is paid only a small percentage of the time by the people from outside of Nevada who set up a corporation as their domicile and then do business elsewhere.

Other fee increases include the filing fees for the following types of certificates and documents. They are: re-instatement of articles of incorporation or charters, amendments to certain documents filed with the Secretary of State, dissolution, change in location of a

corporation, notice of withdrawal from Nevada by a foreign corporation, filing original articles of organization for limited liability companies or for registration for certain business entities. There are also fee changes for certifying copies of certain documents and executing certificates of corporate existence.

The bulk of these fees, which are charged in this bill have not been changed since 1989, approximately 12 years ago. These are fees that have not been adjusted in the Secretary of State's office for a great deal of time. In many ways, what we are accomplishing here, is allowing the Secretary of State to increase fees associated with the cost of doing business and certainly associated with the level of sophistication that has been increased in the Secretary of State's Office over the past 10 years.

We heard a lot of testimony in the Judiciary Committee about how much has been done in our State to make Nevada the corporate domicile of choice for the entire United States, the Delaware of the West as some people call it. I would prefer to say that Nevada will be better than Delaware as a domicile for any company, nationally, who wishes to set up a domicile in a place with business–friendly laws and a Secretary of State's Office who can respond to the needs of today's businesses. To address the costs incurred by the Secretary of State's Office, and I won't repeat this because it is the same thing I said with respect to the amendment we just adopted, the Secretary of State is allowed to continued to keep a portion of certain expedite fees that he charges at this time. The effective date of the bill is August 1, 2001, to allow the Secretary of State's Office time to adequately inform its customers of the changes. However, the provisions allowing the Secretary of State's Office to access funds from the Account on Special Services is effective on July 1, 2001. Furthermore the effective date of the liability provisions that are set forth in the bill is prospective only. They do not apply to causes of action which accrue prior to the bill's effective date. Any causes of action which accrue prior to that date will be settled under the existing laws regarding the liability of officers and directors regarding the issue of piercing the corporate veil.

I would say, generally, Mr. President pro Tempore, as many of you may know this bill is an integral part of an education enhancement package which was announced by the Governor, yesterday, which has been worked on by myself and by the Judiciary Committee for a number of weeks. Although, this bill, in its draft form was in a number of different permutations, is expected, conservatively estimating from our fiscal division, to generate $30 million over the biennium. That $30 million, under the Governor's program and under the program being supported by this Senate when it passes this bill, today, will go directly to the increases in the salary of our State's teachers, which is part of the Governor's Education Enhancement Package. This is an integral portion of the ongoing funds necessary to: (a) increase teachers' salaries by 2 percent in part of the biennium and (b) position Nevada and the Legislature, next time, to roll up that and the other 2 percent into a 4 percent increase when we return. In addition, these monies are necessary because of their concomitant effect of allowing one-shot funds to be made available for teacher bonuses. Those are recruitment bonuses and retention bonuses for our teachers. It also makes money available directly to classrooms or vital programs for technology and textbooks and for retaining programs like after school programs, music programs and sports programs. These are critical issues. These are probably the most important issues we are going to address this session. That we fund education properly. I

cannot emphasize enough that this bill is necessary. It is integral to this plan, and I would strongly urge my colleagues to support it unanimously.

SENATOR CARE:

Thank you, Mr. President pro Tempore. I will begin with sincere charity. I want to thank the Chairman for the work he has done in helping the crisis in funding public education particularly in southern Nevada. I am going to do that again, today, but I am compelled to speak.

Yesterday afternoon, the Judiciary Committee passed out Senate Bill No. 577 as an amend and do pass, which is the action we took. The action that we took last night gutted what is now section 1 in the bill which deals with alter ego. It also took out, and it is out now, the language about "clear and convincing evidence." It also altered one little word we stuck in last night, the word "or" in section 3. Now the word "and" is back inside the bill. That may not sound like a lot, but I am going to explain that momentarily.

I asked that the language be deleted last night and that one amendment be deleted simply for the following reason. We had another bill, actually a BDR because the bill was never introduced, that was intended to increase, or actually to create, a franchise tax. The theory was that a number of corporations would relocate to Nevada to take advantage of our corporate laws. We had the engaging debate that if we do that, then what do we offer for these corporations to come here? The answer seemed to be, to some extent, that we should limit the liability of the officers and directors of those corporations. That made sense. There was a nexus. But when we got Senate Bill No. 577 last night, that nexus, in my judgment, was no longer there. What we were doing, in essence, was simply raising the fees the Secretary of State charges already. And, in fact, many of those fees have not been altered since 1987 and probably should have been increased some time ago. That was the rational last night, when I and a few others argued, "take out that language that, to such a great degree, limits the liability."

About an hour ago, our committee rescinded that action and adopted the amendment that is now part of Senate Bill No. 577. This is my interpretation of the bill before us now. The Chairman says that all it does is codify existing case law on alter ego. It does that but in my judgment not completely. I realize only four of us in this Chamber are attorneys, but it is important to understand alter ego or piercing the corporate veil. The way the bill reads, now, you would have to demonstrate that the officer or director committed fraud. By adding a simple comma, we could have said "or" that the conduct to recognize the corporate fiction, with that conduct in mind, would constitute an injustice. That is what the courts say now. The courts specifically say, now, you do not have to demonstrate fraud. You can, simply, demonstrate that recognition of a corporate fiction would constitute an injustice. Again, this is legal talk but significant legal talk. That is not in this bill. That would be out. Secondly, in my judgment, in section 3, by keeping the "and" in there instead of "or," it means, to me, that if an officer or director is accused of violating the best judgment rule, now, you have to demonstrate the willful act, the fraud or the knowing violation of the law. You cannot get there by demonstrating negligence. That will not do it. Those are the significant differences with what we did last night and what we have before us today.

We have a lot of wonderful corporations in this State. They are good citizens. Hundreds of them are represented by the lobbyists who walk this hall. Many of us have professional and personal relationships with people who operate those corporations.

Those corporations would have had nothing to worry about with the bill that we passed out of committee last night, nothing at all. Those are good citizens. It is unfortunate, because what we are being asked here, today, by enacting the increases, is that they will protect our children, their welfare, their future, but at the same time, protect some corporate crooks. I know what we are going to do here, but I would like to say it comes at a terrible price.

SENATOR TITUS:

With all due respect to the prime sponsor of Senate Bill No. 577 who has worked very hard to find much needed revenue for education, I have serious reservations about this bill. As non-amended, it includes added immunity, protection for officers and directors of businesses incorporating in Nevada. Protections which give directors of Firestone and Reynolds Tobacco less liability than the officers of a homeowner's association. Such directors will, thus, have greater ability to act without oversight by the courts, essentially allowing them to bilk our residents with impunity. The ability to pierce the corporate veil is a necessary tool, according to our own Supreme Court, to protect our consumers and investors. Without this ability, a widow of a Senator from this body, Mrs. Fransden, would not have been able to win a judgment against an offending officer who attempted to hide behind the corporate shield. The many seniors who lost their life savings in the Harmon Mortgage fiasco would be unable to recoup any of their losses.

I also have philosophical concerns about this bill. Senate Bill No. 577 is designed to provide funding for education. We demand accountability from our educational system. Should we not demand accountability from corporations and businesses that operate in Nevada? Of course. In fact, we should be wary when those individuals seek to have blanket immunity before moving to Nevada. As stated by the sponsor, Nevada already has a pro–business climate and is considered the "Delaware of the West." What a terrible message we are now sending to the business world. We might as well hang out a shingle, "Sleaze balls and rip off artists welcome here."

Unfortunately, I am caught between a rock and a hard place. I have been threatened, and I do not use that term lightly, that if Senate Bill No. 577 does not pass in this exact form, the so-called education funding package deal falls apart, and there will be no money to pay for the critical needs of our schools and no money for teacher raises. I cannot let that happen.

For that reason, I will vote for this bill, but I do so with a heavy heart. Nevada has sold its soul, tarnished is already shaky reputation, today, in exchange for a $30 million band-aid. I will work to have this corrected down the hall because I believe we can find the money needed for education without unnecessarily putting our investors at risk.

SENATOR COFFIN:

Thank you, Mr. President pro Tempore. I cannot match the eloquence of my good friends in my party. I do appreciate the comments that they made. I do wish they could follow their eloquence with their votes. I want to say, I hope they change their minds, and I hope some of you do, too, because I have heard that you are troubled by what the outcome of this bill means. A little history perspective for some of us old-timers. I will take us down memory lane, 14 years, to an April Fool's Day in 1987 when we voted on the subject of a personal income tax in the State of Nevada. It was passed out of here, 16-5 from this House. I was a freshman Senator, then. At that time, looking at the record, I

said, "Be very careful if you do that, because if you rule out anything, it doesn't mean you are for an income tax if you vote 'no' on this bill, but it means there are only a few other places you can go to get the money." The best place to go is business. In 1991, when many of you were sitting right here on this floor, we were faced with another band–aide approach to a sick fiscal system, and we passed it. A lot of you voted against it. I am looking at four or five people on this floor on the other side of the aisle who voted against those measures, against business that day. The price tag then was pretty big. But $15 million a year does not begin to address the issue that is really needed. I have sat through 110 days of budget hearings, and we are a long way from matching revenues to expenditures. Why would we, and in the words of the distinguished Minority Leader, "sell our soul" for a pittance. It is the equivalence of 30 pieces of silver in A.D. 31, inflated rates, I am sure. What is going to happen, by this little amendment as I see it, is that reputable companies are not going to want to come here to save a few dollars. Do you think for a minute that the investors of America are going to want to hold stock in a company domiciled in Nevada with laws looser than Delaware without the experienced Judiciary and the established nearly 200 year-old case law history of Delaware? No.

I am not sure about the words the distinguished Minority Leader used to describe what Nevada will be called, but I will tell you what I would call it. I would call it the place where Butch Cassidy and the Sundance Kid would go, the Hole in the Wall. Instead of being in Utah, it is going to be in Nevada.

The pension funds that we own, we have invested in and that your constituents have are in the hands of the very corporate officers and directors who could, if they chose domicile in Nevada, commit virtually any act and get away with it and waste your money. Make no mistake these subtle changes are significant. Scoundrels can move here, and there are scoundrels in the mutual fund business and in the pension business and in many corporations. If I was one of them, I might consider moving here now. Remember that it is the directors and officers that pick the consultants who say, if they rely upon their advice, they will not be held liable. It is going to be very difficult to hold them liable if they have relied upon some expert. But who is paying the expert? It is the director and the officer who chooses the expert.

So why would we want such a terrible reputation? The stock and bond ratings services would look at a Nevada domiciled corporation in a whole different way if they knew that the officers and directors were going to be held to a lower standard of behavior in the way they manage the assets of a company.

I watched the entire hearing yesterday in Judiciary, and I was proud of the committee because the committee took out the offensive language. That is the first time in a long time the Republicans have lead the charge to raise taxes. I am proud of you for doing it. It has been pretty hard to get you to go along on that, and you have done it. I should congratulate you. If I offended anyone by saying this amount of money is not enough, well, it isn't enough, but it is a step, and you have done this. But you have done it to business, to little business people. You didn't do it to yourself. Some of you are in business, of course, so you might have. I am not incorporated so I won't pay, but someone else will. A lot of people will. A lot of your constituents will. They will go away unhappy wondering why this would happen. They will wonder why those of you who have stood up for them in the past have abandoned them now. It has been stated by Senator Care that you already have the right as a corporation to opt into these limitations

of personal liability in the articles of incorporation, but it is said by the sponsor of the measure that we do not have experienced counsel that can help them do it. I fail to believe that in the two sophisticated cities of Reno and Las Vegas and the similarly situated capitol of this State, Carson City, there aren't enough good attorneys who can do this for their clients. That escapes me. I cannot believe that the two largest law firms in this State, and we all know who they are, cannot do it. They have probably done it already. They probably have specialists in there. I do not buy that argument. Increasing the fees on business is not the way to go. Maybe we should re-initiate the idea of a personal income tax. Maybe we should re-initiate the idea of cutting sales tax and raising property tax. Maybe we should do all of those things that we haven't had the courage to do, and I hold myself just as accountable as you should hold yourselves.

SENATOR JAMES:

Thank you, Mr. President pro Tempore. Let me say that I find it extremely unfortunate that a measure of this nature, as arduously wrought, as fair in administration, as high in purpose as this one, should be subjected to the kind of high rhetoric, stretching of the truth, misstatement of the law, downright fear mongering and the use of scare tactics as we have just seen on the floor today. I will tell you, Mr. President pro Tempore, the only people who are going to give Nevada a black eye are those who would engage in those practices to accomplish their own political objectives. There is nothing in this bill that would give protection, that would give solace, that would give encouragement to scoundrels and people who are out to bilk people of their money—nothing, whatsoever.

I want to talk about the real law because the bill is extremely clear that a director and officer of a corporation is liable for fraud, intentional breach of fiduciary duty and intentional violation of the law.

What are the words that we heard used about the kind of things that would happen if we enacted this? People would be bilked. We could get out our dictionary, but bilking is an intentional scheme to take someone's money. We heard about Harley Harmon. Last time I checked, that was a fraud case. What are we really talking about? Well, we are talking about something called business judgment. We are talking about the members of a board of directors, who are part of a company or are outside directors who have lent their experience, their knowledge and their skills to help guide a company, which is what a board of directors does. We are talking about them and the business judgments they make when they sit in those boardrooms. What are they? About 18 months ago, maybe the business judgment was, "We are not going to invest in any Internet IPOs." Well, the stockholders might sit back and watch other companies that invested in Internet companies or put their money into the Internet bubble and say, "Look, their stocks are going through the roof. Our stocks are stagnant. We have remained in value investments. We have remained in the old economy. We are missing the new economy. They breached their business judgment. They made a mistake. Let's sue them."

Under the old law, you could sue them because you did not get that money. Eighteen months later, the companies who did invest in the new–economy Internet IPO bubbles, and whose stocks went from astronomical heights down to numbers like $5, $3, 20 cents, their shareholders could say, "Wait a minute. You breached your business judgment. You made a mistake. You invested in Internet IPOs. Couldn't you see that the bubble was going to burst and all of those stocks were going to go down?" So you sue them for that.

What we are talking about are boards of directors who act honestly, and let us remember that word, honestly, because you cannot act dishonestly, not under this bill and get away with it in Nevada. That is the message that I hope goes out to the financial markets of this country. Not the one you heard from the three previous speakers. Those people who act honestly on those boards, but maybe they misread the market, maybe they made a business judgment mistake, those people would not be liable in their personal assets for having made that mistake.

If you are a shareholder what recourse do you have? You still have an action against the corporation. You still have all the appraisal rights as a minority shareholder that are offered to you under Nevada laws. You have all of those things. This isn't changing any of that. Nevada companies are a good and a safe place to invest, and they remain more so under the law you have in front of you. Please, I hate to repeat the words like "to protect crooks, to give blanket immunity, to allow sleaze-balls and rip-off artists to come here." Give me some honest legal analysis and tell me where this bill does that. Nowhere.

My colleague on the Judiciary Committee, who I so respect as an attorney, who I turn to every day to give a fair and honest analysis of measures, of all the speakers, let me address him because he did engage me in a legal question. He did not participate in the kind of rhetoric and scare tactics that the others did. He raised the issue, "Does removal of the word 'injustice' from the piercing of the corporate veil standard make a deleterious change in the law?"

Let me give you an example. The word "injustice" is a word without standard when it is applied in this context. What is the standard of injustice? How do you decide as a jury or as a judge what is unjust? Is it unjust that a small business person who incorporates his business and seeks the protection of limited liability to conduct business as a corporation then borrows too much money from "Mega-Bank, Inc.,", a hypothetical nation-wide bank, and then cannot pay back that money but has a few personal assets of his own. It is unjust that "Mega-Bank, Inc." that loaned the money to the small business person should be able to pierce the corporate veil, particularly, in the context of this small business person who may not have kept all the corporate formalities, may have missed a few minutes of meetings, may have mingled some of his accounts unintentionally. By putting all of those things together and adding injustice in a bankruptcy or other context, they can then pierce through the corporate veil and get the small business person's personal assets. Is that injustice? That is the kind of lack of a standard that is allowed in these cases. The corporate entity should not and does not in Nevada allow a person to sanction a fraud to hide behind the corporate veil while having perpetrated a fraud. A person who seeks to get at the assets of a person who set up a corporation as a fraud should have the corporate veil pierced, disregarded by the court. Under this legislation, Mr. President pro Tempore, you would be able to pierce the corporate veil and get at the personal assets of that person, that scoundrel, if you will, who would use the corporation to his advantage to perpetrate a fraud.

I do not know what to say, Mr. President pro Tempore, to the person who stands upon this floor and argues that it would be preferable for us to raise the personal income taxes of Nevadans and to change the Constitution to do that, to raise the personal property taxes of Nevadans as opposed to, and as a realistic alternative, to raising transactional fees for corporations who use the business offices of our Secretary of State. The latter, the one

that is embodied in this bill, is the better, more prudent, fairer way to raise the money necessary to educate our school children properly.

The comment was made that businesses will have all this difficulty, now, incorporating in Nevada because we have changed the law so radically. I have already refuted each and every one of those arguments, Mr. President pro Tempore. One of the things that was thrown out was, "They will just go to Delaware where there are hundreds of years of case law." Over the last 10 years as I shared with the Judiciary Committee just a few days ago, we have made sure that Nevada's laws are in nearly every respect, except where they are better or newer, similar or identical to Delaware's. Therefore, our new business courts that we have created to help these corporations when they have disputes can look to the jurisprudence of Delaware and its great length of jurisprudence.

This bill represents the essence of the legislative process. That essence is the endeavor to accomplish a fine objective through the art of compromise, through the art of working with the Executive Branch, through the art of working in a bipartisan way to accomplish that objective. It is a good bill. It does no damage. It does no violence to the laws of our State. It has no deleterious effect, whatsoever, on the reputation of this great State. We will continue to grow under it, and finally, Mr. President pro Tempore, it sets the predicate for what our Governor has said, and what our Governor under his leadership has set so firmly in place, that we can address the structural issues regarding our tax structure. We can address the structural issues regarding our budget and regarding the funding of our critical education system. I would urge us to take the first step, to disregard the high rhetoric and to vote this bill on to the other House.

SENATOR CARE:

Thank you, Mr. President pro Tempore. I promise to be brief. I want to emphasize that when I gave my analysis of this bill, I twice qualified my remarks by saying quote, "In my judgment." The law is open to interpretation. My fear is that courts will interpret this bill the way I do.

For example, in the judgment rule, corporate officers and directors, the Chairman I am sure would agree, have a duty to review documents, to have a basis for making their decisions. It is one thing to intentionally shirk that duty; it is another to negligently not do that duty. My concern is there is no recourse here against the officer or director who negligently violates the rule.

Finally, it is easy to stand up and say people say things for some sort of political motive. I know all of you in this Chamber, some of you better than others, but you know by now when I stand here and speak, it is because I damn well mean what I say. Thank you.

SENATOR COFFIN:

Thank you, Mr. President pro Tempore. I will try to be brief. Jokingly, I must say, I have never in this Chamber been accused of high rhetoric if, indeed, you were including me among the others who spoke. I do not know. I am not a lawyer and, unfortunately, I am not a former collegiate debate champion as is the distinguished Judiciary Chairman. He has skillfully restated, in some fashion, all of the arguments he has heard against his measure and refuted them, of course, and then judged himself the winner. You learned a lot in collegiate debate. I wish I could do that. I do not have those kinds of skills.

I do want to correct one thing because I was thinking you were leaving the impression that I was for a State income tax. I will restate again as I did on April 1, 1987, that I am not for, currently, a State income tax, and I am not for, currently, a business tax. I say currently because I could be persuaded if it was the right thing to do, and it may be the right thing to do so we do not have to continue to burden business with its already unfair share of the cost of government in Nevada. You are raising a pittance here but creating a remarkable hole in the wall for all of the corporations that may seek here, but you won't get the good ones; you will get the bad ones. I truly appreciate the statements and the assistance I have received from members of the committee, and I know the Chairman did say this has been carefully crafted, but it has moved as fast as any bill I have ever seen. We just got the white sheets, then the blue sheets and then the white sheets all in an hour, and I still have hardly read the bill. I have abstained in the past on some bills like this, but I think, today, I will just vote against it as carefully crafted as it has been portrayed. I do not think that an impartial judge of this debate would say it was. Thank you.

SENATOR PORTER:

Thank you, Mr. President pro Tempore. I do not have the legal background, and most of us don't, to enter the debate on the merits of the liability portion of this bill. I would like to share with you some of the other discussions that we had during the committee hearings that brought this bill about. If we look at education during the 1950s, 1960s and early 1970s, the challenges for us in the classroom and for teachers were students chewing gum, being late for class, skipping class. But if we fast forward to today, the challenges for education, our families and our children have changed so much that we are now looking at helping children learn about violence. We are teaching them what to do about drive-by shootings in southern Nevada. We are teaching them what to do about violence in the classroom and at home. It has changed so dramatically, that even today a child is in the classroom only about 9 percent of a year. That means 91 percent of the time they are someplace else, whether that is at home, where they should be, on the streets or getting into trouble. There have been a lot of challenges and changes impacting us today.

Southern Nevada is one of the fastest growing schools in the country, and we are trying to hire teachers to fill our classrooms. We heard testimony that we need about 1,200 new teachers in southern Nevada, alone, this year, and we only have 500 to 600. Our entry-level teachers start at $26,800. My wife was an educator for a number of years, nearly 17 years in the school library, but as we heard in testimony, we have garbage collectors and even those parking cars that are being paid far more than our entry-level teachers.

What this bill does is a number of things. It takes care of and helps us with a shortage. It also helps to eliminate some corporate loopholes. I have been very critical of this bill as it has evolved, not as to the merits and desires of plugging a gap for us in education, but because I, too, share the concerns of my colleague from North Las Vegas about small business. We looked at different avenues and different ways and wanted to make certain there would be no harm. We had testimony from the Las Vegas Chamber of Commerce, from the National Federation of Independent Business who spoke about, in concept, their support because they didn't have time to visit all of their members and explain to them the bill. This bill closes some corporate loopholes and changes transaction fees that haven't been adjusted in a number of years. I am not one to increase fees, but I think, this is about closing some corporate loopholes.

There is another element that hasn't been addressed that I mentioned in committee. Parents, moms and dads, and the business community want accountability not only of our teachers but also of where the money is going. They want to make certain that if programs need help, we find a way to support those programs. They also expect that if there are programs that should be eliminated, they, too, should be eliminated. They also expect and demand that money is going to the classroom. That those funds are going to our children and not to a bloated bureaucracy as are some of our districts today. More importantly, we want to make certain we are judging education not on the amount of dollars we are spending but on where the funds are going and if they are being spent wisely. The program the Governor is proposing, the program that Senator James and our committee is proposing, is a result-oriented, need-based program. I would encourage the support of the Senate and this Legislature. I also appreciate the business community that has been e-mailing and calling us, being involved in the discussions, but some of the liability questions that were being argued were brought to us on a hand note in committee last night by a special interest group that is also very concerned. I truly believe that this is the beginning. The business community, the elected officials in this Body and the local governments have committed to take this to another level as far as helping education in our next Session.

Senators Rhoads, Townsend and Rawson moved the previous question.

Motion carried.

The question being on the passage of Senate Bill No. 577.

Roll call on Senate Bill No. 577:

YEAS—18.

NAYS—Coffin.

EXCUSED—Neal, O'Donnell—2.

Senate Bill No. 577 having received a two-thirds majority, Mr. President pro Tempore declared it passed, as amended.

Bill ordered transmitted to the Assembly.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-First Session
May 30, 2001

The Committee on Judiciary was called to order at 7:55 a.m. on Wednesday, May 30, 2001. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Portions of the meeting were simultaneously videoconferenced in Room 4401 of the Grant Sawyer Office Building, Las Vegas. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. Mark Manendo, Vice Chairman
Mrs. Sharron Angle
Mr. Greg Brower
Ms. Barbara Buckley
Mr. John Carpenter
Mr. Jerry Claborn
Mr. Tom Collins
Mr. Don Gustavson
Mrs. Ellen Koivisto
Ms. Kathy McClain
Mr. Dennis Nolan
Mr. John Oceguera
Ms. Genie Ohrenschall

GUEST LEGISLATORS PRESENT:

Senator Maurice Washington, Washoe Senate District 2
Senator Valerie Wiener, Clark Senate District 3
Senator Mark James, Clark Senate District 8
Speaker Richard Perkins, Assembly District 23
Assemblyman David Goldwater, Assembly District 10

Department of Prisons, S.B. 241 was a strong step forward that would include better follow-through on the issue.

MOTION PASSED WITH MS. BUCKLEY, MR. COLLINS, AND MS. McCLAIN ABSENT FROM THE VOTE.

Chairman Anderson asked Mr. Nolan to present the bill on the Assembly floor.

Chairman Anderson entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson repeated his opposition to the bill saying he did not believe there was a need to collect more information. Assemblyman Carpenter said that collecting information, handled in the correct manner, would be a positive step.

A ROLL CALL VOTE WAS CALLED AND THE MOTION PASSED 10-2 WITH MS. ANGLE AND MR. GUSTAVSON VOTING NO, AND MS. BUCKLEY AND MR. COLLINS ABSENT FROM THE VOTE.

Chairman Anderson recessed the meeting at 9:39 a.m.

Chairman Anderson reconvened the meeting at 10:04 a.m., opened the hearing on S.B. 577 and acknowledged Senator Mark James, Clark County Senatorial District 8.

Senate Bill 577: Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

Senator James said legislation had been processed each session updating and upgrading to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country. Senator James gave a brief description of what had happened over the last couple of years in corporate law. It had been a rare occasion when the fees were increased for Secretary of States transactions, the last raise in fees being in 1989. The fee increases in S.B. 577 were modest increases. The intent was to guarantee that Nevada was the "domicile of choice" for corporations around the country. Work was accomplished with the S.C.R. 19 Interim Committee of the Seventieth Session, with recommendations resulting in a number of bills that

had been processed through the Senate Committee on Judiciary. Senator James believed S.B. 577 would generate approximately $30 million in the biennium for the General Fund budget. Senator James reported it was the Governor's desire to utilize these funds to assist in providing raises to the teachers in Nevada.

Senator James said S.B. 577 would accomplish many purposes. He highlighted a number of provisions of the bill and additional key data:

1. Schedule of fees
2. Liabilities of those who serve as directors of corporations as seen in the doctrine of alter ego or piercing the corporate veil
3. 172,000 corporations in Nevada
4. 35,000 bankruptcies last year in Nevada
5. Adherence to the corporate fiction
6. Required corporate formalities

Chairman Anderson interrupted Senator James and indicated that Risa Lang, Committee Counsel, had prepared an *Explanation of Senate Bill No. 577* (Exhibit G). Nick Anthony, Committee Policy Analyst, had prepared a summary on the *Polaris v. Kaplan* Nevada Supreme Court Case (Exhibit H).

Senator James made closing remarks, noting that a Senate amendment deleted the wording, "clear and convincing evidence" leaving the evidence standard at "preponderance of evidence" to show liability under the statute.

Senator James submitted the following exhibits without testimony:
Exhibit I – Video from Senate Judiciary Hearing May 22, 2001
Exhibit J – Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577

Assemblywoman Buckley said she supported the provisions of the bill that increased the fees. As far as the liability provisions, she had lots of questions. In Section 1, where it said a court determined the issues, was it the intent to eliminate the right to a jury trial? Senator James said that was not the intent. Assemblywoman Buckley asked if it was the intent to take the decision away from a jury and place it in the hands of a judge. Senator James said S.B. 577 did not do that. Assemblywoman Buckley reported there had been some legal opinions to the contrary.

Assemblywoman Buckley called attention to provisions applying to the alter ego doctrine and added, "Why would we want to change a good law that said justice was to be the determining factor?" Senator James said many creditors

would also require a personal guarantee in addition to a corporate guarantee. Fraud was not allowed; otherwise there was a predictable rule. That was justice. Assemblywoman Buckley believed "justice" was in the first version that came out of the Judiciary Committee.

Assemblyman Brower agreed with Assemblywoman Buckley's comments, but he was concerned about any lawsuit that might be prohibited as a result of S.B. 577. Senator James countered S.B. 577 prohibited no type of lawsuit.

Assemblyman Oceguera asked why the corporate veil was not predictable. Senator James said the Nevada Supreme Court case in 1987 set the standard, and hundreds of cases had been decided applying that standard.

Assemblywoman Ohrenschall noted the *Polaris* decision proved that corporate fiction was utilized to "sanction fraud or promote injustice." Did that mean there would be immunity unless fraud could be proven? Senator James said S.B. 577 did not provide immunity. The lower courts required proving fraud, while the higher courts only required proof of injustice. Assemblywoman Ohrenschall felt S.B. 577 would "raise the bar" from not needing to demonstrate fraud to absolutely proving fraud. Senator James agreed. Assemblywoman Ohrenschall asked if S.B. 577 eliminated gross negligence or wanton and woeful disregard, standards that came close but were not fraud. Senator James said the liability was to a third party, and they would need to show fraud.

Chairman Anderson noted he had received a conflict notice affecting S.B. 51 that made various changes pertaining to business associations and increased fees for document corrections.

Dean Heller, Secretary of State, said he wanted to read the conflict notice and return an explanation of the conflicts. He did not see it as a major conflict or that it should hold up the bill, but he was willing to work with the committee to resolve any conflicts. Chairman Anderson wanted assurance that the dollars were generated as intended; the Legal Division would compare S.B. 51 and S.B. 577. Mr. Heller said there were new articles in S.B. 51 that were not included in S.B. 577. Ms. Lang said there were three substantive conflicts that would need to be resolved; otherwise S.B. 51 and S.B. 577 would be made consistent.

Michael Bonner, an attorney in Las Vegas, was asked by Senator James to speak on the advantages of corporations choosing Nevada as their domicile. That involved comparing the Nevada statutes to the Delaware statutes. S.B. 577 clarified issues and strengthened protections as detailed in *Nevada*

Revised Statutes (NRS) 78.307. Mr. Bonner suggested that the language "promote injustice" should be deleted.

James Bilbray, former Senator, Chairman of the Senate Committee on Taxation and practicing attorney, had represented clients and sat on public boards where suing directors was used by many people as a method to recover what was perceived as wrong doings. If Nevada wanted more businesses to come into the state, benefits must be offered; protections for the directors was such a benefit.

Assemblyman Carpenter asked if Delaware had in their law what Nevada wanted to put into their statutes. Mr. Bonner said Delaware had a similar version of liability protection; however, Nevada provisions were better.

Assemblywoman Ohrenschall disclosed she was a director of a number of Nevada corporations, and she had assisted in creating many incorporations. Despite that, she would participate and vote.

Kenneth Lange, Executive Director, Nevada State Education Association, spoke in support of S.B. 577.

Chairman Anderson recessed the meeting at 10:56 a.m. to go to the Assembly floor session. The meeting would reconvene at 4:00 p.m. to continue testimony on S.B. 577.

Chairman Anderson reconvened the meeting at 4:15 p.m., made opening remarks, and noted a quorum was present. Chairman Anderson continued the hearing on S.B. 577.

Derek Rowley, President, Corporate Services Center, spoke in favor of S.B. 577. Mr. Rowley voiced concern over rumored changes that could strip the indemnification provisions from the bill, making it a special interest amendment in favor of one or two groups.

Chairman Anderson declared such allegations were not allowed, and he asked who had made such accusations. Special interest legislation was not done. Chairman Anderson took personal affront at Mr. Rowley's remarks and voiced concern about his further testimony.

Mr. Rowley continued his testimony. He said the indemnification provisions were vital to making the package work. Mr. Rowley said Nevada was not for sale with the bill, the bill did not prevent criminal prosecution of corporate officers or directors, the bill did not prevent personal liability of corporate

officers or directors where fraud existed, and the bill did not prevent individuals from holding corporations responsible for damages incurred. What the bill would do was codify the existing Nevada legal decisions and add a new level of predictability to Nevada's corporate statutes.

Mr. Rowley said there was a liability crisis in the country today. The indemnification provisions of S.B. 577 should be kept whether the fees were increased or not. Mr. Rowley believed there were misconceptions that the corporate filings were stable and the revenues from these filings were predictable. The truth was that corporate filings were a barometer of the economy. While an 8 percent annual growth in corporations was estimated by the Secretary of State's office, Nevada experienced a negative growth through the first quarter of 2001. It was not understood how price-sensitive the incorporation industry was today. There was a great deal of competition for new incorporation, and the ease of the Internet made it simple for price comparison from state to state, service for service. Mr. Rowley said he supported S.B. 577 as written, but he could not support S.B. 577 if the indemnification provisions were removed.

Chairman Anderson said S.B. 577 provided an opportunity to take case law and put it into the relevant statute. He asked if that would be objectionable. Mr. Rowley said it would not necessarily be objectionable. In the effort to promote or market Nevada for business purposes, his company was pleased with the current provisions. The impact of the increased fees was unknown; however, to justify those fees, he believed an additional benefit was needed to keep Nevada at the forefront of the incorporation industry.

Assemblywoman Buckley asked if Wyoming had recently raised their fees. Mr. Rowley said Wyoming raised their renewal fees, creating a $40 increase over the original incorporation fees. Assemblywoman Buckley verified that S.B. 577 did not increase the renewal fees. Mr. Rowley agreed. Since the increase in revenue was based on an increase in new corporate filings, it would be necessary to "sell" Nevada on a continuing, on-going basis in order to generate the revenues.

Chairman Anderson asked Mr. Rowley if he was familiar with the *Polaris v. Kaplan* case. Mr. Rowley said he had only read a summary of the case.

Assemblyman Carpenter asked what kind of corporation would be concerned over a $50 difference in fees. Mr. Rowley said the typical "mom and pop" operation or "people with a good idea" made up a vast majority of the Nevada corporations. They were very conscientious about costs, running their business on a shoestring; they were people with a dream.

Assemblyman Brower said there seemed to be a disconnect between "the stick" of increased fees and "the carrot" of the liability law. Mr. Rowley said the language in Section 1 stabilized the expectation of companies regarding indemnification, and it did not change anything the courts were not already enforcing. Section 3, subsection 7, was very important. Assemblyman Brower then asked what the pitch or "the hook" would be when marketing Nevada. Mr. Rowley said he would pitch low fees and costs, the Nevada tax structure, liability protection, and indemnification provisions. The liability protection was a big deal for individuals.

Chairman Anderson said it was clear there was concern about retaining Section 3, subsection 7, as a crucial provision of the bill, and no other additions were needed for the bill. Mr. Rowley had no other concerns about the bill as long as the indemnification provisions were retained in the law.

Assemblyman Carpenter asked if Mr. Rowley had been talking about income tax laws. Mr. Rowley said he was talking about the lack of a state corporate income tax. Assemblyman Carpenter asked if Wyoming had a state corporate income tax. Mr. Rowley replied Wyoming did not. Assemblyman Carpenter asked if Delaware had a state corporate income tax. Mr. Rowley said Delaware had a state corporate income tax of 8.7 percent.

Assemblyman Collins asked what it would cost Nevada if people went to Wyoming to incorporate. Mr. Rowley said the way the bill was currently written, it was not significant if Nevada lost a large number of corporations to Wyoming. An individual who took a corporation to "domesticate" in Wyoming could do so for approximately $200, and Wyoming had provisions in their law that allowed that corporation to carry its corporate history with it as if it had always existed in Wyoming.

Chairman Anderson asked Mr. Rowley if his company would recommend more corporations in Wyoming over Nevada if the fees increased. Mr. Rowley said his sale staff did not make that decision; they provided the information, and the decision was left up to the customer. Chairman Anderson asked if the "mom and pop" corporations understood the indemnification provisions that Mr. Rowley was trying to protect. Mr. Rowley said they might not have a full understanding of those provisions, which was even more reason to have those provisions in place.

John Olive, President, Nevada Association of Listed Resident Agents (NALRA), represented 35 resident agent companies that collectively represented 50,000 to 55,000 corporations organized within the state of Nevada. Mr. Olive spoke

in support of S.B. 577. The value of codifying case law would allow prospective incorporators to assess the likelihood of success in defending themselves in a case in which they might be drawn in as defendants. Mr. Olive said that the indemnification extension would essentially substitute for the lack of heritage of corporate jurisprudence until the business court had sufficient case law to provide a similar depth of jurisprudence as seen in Delaware.

Chairman Anderson asked how the bill would impact the resident agent industry. Mr. Olive said a study was done at the Advanced Research Institute at University of Nevada, Las Vegas to project the impact of the proposed $500 franchise fee. It was determined that the franchise fee would have precipitated an estimated 80 percent exodus of corporations from the state of Nevada. The study would need to be revised with the increase of fees to reflect their impact; it was estimated there would be some reduction in the number of corporations being formed. Chairman Anderson queried, that by offering the limited liability as provided in S.B. 577, how many additional companies would be attracted to Nevada. Mr. Olive quoted growth projections of 12 to 15 percent.

Assemblyman Brower stated Section 2, page 2, would eliminate a current statutory provision that allowed a corporation to include in its Articles of Incorporation certain liability limiting provisions. Mr. Olive agreed. Assemblyman Brower said Section 3, subsection 7, page 3, addressed the same issue, only making it automatic. Mr. Olive agreed. Assemblyman Brower said the bill would then achieve the same result as current law; it would not be a substantive change in the law. The real issue addressed by the bill would then be the alter ego doctrine in Section 1. Mr. Olive said Section 3, subsection 7, might seem redundant with Section 2, but it was the same spirit as Section 1 that codified current case law; Mr. Olive agreed with Assemblyman Brower's assessment of the bill.

Rose McKinney-James, Clark County School District, offered "unqualified" support for S.B. 577. Ms. McKinney-James believed the funding from the bill would be used for salaries for teachers and to fund those programs and services that had been curtailed.

Bob Crowell, Nevada Trial Lawyers Association (NTLA), supported the fee and funding mechanism set forth in S.B. 577, but was concerned about the corporate immunity. S.B. 577 changed the corporate immunity statutes in Nevada in three ways:

1. Codified the alter ego doctrine or piercing the corporate veil, by changing the case law with respect to proof required to pierce the corporate veil.
2. Extended the officers' and directors' immunity currently in Nevada law to other individuals.

3. Shortened the statute of limitations for bringing actions against officers and directors from three years to two years.

Bill Bradley, Nevada Trial Lawyers Association (NTLA), posed a scenario involving Chairman Anderson and Assemblyman Carpenter for purposes of explaining the ramifications of forming and operating a corporation in Nevada, and, unfortunately, of experiencing fraud in their dealings with another corporation.

Pat Cashill, Nevada Trial Lawyers Association (NTLA), said Nevada had 44 years of corporate case law going back to 1957. The key to the judicial history in Nevada on that issue was the court took the position that there was no fixed criteria to use the alter ego doctrine to pierce the corporate veil. The *Polaris* decision talked about a number of factors that "would sanction fraud or promote injustice" and could lead to piercing the corporate veil:

1. Under-capitalization
2. Co-mingling of funds
3. Unauthorized diversion of funds
4. Treatment of corporate assets as individual's own
5. Failure to observe corporate formalities

Mr. Cashill went on to suggest language retentions and deletions in S.B. 577. He was "gravely" concerned and believed it would be bad social policy to enact the bill as written.

Chairman Anderson asked how the "Bubba and the Cowboy" corporation would be affected if S.B. 577 was enacted. Mr. Bradley agreed the corporation would be left "holding the stick." The importance of the *Polaris* decision (Exhibit K) was seen where the Supreme Court elected to follow the "promote injustice" standard. Trying to prove fraud was an extremely tough burden; fraud was a state of mind, and it was tough to prove a state of mind. Mr. Bradley believed it was important to amend S.B. 577 to include the language "or promote injustice."

Assemblyman Brower asked why a criteria "less than fraud" would be allowed to be used as the standard to pierce the corporate veil. Mr. Crowell said it was difficult to articulate what constituted fraud or the various circumstances that might lead to or give rise to an injustice sufficient to pierce the corporate veil. He believed the Supreme Court answered that question on page 3, Section [2][3] of Exhibit K where it stated, "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." The *Polaris* decision continued on the top of

page 4 of Exhibit K, "There is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." Mr. Bradley said there were circumstances where it "may not be fraud," but you knew it was wrong. Assemblyman Brower said, "If it walks, talks, and swims like fraud you should be able to prove fraud."

Assemblyman Collins reminded the committee to look at the bigger issue of S.B. 577. Was the issue to deal with the *Polaris* decision or find money for the teachers? Mr. Bradley was in support of funding teacher salaries; however, it was not necessary to significantly change a strong 50-year judicial doctrine in order to accommodate that fee increase. That was why NTLA was offering an amendment.

Assemblyman Manendo asked if S.B. 577 had been in place a couple of years ago, how would that have affected the "Harley Harmon incident" in southern Nevada? Mr. Cashill said the current language in Section 3, subsection 7, page 3, provided immunity to officers or directors for any action committed as an officer or director. He did not believe it was the intent to extend immunity "that far." Mr. Cashill suggested some "limiting" language should be inserted that would limit the immunity to corporate activities in a legitimate sense. Mr. Bradley said Section 3, subsection 7, stated, "unless otherwise provided in NRS..." and that included mortgage and securities issues; there was some protection because it referred to existing provisions in the NRS. Without an amendment, Section 3, subsection 7, would eliminate third party damages, and that was not the intent. Mr. Cashill said there was an inconsistency between existing law in Section 2 that limited the liability and Section 3, subsection 7 that seemed to extend unlimited immunity.

Assemblywoman Buckley asked, when viewing the issue of fraud versus injustice, what definition of fraud would be used if the language of S.B. 577 was approved. Would it be the common law definition of fraud or the definition in NRS 42.001? Mr. Cashill said in the case *Lubey v. Barba* the common law definition was used as a standard. He did not know whether the statute or the common law definition would apply in any case. Assemblywoman Buckley said perpetrators of fraud could "get away with it" by saying there was "no intentional misrepresentation" to deprive a creditor. Mr. Cashill agreed.

Assemblyman Brower disagreed, saying he believed, in a case of "looting the corporation," fraud could be proven. Assemblyman Brower said Section 3, subsection 7, did not give unlimited immunity because it said, "unless it was proven there was fraud, intention misconduct or known violation of the law." Mr. Crowell disagreed with Assemblyman Brower and submitted an amendment

(Exhibit M) that clarified a director could not be shielded from liability for acts outside the corporation, which left intact the rights of a third party.

Chairman Anderson asked for an explanation of the Loomis letter (Exhibit L). Mr. Cashill recalled the circumstances of the case and subsequent judgment against Lange Financial Corporation. The Loomis family had great difficulty collecting the judgment amount, but was able to use the alter ego doctrine to reach through numerous corporate shells to reach the assets of the corporation in order the satisfy the judgment.

Mr. Crowell made closing statements regarding the proposed amendment (Exhibit M) from the NTLA. It included five sections:

1. Rewrote Section 1 using language drawn directly from the *Polaris* decision.
2. Amended language in Section 3, subsection 7, to clarify that the immunity from liability extended to an officer or director only "to the corporation or its stockholders" and to include the word "or" when listing the two actions that might cause liability.
3. Changed the effective date language to include "shall apply to claims that arise after October 1, 2001" in Section 59, subsection 2(b).
4. Changed Section 8 to restore the statute of limitations to three years.
5. Deleted Section 55 since legislative intent should not be a part of the bill.

Chairman Anderson asked if the proposed amendment (Exhibit M) had been shared with Senator James. Mr. Cashill said they "talked."

Assemblyman Oceguera asked for clarification from Mr. Bradley concerning comments made relating to Section 2, and to Section 3, subsection 7. Mr. Bradley reiterated the changes as outlined in the NTLA proposed amendment (Exhibit M).

Assemblyman Carpenter said on page 3, line 21, the NTLA proposed to delete "unless it is proven that," and asked why would the NTLA want that taken out. Mr. Bradley said that was a typo; it was their intent to retain that language.

Chairman Anderson clarified the language of the proposed amendment and asked the NTLA to submit a clean copy with any additional changes.

Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO), said Clark County had a critical need for 1,200 new teachers in 2001-2002, but they had only been able to recruit 500. Mr. Thompson shared statistics regarding high school dropouts, prison inmates, low teacher salaries, portable classrooms, and

lack of books. The problem could not wait; it needed to be solved in the current session. The problem was not going away!

Dave Howard, Reno-Sparks Chamber of Commerce, spoke in support of S.B. 577 with some reservations; he felt the bill did not do enough. Although it was believed that the bill was written to attract new corporations to Nevada, no one had discussed attrition if the economy "goes down the dumps;" there was no guarantee that the economy would continue to encourage growth. And even though Mr. Crowell said the bill would not be retroactive, Mr. Howard felt the provisions of the bill would also apply to those who were already incorporated.

Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce, spoke in support of S.B. 577 as written. She said it was a first step to finding a solution to help teachers obtain a salary increase without negatively impacting the economy and disproportionately hurting small businesses. The Las Vegas Chamber of Commerce and the business community recently completed a position paper outlining their intention to work during the interim to find a tax package that would fulfill the state's financial needs over the next ten years.

Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada, said S.B. 577 contained a very serious issue. Mr. McMullen spoke in support of the bill, but he did not believe it needed an amendment. He reiterated his commitment to work during the interim on a package to be presented to the legislature at the Seventy-Second Session. Mr. McMullen said the bill had been looked at from both sides, as defendants and as plaintiffs, and he believed it to be a fair statement of the law, one that needed to be secured and passed in its current form. He said the real issue was sanctioning fraud; promoting justice was vague and too broad.

Chairman Anderson asked if Mr. McMullen had heard the testimony of the Secretary of State regarding the conflicts between S.B. 51 and S.B. 577. Mr. McMullen said he did not have a problem with conflict amendments; he did have a problem with changing the bill as written. Chairman Anderson stated there were time factors in the bill that may have led to a misunderstanding of the real intent of the bill. Mr. McMullen said he had no problems with the effective date of the law relating to claims. Chairman Anderson asked if Mr. McMullen participated in the drafting of the bill. Mr. McMullen said he had not.

Assemblyman Collins reiterated his question related to the "real issue" under discussion. Was it a test or was it a precedent with strings? Mr. Collins asked, "Are we doing the right thing?" Mr. McMullen said the real question should be,

"How do we guarantee that we actually get out of this bill what we said we were going to get out of it?" In order to increase fees, new provisions were necessary to drive revenue, to secure it, and to expand it in the future.

Assemblywoman Buckley verified the fees that would increase and those that would remain the same. It was good to be a business-friendly state; it was good for the economy. She questioned why an $80 increase required the kind of immunity provisions that could hurt other Nevada businesses? Mr. McMullen did not believe those immunity provisions would hurt any existing Nevada businesses; they were good for Nevada business. In his judgment, he did not think the trade was $80 for those provisions; rather, it was a resolution of budget issues, a marketing tool, and a clarification of current law.

Assemblyman Brower said he did not see the linkage between the fee increase and the change in policy. Regardless of whether the fees were increased, the proposed change in the law was a good policy change for Nevada. Mr. McMullen confirmed that would be good for Nevada. What people wanted most of all was to know what the rules of law were. It would be good for new corporations and would be clarification for existing corporations.

Chairman Anderson asked if Delaware or any other state had similar provisions. Why not take case law and put that into statutory provision? Mr. McMullen said Delaware did have more case law to rely on, but that might not be the question. It was easy for Delaware to attract corporations, especially on the east coast. Nevada needed to create a better attraction for corporations.

Chairman Anderson said the advantage of case law was that once it was on the books, it was there. Like common law, you could continue to make reference to it as it continued to evolve. Case law became a much more reliable predictor of behavior in a litigant society. Mr. McMullen disagreed. The issue was whether or not the stream of revenue was secured. Out-of-state corporations did not want case law to be a determining factor, as they could be the next case. Those corporations wanted to know that the rules were secure. Chairman Anderson said the question was then whether public policy should be put at-risk to fund education. Mr. McMullen did not think there was any risk; it was a clear statement of the policy.

Mary Lau, Executive Director, Retail Association of Nevada, said the issue of increased fees had been brought forward previously without result, and now that issue was being revisited.

Chairman Anderson asked for further testimony. There being none, he announced the committee would be recessed until 9:30 a.m. tomorrow

morning. The testimony phase was at an end. The committee was waiting for additional information from the Legal Division regarding the fiscal impact and those sections in conflict.

Assemblywoman Koivisto asked, if it was such good policy, why had it never come up before. The question was discussed among committee members. Chairman Anderson queried about an interim committee study done by Senator James. Assemblyman Brower was not aware of any Bill Draft Request (BDR) recommendation nor did he recall it being a discussion topic at any of the meetings. Assemblyman Manendo said the interim study committee broke into several panels, and the issue was not raised on his panel.

Ray Bacon, Nevada Manufacturers Association, said during the Business Law Committee, chaired by Mr. Taylor, discussed adding certainty to the law in two separate subcommittees. Mr. Bacon did not recall that specific issue being discussed.

Mr. McMullen said those types of issues were discussed, but until raising fees became a viable option, the counterbalance of those provisions was not necessary.

Chairman Anderson recessed the meeting at 6:46 p.m. until 9:30 a.m. the next morning.

Chairman Anderson reconvened the meeting at 10:00 a.m., the following day, made opening remarks, and noted a quorum was present. Discussion of S.B. 577 resumed.

Chairman Anderson drew attention to a letter from the Secretary of State's office (Exhibit N) that was submitted in response to the request made by the committee. The letter brought clarity to the provisions of S.B. 577 as to when the various sections would apply and why there were different dates for implementation.

Chairman Anderson announced a short recess to handle trouble with the Internet connection; the meeting reconvened in three minutes.

Renee Lacey, Chief Deputy, Secretary of State, said currently initial lists were currently not required for LLCs, LPs, and entities other than corporations; they only filed annual lists. S.B. 51 would require them to submit initial lists, resulting in the need for additional staff in order to maintain the 10-day money-back guarantee.

Chairman Anderson cautioned that conflicts might exist between S.B. 51 and S.B. 577 that would require amendments to make them consistent. As such, the dollar amounts currently in S.B. 577 might not be in the final draft. Mr. Lacey said that issue had been discussed with the Legal Division that would be preparing the amendment. Ms. Lang said S.B. 51 had already been enrolled, but would be amended to be consistent with S.B. 577.

Assemblywoman Buckley said the appropriation in Section 58 seemed excessive. Ms. Lacey said new positions had been discussed with the Fiscal Division, and most would come out of the Special Services Funds. The request to use those Special Services Funds for technology or positions in the office had to go through the Interim Finance Committee. The appropriation in Section 58 came from the portion that went into the Special Services Fund and not from the portion of the increased fees that would go to the General Fund to assist the teachers. Anything over $2 million that remained in the Special Services Fund at the end of the fiscal year went to the General Fund. The appropriation also included estimated funding for leased space. The additional staff, besides reviewing forms and preparing for the new services and the additional review required by the new services, would also staff a counter service that would provide a 2-hour and 24-hour expedited document service.

Assemblywoman Buckley asked why that funding had not been included in the separate bill where the new services were proposed and the new staff was requested. Ms. Lacey said requiring the new lists for LLCs and LPs was a new service not previously proposed. The Secretary of State's budget had been closed; 20 new positions were requested, and the Assembly Committee on Ways and Means approved 12. The Committee on Ways and Means asked the Secretary of State's Office to obtain funding for the remaining staff through S.B. 577 since the additional staff would be needed for the proposed services in the bill.

Assemblyman Manendo asked why the proposed amendment by the NTLA was approved by the Senate Judiciary Committee and then was taken out. Chairman Anderson verified that the proposed amendments presented to the committee were the same amendments that had been presented in the Senate. Mr. Crowell said the amendment presented in the Senate had been slightly different; it had been passed and then reconsidered the next day. He did not know why. Chairman Anderson requested that the amendment be redrafted, with a clean copy provided to the committee. Mr. Crowell submitted a new copy of the proposed amendment (Exhibit O) for the committee's consideration.

Chairman Anderson recessed the meeting at 10:26 a.m. to be reconvened upon the call of the Chair. There being no further business on that day, the meeting was adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:

Deborah Rengler by cc

Deborah Rengler
Committee Secretary

APPROVED BY:

Bernard J. Anderson, Jr.

Assemblyman Bernie Anderson, Chairman

DATE: July 10, 2001

4774

EXPLANATION OF SENATE BILL No. 577
(First Reprint)
(Prepared by the Legal Division)

Senate Bill No. 577 makes various changes concerning business associations.

Section 1 of S.B. 577 adds a new section to chapter 78 of NRS, which governs private corporations, to limit generally the common-law and statutory liability of corporate stockholders, directors and officers under certain circumstances. This section specifically provides that corporate stockholders, director or officers are immune from individual liability unless: (1) otherwise provided by specific statute; (2) otherwise provided by an agreement entered into by the corporate stockholder, director or officer; or (3) a court finds, in part, that the corporation and the stockholder, director or officer are inseparable and that adherence to the corporate fiction of a separate entity would sanction fraud. The intent of the Legislature in enacting this section is to codify the equitable doctrine of the common-law known as "piercing the corporate veil," "alter ego" or "disregarding the corporate fiction." In addition, it is the intent of the Legislature to change this equitable doctrine so that a director, officer or stockholder of a corporation may not be made individually liable for a debt or liability of the corporation unless the court finds that the director, officer or stockholder of the corporation actually committed fraud in connection with the debt or liability. (See section 55 of the bill.)

Section 2 of S.B. 577 amends NRS 78.037 to remove a provision authorizing the articles of incorporation of a corporation to contain a provision eliminating or limiting the personal liability of a corporate stockholder, director or officer under certain circumstances.

Section 3 of S.B. 577 amends NRS 78.138 to authorize corporate directors and stockholders to rely on certain information, including, without limitation, opinions, reports, and books of account or statements that are prepared or presented by financial advisers, valuation advisers and investment bankers as to matters believed to be in that person's professional or expert competence. Further, this section provides that a corporate director or officer is generally not individually liable for any act or failure to act in his official capacity unless it is proven that his act or omission constituted a breach of his fiduciary duties or involved intentional misconduct, fraud or a knowing violation of law.

Section 4 of S.B. 577 amends NRS 78.150 to require a corporation to include the name and street address of the resident agent of the corporation on the form filed with the secretary of state. In addition, each list required to be filed pursuant to this section is required to be accompanied by a declaration that the corporation has complied with the provisions of chapter 364A which governs business taxes. This section also sets forth a fee that must accompany one of the lists.

Section 6 of S.B. 577 amends NRS 78.170 to increase the penalty required to be paid by a defaulting corporation. Section 7 of S.B. 577 amends NRS 78.180 to increase

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the fee that a defaulting corporation must pay for reinstatement. Section 8 of S.B. 577 amends NRS 78.300 to make various changes concerning the liability of corporate directors for unlaw distributions.

Section 9 of S.B. 577 amends NRS 78.7502 to provide that a corporation may indemnify certain persons if they are not liable pursuant to NRS 78.138.

Section 10 of S.B. 577 amends NRS 78.760 to increase the fee for filing certain articles of incorporation. Section 11 of S.B. 577 amends NRS 78.765 to increase the fees for filing a certificate changing the number of authorized shares, a certificate amending the articles of incorporation and a certificate of correction. Section 12 of S.B. 577 amends NRS 78.767 to increase the fee for filing a certificate of restated articles of incorporation. Section 13 of S.B. 577 amends NRS 78.780 to increase the fee for filing a certificate of dissolution. Section 14 of S.B. 577 amends NRS 78.785 to amend various miscellaneous fees.

Section 15 of S.B. 577 amends NRS 80.050 which is in the chapter concerning foreign corporations, to increase the fee for filing a notice of withdrawal from the State of Nevada by a foreign corporation.

Section 16 of S.B. 577 amends NRS 80.110 to require a list of officers and directors filed by a foreign corporation to be accompanied by a declaration that the corporation has complied with the provisions of chapter 364A of NRS concerning business tax. In addition, this section requires a corporation to pay a fee when filing such a list.

Section 18 of S.B. 577 amends NRS 80.150 to increase the penalty for a defaulting foreign corporation. Section 19 of S.B. 577 amends NRS 80.170 to increase the fee that a defaulting foreign corporation must pay for reinstatement.

Section 20 of S.B. 577 amends NRS 86.263 in the chapter concerning limited liability companies, to require such a company to include the name and street address of the resident agent of the company on the form filed with the secretary of state. In addition, each list required to be filed pursuant to this section is required to be accompanied by a declaration that the limited liability company has complied with the provisions of chapter 364A which governs business taxes. This section also sets forth a fee that must accompany one of the lists.

Section 22 of S.B. 577 amends NRS 86.275 to increase the penalty for a defaulting limited liability company. Section 23 of S.B. 577 amends NRS 86.276 to increase the fee that a defaulting limited liability company must pay for reinstatement. Section 24 of S.B. 577 amends NRS 86.561 to increase miscellaneous fees collected by the secretary of state from a limited liability company.

Section 25 of S.B. 577 amends NRS 87.440 to increase the fee that a registered limited liability partnership is required to pay with its certificate of registration. Section

26 of S.B. 577 amends NRS 87.460 to increase the fee that a registered limited liability partnership is required to paid when filing a certificate of amendment. Section 27 of S.B. 577 amends NRS 87.470 to increase the fee required by a registered limited liability partnership when filing a written notice of withdrawal. Section 28 of S.B. 577 amends NRS 87.490 to increase the fee required when such a partnership files a certificate of change of location or resident agent.

Section 29 of S.B. 577 amends NRS 87.510 to require a registered limited liability partnership to include the name and street address of the resident agent of the partnership on the form filed with the secretary of state. In addition, each list required to be filed pursuant to this section is required to be accompanied by a declaration that the partnership has complied with the provisions of chapter 364A which governs business taxes. This section also sets forth a fee that must accompany one of the lists.

Section 30 of S.B. 577 amends NRS 87.520 to increase the penalty required to be paid by a defaulting registered limited liability partnership. Section 31 of S.B. 577 amends NRS 87.530 to increase the fee that a defaulting registered limited liability partnership must pay for reinstatement. Section 32 of S.B. 577 amends NRS 87.550 to increase miscellaneous fees paid by registered limited liability partnerships to the secretary of state.

Section 33 of S.B. 577 amends NRS 88.395 to require a limited partnership to include the name and street address of the resident agent of the partnership on the form filed with the secretary of state. In addition, each list required to be filed pursuant to this section is required to be accompanied by a declaration that the partnership has complied with the provisions of chapter 364A which governs business taxes. This section also sets forth a fee that must accompany one of the lists.

Section 34 of S.B. 577 amends NRS 88.400 to increase the penalty required to be paid by a defaulting limited partnership. Section 35 of S.B. 577 amends NRS 88.410 to increase the fee that a defaulting limited partnership must pay for reinstatement. Section 36 of S.B. 577 amends NRS 88.415 to make various changes concerning the liability of directors of limited partnerships for unlaw distributions.

Section 37 of S.B. 577 amends NRS 88A.600 to require a list of officers and directors filed by a business trust to be accompanied by a declaration that the business trust has complied with the provisions of chapter 364A of NRS concerning business tax. In addition, this section requires a business trust to pay a fee when filing such a list.

Section 38 of S.B. 577 amends NRS 88A.630 to increase the penalty for a defaulting business trust. Section 39 of S.B. 577 amends NRS 88A.650 to increase the fee that a defaulting business trust must pay for reinstatement. Section 40 of S.B. 577 amends NRS 88A.900 to increase miscellaneous fees paid by business trusts to the secretary of state.

Section 41 of S.B. 577 amends NRS 89.210 to increase fees paid to the secretary of state by a professional association for filing articles of association and amendments.

Section 42 of S.B. 577 amends NRS 89.250 to require a list of officers and directors filed by a professional association to be accompanied by a declaration that the professional association has complied with the provisions of chapter 364A of NRS concerning business tax. In addition, this section requires a professional association to pay a fee when filing such a list.

Section 43 of S.B. 577 amends NRS 89.252 to increase the penalty for a defaulting professional association.

Section 44 of S.B. 577 amends NRS 89.256 to increase the fee that a defaulting professional association must pay for reinstatement.

Section 45 of S.B. 577 amends NRS 92A.190 to increase the fee charged in a merger or exchange.

Section 46 of S.B. 577 amends NRS 92A.210. The changes to this section were to move the fees for filing articles of merger of domestic corporations which were in NRS 78.770 (repealed in section 54 of this bill) into NRS 92A.210 because this appears to be a more appropriate place to list these fees.

Section 47 of S.B. 577 amends NRS 116.3103 to remove the insulation from liability provided to officers and members of a executive board of a common-interest community.

Section 48 of S.B. 577 amends NRS 225.140 to provide that certain fees charged by the secretary of state for providing special or expedited services must be deposited in the account for special services of the secretary of state in the state general fund and that the remainder must be deposited for credit to the state general fund.

Section 49 of S.B. 577 amends NRS 600.340 to increase the fee to register a trademark, tradename or service mark in this state. Section 50 of S.B. 577 amends NRS 600.355 to increase the fee for correcting the registration of such a mark. Section 51 of S.B. 577 amends NRS 600.360 to increase the fee for removing the registration of such a mark. Section 52 of the bill amends NRS 600.370 to increase the fee for assigning such a mark. Finally, section 53 of the bill amends NRS 600.395 to increase the fee for canceling the registration of such a mark.

Section 54 of S.B. 577 repeals NRS 78.770 concerning the fees for filing articles of merger of domestic corporations because these fees are moved to NRS 92A.210 (sec. 46).

Section 58 of S.B. 577 transfers money from the account for special services of the secretary of state to the secretary of state's operating general fund budget account.

Polaris v. Kaplan

Supreme Court of Nevada
747 P. 2d 884

ISSUE

On appeal to the Nevada Supreme Court, the issue was whether a salesman and a corporate shareholder officer could be held personally liable, for the debts of the corporation, under the alter ego doctrine. While the court declined to extend liability to the salesman under the facts of the case, the main issue centered on the liability of the shareholder officer.

FACTS

Polaris was an Ohio corporation that manufactured and sold wire products to NMS. By March 1978, NMS owed Polaris over $50,000 and was behind on payments. NMS then issued a promissory note for the outstanding balance.

NMS sold toy distributorships and incorporated in 1976. Bob Davis and Michael Kaplan were the sole shareholders and officers of the corporation. In 1978, NMS ceased its business operations, with a negative equity of over $150,000.

Davis and Kaplan then formed a new corporation, CRI, to sell health and beauty aid distributorships. They were again the sole shareholders and officers. Facts in evidence indicated that Kaplan and Davis did not always follow normal corporate procedures. Both NMS and CRI paid the personal obligations of the officers and unnumbered counter checks were often issued to Davis and Kaplan.

CRI did business in the same location as NMS and used the same bank. It also took assignment of NMS's assets and assumed NMS's liabilities. CRI informed Polaris it had assumed NMS's note; however, Polaris received only one payment. Polaris then brought suit on the promissory note.

RULE

The court enumerated three general requirements for application of the alter ego doctrine: (1) the corporation must be influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice. *McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957).

Further, the court stated that it is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. *Gordon v. Aztec Brewing Company*, 33 Cal.2d 514, 203 P.2d 522, 527 (1979).

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT H
Date 5/30/01 Pages 2
Submitted by
PA002156

ANALYSIS

The court reasoned that CRI's officers treated corporate funds as their own by making bank withdrawals in the form of advances to themselves, for their personal benefit, at a time when the corporation had few real assets and a negative net worth. Further, they found Polaris was damaged because these actions left the corporation without funds to repay the debt.

HOLDING

The court ruled in favor of Polaris and held Kaplan (as shareholder officer) personally liable for the corporation's obligation on the promissory note.

W12926

NEVADA LEGISLATURE

Memo

From the desk of . . .

MARK A. JAMES
Senator, Clark No. 8

Kelly -

These are exhibits from this morning's meeting on SB 577. Thanks - Stephanie

3800 Howard Hughes Parkway, Las Vegas, Nevada 89109

Exhibit I (VIDEO)

Submitted by

Senator James

4801

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ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT I
Date 5/30/01 PA002158 Page 1 of 1
Submitted by SENATOR James 187

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Meeting: Senate Judiciary TRT: 2:35:34 SP LP EP Master Copy

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I 2 OF 2

Via Facsimile: (775) 684-6531
Email: mjames@sen.state.nv.us

May 30, 2001

Senator Mark A. James, Chairman
Senate Committee on Judiciary
Nevada State Senate
401 South Carson Street
Carson City, NV 89701

Re: Proposed Amendments to Directors Liability Statute

Dear Senator James and Members of the Committee:

Thank you for this opportunity to present my thoughts concerning certain proposed amendments to the Nevada Statutes pertaining to the liability of Officers and Directors under Nevada Law.

By way of background, I currently serve as a director of four public companies, Craig Corporation ("Craig"), Citadel Holding Corporation ("Citadel"), Reading Entertainment, Inc. ("Reading") and G&L Realty, Inc. ("G&L"). I am also a director of Fidelity Federal Bank, FSB, which is the wholly owned subsidiary of Bank Plus Corporation. Craig, Citadel and Reading are each Nevada corporations. G&L is a Maryland corporation, and Bank Plus is a Delaware corporation. Craig and G&L are listed on the New York Stock Exchange. Citadel is listed on the American Stock Exchange. Reading and Bank Plus are quoted on the NASDAQ Stock Market. Prior to my association with Craig, I was a partner, specializing in corporate and securities law, with Gibson, Dunn & Crutcher, in Los Angeles. Prior thereto, I served as a law clerk to Justice Dean Bryson on the Oregon Supreme Court, and graduated *Magna Cum Laude* from Harvard Law School in 1976.

Over the years, I have been involved as a lawyer, officer or director in a variety of extra-ordinary corporate transactions. In many cases, those transactions have resulted in litigation. To the best of my recollection, in no case, has such litigation resulted in the overturning of the transaction involved, a finding of ultimate liability on the part of any director or, in my view, any meaningful benefit to the members of the plaintiff class. In my

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550 South Hope Street, Suite 1825, Los Ang

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT J
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Submitted by SENATOR JAMES

view, many corporation codes currently are insufficient to reasonably protect independent directors from harassment lawsuits brought by professional plaintiff's counsel primarily with an eye to producing revenues for the law firms involved and with little interest in or likelihood of producing any significant benefit to stockholders.

By way of example, as a director, I am currently a named defendant in three lawsuits, in each case brought by a professional plaintiff's counsel. These lawsuits have been brought notwithstanding the fact that great care was taken to assure the fairness of the transactions involved, notwithstanding the fact that the transactions were approved by special committees comprised of disinterested directors, notwithstanding the representation of such committees by experienced legal counsel and notwithstanding the fact that, in each case, fairness opinions were rendered by reputable financial advisors. In one case, Alphin v. Cotter, et al., Philadelphia County Court of Common Pleas, Trial Division, Case No. 01138, the lawsuit was filed on the basis of the company's press release announcing the anticipated transaction and prior to either the consideration of the transaction by the company's stockholders, or even the circulation of the definitive proxy materials describing the transaction. In other words, the lawsuit was filed even before the plaintiff's counsel had received the materials describing the details of the transaction and the special committee's reasons for recommending the transaction to the company's stockholders. The trial court has entered summary judgment in favor of all defendant directors, however, that case has been pending for more than four years, is currently on appeal by the plaintiff's counsel, and has resulted in the deposition of myself and all of the other directors of the company.

The other two lawsuits both grow out of a possible management buy-out of G&L. These two lawsuits, one in California and one in Maryland, were filed even before any determination was made by the special committee of disinterested directors whether or not to accept management's buy-out proposal. In short, the lawsuits were brought based on the press release by G&L that a management buy-out proposal had been received and was being considered by the special committee, and notwithstanding the fact that any such transaction would be subject to the approval of the stockholders of G&L. In essence, this is the same as someone suing you based on the fact that you had just bought a sports car and that they feared that you might get into an accident involving a third party.

As I am trained as a corporate attorney, I am perhaps less concerned about being named as a defendant in cases of this type than would be someone not similarly trained. I rely on the fact that, so long as I do things right, I will ultimately be vindicated. However, this is

not a view necessarily shared by people less familiar with litigation. Also, cases of this type can adversely affect the credit rating of the directors named in such cases. I am concerned that individuals who would make excellent directors are deterred from serving in these positions as a result of the fact that they can be, and today often are, sued with impunity, whenever an extraordinary corporate transaction is contemplated by the company they serve. There should be some way to balance the scales.

One good way to balance the scales would be to adopt the currently proposed revisions to the statute on director liability. In essence, this assures directors that, unless they are guilty of intentional misconduct, their personal net worths will not be at risk when they attempt to carry out their duties as directors. Given the size of many of the transactions on which the directors of a public company are required to vote, the financial risk to the directors can be significant. It is to be noted that it is not unusual for plaintiff's attorneys to allege multi-million dollar claims against outside directors who will receive no benefit from the transaction other than their directors' fees. If any of these claims were to come home to roost, it could mean financial ruin for the directors involved. This obviously gives plaintiff's counsel considerable leverage to attempt to coerce a nuisance settlement from the company's board of directors.

The introduction of a "clear and convincing" burden of proof would be very helpful in protecting directors from harassing suits, and require plaintiff's counsel to really think out his or her case. In addition, by expanding the list of experts referred to NRS 78.138(2)(b) to include financial advisors, investment bankers and valuation advisors, directors are given clear direction as to the scope of consultants they may rely on in making their decisions.

I believe that another good way to balance the scales is to put plaintiff's counsel at some financial risk, if they choose to proceed in the face of a prima facie case of fair and reasonable action on the part of the defendant directors. At the present time, a strike law firm has no downside risk in bringing a case other than the amount of time that the lawyers at the firm invest in the case. These law firms often do minimal work, and rely on their ability to settle for nuisance value and to collect a quick fee, rather than on their ability to ultimately win at trial.

Although a provision to address this nuisance caused by strike law firms is not a part of the proposed revisions to Chapter 78 of the Nevada Revised Statutes, I would recommend that such a provision be drafted and included as part of a bill for the next legislative session.

In making this recommendation, I suggest that it is not unfair to allow officers and directors to recoup their attorneys' fees from such a plaintiff's counsel, if that counsel fails to prove his or her case. This is, in essence, the rule in major commercial centers such as London, and elsewhere in the English Commonwealth. It will at least assure that strike lawyers do a little homework and research before bringing cases, and, hopefully, stop such counsel from bringing cases based solely on a press release that a company is considering a possible transaction or that a company may be presenting a possible transaction to its stockholders for their consideration. Alternatively, consideration might be given to a statute which:

(a) mandates the recoupment of litigation costs where the plaintiff's case fails to make it out of the pleading stage, or where summary judgment is entered in favor of the defendants; and

(b) gives the judge discretion to award attorney's fees in cases in which the plaintiff fails to prevail at trial.

Further, if a transaction is approved by a majority of the disinterested directors of a company, and if the action of those disinterested directors was supported by a fairness opinion, and if the firm issuing that fairness opinion was selected in a commercially reasonable manner by the disinterested directors, then it seems to me that it is likewise not unfair (i) to establish a presumption that the transaction was in fact fair, and (ii) to require plaintiff's counsel to post a bond in the amount of the anticipated litigation costs and expenses of the defendant officers and directors. Again, it seems to me to be a reasonable goal to balance the playing field that currently exists between plaintiff's counsel and the directors and officers of a company, so that directors know that they have some recourse if they are wrongfully accused of improper behavior and so that plaintiff's counsel knows that it must to do some homework prior to filing a complaint, or be at financial risk. At the present time, these individuals have no recourse and there is no downside to the filing of completely unresearched and spurious complaints by plaintiff's counsel.

As to the proposal to codify and increase the standard for piercing the "corporate veil," I believe that it is a good one. Since many corporations operate through a variety of operating subsidiaries, there is always an issue as to whether these entities will be respected. I think that a statute such as this would be helpful; since it raises the bar for piercing the "corporate veil" to a showing of fraud by "clear and convincing" evidence and it would give corporations operating through subsidiaries greater certainty that the corporate separateness of such entities would be honored. If such a standard were adopted, it would be my recommendation that we reincorporate all of our various subsidiaries in Nevada.

I believe that the changes currently contemplated would increase the attractiveness of Nevada as a state of incorporation for major public companies. I further believe that the adoption of such changes would mitigate the negative impact of increasing the fees assessed against companies choosing to incorporate in Nevada.

Should you have any questions, please feel free to contact me at (213) 239-0555.

Sincerely,

S. Craig Tompkins
President

*884 747 P.2d 884

103 Nev. 598

Supreme Court of Nevada.

POLARIS INDUSTRIAL CORPORATION d/b/a Dayton Wire Products, Appellant,
v.
Michael KAPLAN, and Jerome Kaplan, Respondents.
No. 16574.
Dec. 29, 1987.

Promisee brought action on promissory note against original corporate promisor, corporation that assumed promisor's obligation, and corporations' two shareholders officers, who were alleged to be alter egos of corporations. Following summary judgment for promisee against corporations, promisee amended complaint to add as defendants third corporation and salesman, alleging they, too, were alter egos of promisor corporations. After third corporation and one shareholder officer defaulted, the Eighth Judicial District Court, Clark County, Thomas J. O'Donnell, J., entered judgment for salesman and remaining shareholder officer, and promisee appealed. The Supreme Court, held that: (1) salesman who never had interest in or influence over promisor corporations was not corporations' alter ego so as to be liable for corporations' debt, and (2) findings that shareholders officers cashed numerous unnumbered counter checks for their personal benefit, that these withdrawals further thinned capitalization of corporation at time when corporation's obligation on promissory note was not being paid and that corporation had little real assets and negative net worth mandated conclusion that remaining shareholder officer was corporation's alter ego personally liable for corporation's obligation on promissory note.

Affirmed in part; reversed in part.

West Headnotes

[1] Appeal and Error ⚿842(2)
30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(2) Findings of Fact and Conclusions of Law.

[See headnote text below]

[1] Appeal and Error ⚿1010.1(5)
30 ----
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in Support
30k1010.1 In General
30k1010.1(5) Reasonably Supported Findings.

Judgment based on conflicting evidence will not be disturbed when supported by substantial evidence, unless wrong conclusion was clearly reached.

[2] Corporations ⚿1.4(4)
101 ----
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(4) Instrumentality, Agency, or Alter Ego.

Alter ego doctrine only applies when corporation is influenced and governed by person asserted to be alter ego, there is such unity of interests and ownership that one is inseparable from other and facts are such that adherence to corporate fiction of separate entity would, under circumstances, sanction fraud or promote injustice.

[3] Corporations ⚿1.4(4)
101 ----
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(4) Instrumentality, Agency, or Alter Ego.

Party seeking application of alter ego doctrine need not prove actual fraud, but rather, that recognition of two entities as separate would result in injustice.

[4] Corporations ⚿1.6(7)
101 ----
101I Incorporation and Organization
101k1.6 Particular Occasions for Determining Corporate Entity
101k1.6(7) Liens, Bonds, Notes and Mortgages.

Absent evidence that salesman ever had any interest in or influence over corporations, salesman was not corporations' alter ego liable for corporations'

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obligation on promissory note.

[5] Corporations ⚿1.4(4)
101 ----
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(4) Instrumentality, Agency, or Alter Ego.

Commingling of funds, under capitalization, unauthorized diversion of funds, treatment of corporate assets as individual's own, and failure to observe corporate formalities may indicate existence of alter ego relationship between corporation and shareholder, but such factors are not conclusive.

[6] Corporations ⚿1.4(1)
101 ----
101I Incorporation and Organization
101k1.4 Disregarding Corporate Entity
101k1.4(1) In General.

There is no litmus test for determining whether corporate fiction should be disregarded; result depends on circumstances of each case.

[7] Corporations ⚿1.6(3)
101 ----
101I Incorporation and Organization
101k1.6 Particular Occasions for Determining Corporate Entity
101k1.6(3) Debts and Obligations of Corporation; Creditors' Remedies.

Actions pointing to community of interest between individual and corporation must also be cause of plaintiff's injury and must have sanctioned fraud or promoted injustice before corporate veil can be pierced and individual held liable for corporation's obligation to plaintiff.

[8] Corporations ⚿1.7(2)
101 ----
101I Incorporation and Organization
101k1.7 Pleading and Procedure in Determining Corporate Entity
101k1.7(2) Evidence and Fact Questions.

Notations on unnumbered counter checks charging withdrawal of corporate funds to "employee advances" supported trial court's finding that corporation's shareholders officers cashed numerous unnumbered counter checks for their personal benefit.

[9] Evidence ⚿571(1)
157 ----
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(1) In General.

Auditor's opinions that corporation would have had funds to pay debt if withdrawals by shareholder officers had not further thinned capitalization of corporation and that corporation had few real assets because accounts receivables carried on its books were uncollectable were sufficient to sustain trial court's finding that shareholders' payments to themselves prevented corporation from paying its debt.

[10] Corporations ⚿1.6(7)
101 ----
101I Incorporation and Organization
101k1.6 Particular Occasions for Determining Corporate Entity
101k1.6(7) Liens, Bonds, Notes and Mortgages.

Trial court's findings that corporation's two shareholder officers cashed numerous unnumbered counter checks for their personal benefit, that these withdrawals further thinned capitalization of corporation at time when corporation's debt on promissory note was not being paid and that corporation had little real assets and negative net worth mandated conclusion that shareholder officer was corporation's alter ego personally liable to for corporation's debt on promissory note.

***885** Chris A. Beecroft, Las Vegas, for appellant.

Brown, Wells, Beller & Kravitz, Las Vegas, for respondents.

[103 Nev. 599] OPINION

PER CURIAM:

This case arises from a promissory note originally issued by National Marketing Services (NMS), a now-defunct Nevada corporation, to appellant **Polaris** Industrial Corporation for amounts owing on an account. The note was later assumed by Commercial Resources, Inc. (CRI), another Nevada corporation no longer in existence. In 1979, **Polaris** brought an action on the note against both corporations and their two shareholders and officers, Bob Davis and respondent Michael Kaplan. **Polaris** alleged Davis and [103 Nev. 600] Kaplan were the alter egos of NMS and CRI.

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Summary judgment was entered for **Polaris** against the corporations. **Polaris** then amended its complaint to add as defendants Cambist Corporation and respondent Jerome Kaplan alleging they, too, were the alter egos of NMS and CRI. Cambist Corporation and Bob Davis defaulted. The case proceeded to trial against respondents Michael and Jerome Kaplan. The district court concluded **Polaris** had not borne its burden of proof in demonstrating the Kaplans were the alter egos of NMS and CRI. Judgment was entered for the defendants. **Polaris** appeals.

Polaris was an Ohio corporation that custom manufactured wire products. Beginning ***886** in 1976, **Polaris** sold wire display racks to NMS. Initially, NMS paid for the goods in advance. Later, payment was made on delivery. Eventually, NMS requested a thirty-day account. By March 1978, NMS owed **Polaris** $50,560.16 and was behind on payments. NMS then issued the promissory note that is the basis of this suit.

NMS sold toy distributorships. It was originally a sole proprietorship owned by Michael Kaplan. NMS incorporated in 1976 soon after its first contact with Polaris. Bob Davis and Michael Kaplan were the sole shareholders and officers of the corporation. In its most lucrative year, 1977, NMS realized a profit of about $500,000.00. It ceased to do business the following Spring. The corporate balance sheet reflected a negative equity of $154,144.00 indicating the stockholders had taken out more than they had put in.

Davis and Kaplan formed a new corporation, CRI, to sell health and beauty aid distributorships. They were again the sole shareholders and officers. CRI did business in the same location as NMS and used the same bank. It also took assignment of NMS's assets and assumed NMS's liabilities. CRI informed **Polaris** it had assumed NMS's note. Thereafter, **Polaris** received only one payment. Both NMS and CRI were sold to a party in Missouri after the institution of this suit.

The district court made a number of findings that indicated Kaplan and Davis did not always follow normal corporate procedures. Both NMS and CRI paid the personal obligations of the officers. Unnumbered counter checks were often issued to Davis and Kaplan. (FN1) There was no evidence that capital contributions had actually been made or that stock certificates had been issued. The only evidence of corporate meetings consisted of minutes that generally ratified all previous decisions of the prior year. Despite these findings, the court concluded Polaris had not shown an alter ego relationship between Kaplan and the corporations.

[103 Nev. 601] Jerome Kaplan was Michael Kaplan's brother. He was a salesman for CRI, but never had any interest in the corporation. In July 1979, Jerome formed Cambist Corporation to sell sporting goods distributorships. Cambist shared offices with CRI and paid the rent in return for use of office furniture. Cambist ceased doing business in March 1980. The district court also concluded that Jerome Kaplan was not an alter ego of CRI.

[1] Polaris contends the district court reached the wrong conclusion. The general rule is that where the evidence is conflicting and there is substantial evidence to support the judgment, it will not be disturbed. *Consolazio v. Summerfield,* 54 Nev. 176, 179, 10 P.2d 629, 630 (1932). But there is an exception when it is clear that a wrong conclusion has been reached. *Id.* Our task on appeal is to determine whether the trial court's findings in this case mandated a contrary conclusion.

[2][3] There are three general requirements for application of the alter ego doctrine: (1) the corporation must be influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction fraud or promote injustice. *McCleary Cattle Co. v. Sewell,* 73 Nev. 279, 282, 317 P.2d 957, 959 (1957). It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. *Gordon v. Aztec Brewing Company,* 33 Cal.2d 514, 203 P.2d 522, 527 (1979)*quoted in McCleary, supra.*

[4] It is admitted that Michael Kaplan, along with Bob Davis, wholly owned and controlled NMS and CRI. However, there is no evidence Jerome Kaplan ever had any interest in or influence over these two corporations. Hence, this appeal fails as to Jerome Kaplan.

***887** [5][6] In determining whether a unity of

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interest exists between the individual and the corporation, courts have looked to factors like co-mingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own, and failure to observe corporate formalities. *See North Arlington Medical Building, Inc. v. Sanchez Construction Co.*, 86 Nev. 515, 522 n. 8, 471 P.2d 240, 244 (1970). These factors may indicate the existence of an alter ego relationship, but are not [103 Nev. 602] conclusive. *See id.* There is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case. *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 216 Cal.Rptr. 443, 702 P.2d 601, 606 (1985).

[7] The district court found that the corporation paid Kaplan's personal obligations, that Kaplan made withdrawals of funds for his own use without following corporate procedures and that certain corporate formalities were not observed. These findings point to a unity of interest between the individual and the corporation. However, these actions must also be the cause of **Polaris's** injury and must have sentenced a fraud or promoted an injustice before the corporate **veil** can be pierced. *See North Arlington Medical Building, supra.*

The record does not reflect how failure to issue stock or keep proper corporate minutes sanctioned a fraud or promoted an injustice to **Polaris**. It also does not establish that an injustice necessarily resulted from the corporation's payment of Kaplan's personal debts. Kaplan testified the payments were in lieu of salary. We also note the district court did not specifically find that the corporations were undercapitalized.

[8][9][10] We are, however, troubled by the district court's conclusion in light of its findings that Davis and Kaplan cashed numerous unnumbered counter checks for their personal benefit and that these withdrawals further thinned the capitalization of CRI which, according to another finding, had little real assets and a negative net worth.

On July 20, 1979, the same day that Polaris served Kaplan and Davis with its complaint, Kaplan withdrew $12,500.00 by unnumbered counter check. A notation on the check charged the withdrawal to Account 140, revealed at a trial to be "Employee Advances." From August 1979 to October 1979, Kaplan and Davis made numerous payments to themselves, Jerome Kaplan and McKenzie Davis. (FN2) CRI's bookkeeper was not apprised of the [103 Nev. 603] withdrawals by unnumbered checks. Kaplan admitted Davis took funds from the corporation to support his gambling habit. He, himself, claimed to have made temporary withdrawals to protect corporate funds from Davis. However, the district court found the funds were taken for the personal use of both officers. This finding is supported by notations on the checks charging them to "employee advances." R. Craig Bird, an auditor retained by Polaris, opined that CRI would have had the funds to pay its debt if the withdrawals had not further thinned the capitalization of the corporation. He also stated that CRI had few real assets because the accounts receivables carried on its books were uncollectable. The district ***888.** court was entitled to accept his opinion. Our review of the record shows the district court's findings concerning the unnumbered counter checks and their effect on the corporation are supported by substantial evidence. They will, therefore, not be disturbed on appeal. *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 472, 705 P.2d 673, 675 (1985).

In light of the findings, it becomes clear that CRI's officers treated corporate funds as their own by making ad hoc withdrawals at the bank in the form of advances to themselves at a time when the corporation's debt to **Polaris** was not being paid, and that **Polaris** was damaged because these actions left the corporation without funds to repay the debt. The essence of the alter ego doctrine is to do justice. *Mesler v. Bragg Management Co., supra*, 702 P.2d at 607. We are compelled to recognize that the district court clearly reached a wrong conclusion in determining that Michael Kaplan had not been shown to be the alter ego of NMS and CRI.

Accordingly, we affirm the judgment of the district court as to Jerome Kaplan, and reverse the judgment as to Michael Kaplan. (FN3)

(FN1.) The counter checks were blank checks obtained at the bank.

(FN2.) The record shows these payments:

July 20, 1979	Michael Kaplan	$12,500.00 *
August, 1979	Bob Davis	5,000.00
August 7, 1979	Michael Kaplan	4,700.00
August 10, 1979	Jerome Kaplan	2,000.00
August 14, 1979	Michael Kaplan	2,500.00
August 16, 1979	McKenzie Davis	1,500.00

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k 4 of 5

August 21, 1979	Bob Davis	1,750.00
August 20, 1979	Cash	4,000.00 *
August 30, 1979	Michael Kaplan	1,500.00 *
October 15, 1979	Cashier's checks (Michael Kaplan, Jerome Kaplan and CRI)	24,863.84 *

* Unnumbered counter checks

(FN3.) Appellant named National Marketing Services, Commercial Resources, Inc., Cambist Corporation, Bob M. Davis, Michael Kaplan and Jerome Kaplan as respondents. However, appellant obtained judgments against all the parties except Michael and Jerome Kaplan, the only respondents to appear in this appeal. Hence, the names of the other parties have been deleted from the caption of this appeal.

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May 30, 2001

To : The Nevada Senate
Carson City, Nevada

Mr. Mark A. James,

I, Cebe Loomis, being 85 years of age unfortunately cannot appear before you today. So I have chosen to write to you instead. I lived most of my life in Reno with my husband and former member of the Nevada State Senate, E.F. Loomis. I have recently been informed about the possibility of the altering of a certain Nevada Corporate Law. This deeply disturbs me. As I understand it this new proposal would do irreparable harm to the rights of citizens such as myself.

For over ten years my family and my lawyer have been trying to collect upon a judgement handed down by the Nevada Supreme Court. In this judgement my family was awarded a substantial amount of money from a California company ; Lange Financial Corporation. This money has been impossible to collect. The people of this company have continuously eluded us and have used their corporate setup to hide behind and to protect them from the wrongful actions that they have committed.

I strongly urge you to carefully consider this new proposal and the harm it will inflict upon the citizens of Nevada. The State of Nevada should remain proud about the quality of businesses that it is attempting to attract and should not encourage the mistreatments of it's citizens by depriving them of their regress.

Respectfully,

Cebe W. Loomis

Cebe W. Loomis

4813

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT C
Date 5/30/01 Page
Submitted by PAT CASHILL

Amendment to SB 577
Presented by Nevada Trial Lawyers Association
5/30/01

1. Rewrite Section 1 to read as follows:

1. No stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation or the corporate fiction of a separate entity should be disregarded for any other reason.

2. A stockholder, director or officer acts as the alter ego of the corporation if:

(a) The corporation is influenced and governed by the stockholder, director officer;

(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

(c) Adherence to the corporate fiction of a separate entity, under the circumstances, would sanction fraud or promote an injustice.

2. Section 3 - sub 7 is amended to read as follows:
"Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270 668.045 and 694A.030, a director or officer is not individually liable ***to the corporation or its stockholders*** for any damages as a result of any act or failure to act in his capacity as a director or officer unless
a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; ***or***
b) His breach of those duties involved intentional misconduct, fraud or knowing violation of law."

3. Section 59 - sub 2 (b) should be amended to delete that the bill is effective on passage and approval and changed to read, ***"shall apply to claims that arise after October 1, 2001."***

4. Section 8 should be changed to restore the statute of limitations to three years as opposed to the two years in the bill.

5. Section 55 should be deleted. Legislative intent should not be included.

4814

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT M
Date 5/30/01 Pages
Submitted by Bob Crowell

DEAN HELLER
Secretary of State

RENEE L. LACEY
Chief Deputy Secretary
of State

STATE OF NEVADA

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary
for Commercial Recordings

SUSAN MORANDI
Deputy Secretary
for Elections

OFFICE OF THE
SECRETARY OF STATE

May 31, 2001

Assemblyman Bernie Anderson, Chair
Assembly Judiciary Committee
Nevada State Legislature
401 S. Carson Street
Carson City, NV 89701

RE: Senate Bill 577

Dear Assemblyman Anderson:

Pursuant to your request, following is an explanation of our request for different effective dates for certain sections of SB 577. As we discussed, Section 59, Subsection 3, originally set forth an effective date of July 1, 2001 for Sections 4 to 7, 10 to 46 and 49-54 of the Act. These sections of the Act generally affect the requirements and the fees for filing various documents in the Office of the Secretary of State. Because these changes will require substantial revisions to our forms and additional review for processing documents, we requested that the effective date be changed to August 1, 2001. In addition, the August date will provide us with the ability to inform customers of these changes so we can avoid rejecting documents that are filed without the correct fees.

Further, Section 58 of the Act provides this office with funding for "additional personnel, equipment supplies, office space and other costs as are necessary to carry out the provisions of this act." In order to ensure that this office continues to run efficiently, we have requested that Section 58 become effective upon passage and approval. This will enable us to recruit and train necessary additional personnel prior to the August 1, 2001 effective date.

4815

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Fax (775) 684-5725

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Telephone (775) 6
Fax (775) 688-

CORPORATE SATELLITE OFFICE:
555 E. Washington Avenue
Suite 2900
Las Vegas, Nevada 89101

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT N
Date 5/30/01 Pages 2

Thank you for the opportunity to participate in these proceedings. If you require further information, please do not hesitate to contact me at (775) 684-5714.

Sincerely,

DEAN HELLER
Secretary of State

By: Renee Lacey
Renee L. Lacey
Chief Deputy Secretary of State

cc: Assembly Judiciary Committee

4816

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Amendment to SB 577
Presented by Nevada Trial Lawyers Association
5/30/01

1. Amend Section 1 to read as follows:

*1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation ~~formed under the laws of this state~~ is individually liable for a debt or liability of the corporation, **unless** ~~without regard to whether a court determines that~~ the stockholder, director or officer **acts as** ~~should be considered~~ the alter ego of the corporation or ~~that~~ the corporate fiction of a separate entity should be disregarded for any other reason. ~~unless:~~*

~~(a) Otherwise provided in an agreement to which the stockholder, director or officer is a party; or~~

~~(b) A court of competent jurisdiction finds that:~~

2. A stockholder, director or officer acts as the alter ego of the corporation if:

(1) The corporation is influenced and governed by the stockholder, director or officer;

(2) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

*(3) Adherence to the corporate fiction of a separate entity would sanction fraud **or promote injustice**.*

~~2. For a court to make a finding in satisfaction of subparagraph (3) of paragraph (b) of subsection 1, the court must find that the stockholder, director or officer has committed fraud in connection with the debt or liability of the corporation.~~

2. Section 3 - sub 7 is amended to read as follows:

*"Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270 668.045 and 694A.030, a director or officer is not individually liable **to the corporation or its stockholders** for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven that:*
*a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; ~~and~~ **or***
b) His breach of those duties involved intentional misconduct, fraud or knowing violation of law."

4817

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT O
Date 5/30/01 Page PA002174
Submitted by Bob Crowe 203

3. Section 59 - sub 2 (b) should be amended to delete that the bill is effective on passage and approval and changed to read, ***"shall apply to claims that arise after October 1, 2001."***

4. Section 8 should be changed to restore the statute of limitations to three (3) years as opposed to the two (2) years in the bill.

5. Section 55 should be deleted. Legislative intent should either not be included or redrafted to state that the legislature, in enacting section 1, does not intend to change the common law doctrine.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON WAYS AND MEANS AND
SENATE COMMITTEE ON FINANCE
JOINT SUBCOMMITTEE ON HUMAN RESOURCES/K-12

Seventy-First Session
May 31, 2001

The Assembly Ways and Means and Senate Finance Joint Subcommittee was called to order at 4:00 p.m., on Thursday, May 31, 2001. Chairman David Goldwater. presided in Room 3137 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

ASSEMBLY MEMBERS PRESENT:

Chairman David Goldwater
Mr. Morse Arberry Jr.
Mrs. Barbara Cegavske
Mr. Joseph Dini, Jr.
Ms. Sheila Leslie

SENATE MEMBERS PRESENT

Senator Bob Coffin
Senator Bernice Mathews
Senator William J. Raggio
Senator Raymond D. Rawson

COMMITTEE MEMBERS ABSENT:

Ms. Sandra Tiffany (Excused)

STAFF MEMBERS PRESENT:

Mark Stevens, Fiscal Analyst
Gary Ghiggeri, Fiscal Analyst
Georgia Rohrs, Program Analyst
Linda Smith, Committee Secretary

Chairman Goldwater emphasized that the Governor and legislative leadership had worked very hard to fully fund the state Distributive School Account for the 2001-2003 biennium.

Senator Raggio said the amounts included in the DSA budget were contingent upon passage of S.B. 577, which increased corporate business fees, and A.B. 460, which would return rental car collection fees to the state. S.B. 577 would result in an additional $29 million across the biennium and A.B. 460 would result in an additional $23.5 million across the biennium.

Senator Raggio referred to two areas of funding that would be provided outside the DSA:

- A 3 percent teacher retention bonus would be payable from the one-shot money previously proposed by the Governor for a 5 percent bonus.

- The $20,000,000 originally included in the one-shot money for teacher training, textbook resources, and information technology, would be allocated for teacher recruitment bonuses and educational technology -- $10,000,000 over the biennium for each area.

Senator Raggio then referred to the DSA budget and explained the recommended adjustments:

- A 2 percent cost-of-living increase would be included in the second year of the biennium. In FY2004 the base budget amount would reflect a 4 percent cost-of-living increase, even though the increase in FY2003 was 2 percent.

- Because cost projections for utilities were understated in The Executive Budget, it was recommended that utility costs in the DSA budget be increased by a total of $2,123,049 -- $518,820 in FY2002 and $1,604,229 in FY2003.

Senator Raggio stressed the importance of understanding all of the education funding that would be available during the upcoming biennium, not just the DSA. Because of the need for a pool of money for utility increases that might not otherwise be addressed in the various budgets, approximately $23 million would be available from a "utility access fund." It was estimated that $17 million needed to be set aside for state agencies, including prisons and universities, and $6.5 million would be available for K-12. The funding would be for additional utility requirements that might occur and was in addition to the inflation factors for utilities already proposed in the DSA and other budgets. There would be access requirements to ensure that the agencies involved, as well as the school districts, had appropriately utilized the funding that was otherwise provided for utility increases. Senator Raggio stressed the importance of having the access fund. In addition, public and private sectors were experiencing substantial increases in health insurance premiums as well as utilities. The proposal would include, although it would not be part of the DSA budget, approximately $13 million that could be accessed for additional costs in health care premiums. Out of concern that school districts might cut essential or desirable programs, $5 million would be set aside to subsidize other vital education programs.

Senator Raggio said the legislature was bound by the Economic Forum projections in determining available revenues. The budget would be balanced if

S.B. 577 and A.B. 460 passed in their present form. The budget was built based upon reversions in excess of $80 million. The reversions were realistic and would provide a balanced budget even with the proposals currently being discussed. In an attempt to provide something further, if revenues came in much stronger than now anticipated, a "trigger" was recommended. Staff had been asked by leadership in both houses to define the point in the ending fund balance, or revenues against ending fund balance, where a trigger would occur. The trigger amount would be based upon staff's determination and staff was to be exempt and immune from lobbying on that point. The revenue stream would be tested on May 1, 2002, and if revenues were strong enough, a trigger in the amount of 1 or 2 percent for additional cost-of-living increases would become effective on July 1, 2002. Whether or not the 2 percent trigger was fulfilled, there would still be the guarantee of inclusion of 4 percent for cost-of-living increases in the base in FY2004. If revenues were not strong enough on May 1, 2002, the Board of Examiners would test again on October 1, 2002, and, if revenues were strong enough at that time, the trigger would "kick in."

Chairman Goldwater thanked Senator Raggio for his hard work and his explanation of the proposed DSA funding and funding outside the DSA dedicated to education. Chairman Goldwater then referred to the proposed performance audits for Washoe and Clark County School Districts. Senator Raggio said Gary Crews, CPA, Legislative Auditor, Audit Division, Legislative Counsel Bureau, had explained that performance audits of that magnitude would be very costly -- approximately $1 million. The suggestion was made, and Senator Raggio hoped it would be accepted by the joint subcommittee, that one position be added to the LCB audit staff. Mr. Crews would assign a veteran auditor to conduct a preliminary survey over the interim of both the Clark County School District and the Washoe County School District to determine what areas might be appropriate for audit. Local school districts conducted financial audits each year and the financial audits were not the concern of the legislature. Most individuals were concerned with other issues such as budget procedures. The proposed preliminary survey would be less costly. Washoe and Clark County School Districts were selected for the audits due to their being the two largest school districts in the state.

Chairman Goldwater and Senator Raggio concurred that language should be included in the funding bill that the base amount for salaries in FY2004 would reflect a 4 percent salary increase.

Senator Mathews wondered if there was still a "hole in the budget." Chairman Goldwater said it was his understanding that passage of S.B. 577 and A.B. 460 would provide a balanced budget.

> SENATOR RAWSON MOVED TO CLOSE THE BUDGET WITH STAFF RECOMMENDATIONS INCLUDING A 2 PERCENT COST-OF-LIVING INCREASE FOR FY2003 AND AN INCREASE IN FUNDING FOR UTILITY COSTS IN THE AMOUNT OF $2,123,049 OVER THE BIENNIUM.
>
> MS. LESLIE SECONDED THE MOTION

Senator Raggio said his explanation of the educational funding included the proposal for the DSA and funding outside of the DSA and assumed the motion was for the appropriate parts of the agreement. The parts that would go into the DSA would be the 2 percent cost-of-living increase for FY2003 and the adjustment required for inflation for utility rates. Funding for the utility access fund, additional costs of health care premiums, and subsidies for other vital

education programs would be appropriated in separate bills. An explanation needed to be included in the bill that stated the funding provided for the health insurance premium increases was a one-time appropriation and did not set a precedent. In response to a question posed by Chairman Goldwater, Mrs. Rohrs stated there was an increase in the amount available for health insurance premiums built into the DSA. The base was what the school districts reported they would be paying in the next biennium for health insurance premiums and there was an increase built into the DSA beyond that amount. Chairman Goldwater asked if the base for the next budget cycle would include the additional funding for health insurance premiums and Senator Raggio indicated the funding would not be rolled into the base. Senator Rawson said the funding was a one-shot appropriation to cover potential insolvency in the health premium area. Senator Mathews noted that the subcommittee appeared to be confused and said language needed to be included in the bill explaining exactly what would happen to the precedent-setting insurance premium amount. Chairman Goldwater said the indication was that the amount did not roll-up, but if the amount was expended it would seem the districts would report what was spent on health insurance and the amount would automatically become part of the base.

Mrs. Cegavske asked how much was included in the DSA for textbooks. Mrs. Rohrs said textbook funding was part of the operating expenses. There was a separate line item for textbooks in the amount of $13.8 million in the first year of the biennium and $14.5 million in the second year of the biennium. For library books, $2.2 million in the first year of the biennium, $2.3 million in the second year of the biennium; for instructional supplies, $21.2 million in the first year and $22.2 million in the second year; and for instructional software, $1.4 million in the first year and $1.4 million in the second year.

Mr. Stevens said he thought Mrs. Cegavske was referring to the $20 million included in the Governor's bill for training, textbooks, and technology. There was also a bill in the Assembly for the same amount of money. The Senate bill had been reviewed in committee and, in its current form, would be a combination of money for technology and for new teacher recruitment bonuses.

Senator Coffin said Senator Raggio had indicated he was comfortable with the $80 million in reversions and knew Senator Raggio had concerns with the reversions earlier in the session because the amounts were much higher than usual. Senator Coffin asked Senator Raggio what had increased his comfort level with the reversion amounts. Senator Raggio said budget cuts still had to be made that were initially proposed. The Governor had recommended some cuts and committees were in the process of doing those cuts to balance the budget. Senator Raggio again stressed that the budget would be balanced based upon $80 million in reversions. After discussions with staff, Senator Raggio felt the projected reversion amounts appeared to be appropriate. However, no one could foretell what the actual amounts would be. The Governor had signed off on the plan and indicated that hiring freezes would continue and that the budgets would be monitored. The reversion amounts were the best estimates of staff who prepared the budgets and individuals who would have to approve the budgets.

Senator Raggio indicated his presentation of the funding was an attempt to finalize the situation and indicated the Governor and Speaker Perkins concurred. Senator Raggio said it took a lot of hard effort to try to address and allay all of the concerns and utilize as efficiently as possible the funding that had been proposed. Anything the subcommittee approved was conditioned upon all parties signing on. It was also conditioned upon the bills being processed and

passed in a form acceptable to both houses. Senator Raggio said there would be a return to the Governor's proposal included in The Executive Budget if the current plan was not adopted.

Mr. Arberry said the plan took a great deal of planning and did not want to send a message to the educators that the legislature did not support them. The legislature did support education and was working very hard to provide funding for education and to provide adequate salaries for educators. Mr. Arberry indicated he was not totally happy with the proposal, but wanted to commend all the individuals who had worked on the plan.

Senator Rawson was concerned that there might be the perception that the legislators could not support anything that was not included in the budget. There was no question this was a difficult budget year and important issues had been set aside due to lack of funding. Legislators had a separate constitutional responsibility and authority to determine good issues and generate those issues and try to fund them through the legislature. Senator Rawson said he would never "buy off" on the idea that if something was not in the Governor's budget, then it was not worthy of consideration and resented the label of "pork" being tied on anything that was not included in the Governor's budget. There were "pork" bills and there were legitimate funding issues. Senator Rawson stated the plan was a good compromise and a good plan.

Senator Coffin stated he too, was happy with what had been proposed and indicated there had been significant changes made to the Governor's recommended budget.

Chairman Goldwater thanked the subcommittee for 4 months of hard work, thanked Senator Rawson for his able stewardship and leadership, and thanked Senator Raggio and Speaker Perkins for the last 40 hours of hard work on the proposal.

Chairman Goldwater said the motion before the subcommittee was the compromise outlined by Senator Raggio and asked all those in favor of the motion to indicate by saying aye.

THE MOTION PASSED UNANIMOUSLY. (Ms. Tiffany was not present to vote.)

****

Chairman Goldwater adjourned the meeting at 4:50 p.m.

RESPECTFULLY SUBMITTED:

Linda J. Smith
Committee Secretary

APPROVED BY:

Assemblyman David Goldwater, Chairman

DATE: 8-15-01

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-First Session
June 1, 2001

The Committee on Judiciary was called to order at 9:30 a.m. on Friday, June 1, 2001. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. The meeting was simultaneously videoconferenced in Room 4412 of the Grant Sawyer Office Building, Las Vegas. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. Mark Manendo, Vice Chairman
Mrs. Sharron Angle
Mr. Greg Brower
Ms. Barbara Buckley
Mr. John Carpenter
Mr. Jerry Claborn
Mr. Tom Collins
Mr. Don Gustavson
Mrs. Ellen Koivisto
Ms. Kathy McClain
Mr. Dennis Nolan
Mr. John Oceguera
Ms. Genie Ohrenschall

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Cindy Clampitt, Recording Committee Secretary
Deborah Rengler, Transcribing Committee Secretary

Assembly Bill 484: Revises provisions governing disclosure statement required upon sale of unit in common-interest community. (BDR 10-584)

A letter was submitted to the Chairman from Assemblywoman Vonne Chowning (Exhibit C) recommending further amendment to S.B. 261, deleting Amendment No. 1063 that addressed issues originally proposed in A.B. 484. Chairman Anderson announced that Assemblywoman Chowning reached an agreement with Joan Buchanan, Administrator of the Real Estate Division, Department of Business and Industry, to include a new section on the "Seller's Real Property Disclosure Form." With that understanding, the Assembly Committee on Judiciary would be able to recede from the amendment to the bill if it came back from the Senate.

ASSEMBLYWOMAN BUCKLEY MOVED TO RECEDE FROM THE AMENDMENT NO. 1063 TO S.B. 261.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

MOTION PASSED UNANIMOUSLY.

Chairman Anderson took a brief break at 10:55 a.m. The committee would reconvene for work session.

Chairman Anderson reconvened the committee at 11:10 a.m. to proceed with the work session; he drew the committee's attention to S.B. 577.

Senate Bill 577: Limits common-law and statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

Assemblywoman Buckley said the vote on S.B. 577 had been delayed at the request of Speaker Perkins, Chairman Anderson, and Assemblyman Goldwater, in an attempt to find additional revenue to assist in the plight of the educational system and teacher raises. As a result of working with Senator Raggio, the Governor's Office, and many others, the Distributive School Account was able to increase what had previously been announced, adding additional funds for teachers' health insurance and an additional percentage raise to be triggered if revenues were enough. Therefore, no more fees would be added to S.B. 577.

Chairman Anderson announced that the Research Division had prepared a revised amendment (Exhibit D) as submitted by the Nevada Trial Lawyers Association.

Ms. Lang said S.B. 51, that made various changes pertaining to business associations, had already been passed, gone to the Governor, and would be amended to be made consistent with S.B. 577, including the effective date so that the fees came into effect at the same time.

ASSEMBLYWOMAN BUCKLEY MOVED TO AMEND AND DO PASS S.B. 577 WITH THE AMENDMENTS SET FORTH BY THE NEVADA TRIAL LAWYERS ASSOCIATION AND WITH ANY ADDITIONAL AMENDMENTS TO RESOLVE CONFLICTS WITH S.B. 51, ALLOWING THE FEES TO TAKE EFFECT AT THE EARLIEST POSSIBLE DATE.

ASSEMBLYMAN MANENDO SECONDED THE MOTION.

Chairman Anderson clarified the amendments.

Assemblyman Brower informed the committee that he would be voting no on the motion. He said he did not believe the amendment was necessary and was concerned about the ultimate success of the bill.

Assemblyman Carpenter said he did not want Nevada to become a haven for every corporate "crook" in America; he could not support the amendments. Assemblyman Carpenter said he would vote no on the bill.

Assemblywoman Buckley said she supported the motion because the fees were necessary to fund education. She said she had hoped for a more broad-based solution to address the larger issues of teacher salaries and adequately funding education, but if S.B. 577 was the best that could be done to ensure that schools were not left further behind, then she supported the fees. The Senate testimony offered corporations "more predictability under the law" in exchange for the increased fees. Nevada had always been very "business friendly" with the low tax structure, interim committees learning how to attract business, and implementing those recommendations. The amendment codified statutory law instead of relying on case law. It was necessary to make sure the language in S.B. 577 clearly expressed the intent of the Senate and those who testified – to have predictability in Nevada business law. S.B. 577, as amended, would provide the funds needed for education, as well as relief for victims in Nevada.

Assemblyman Nolan agreed with Assemblywoman Buckley. He said he was not in favor of the fees but in light of the alternative, he would support the bill. Assemblyman Nolan asked if the amendment presented (Exhibit D) included consensus language agreed upon by all parties.

Assemblywoman Buckley said the amendment was not consensus language. The additional funds for education agreed upon by the Governor's Office and interested parties were included in the projections and closed in the Distributive School Account budget, adding additional funds for teachers' health insurance and an additional 2 percent raise to be triggered by adequate revenues. Assemblywoman Buckley said S.B. 577 clarified and put forward the Senate's intent by codifying law instead of relying on case law, and preserved the fees for education.

Chairman Anderson said there might have been some confusion regarding other provisions and subsequent agreements that were not reached.

Assemblyman Collins said he did not see the necessity of the amendment, but he did support education; he would vote for the bill.

Assemblywoman Angle said S.B. 577, as written, was a "wonderful way" to fund education and to make Nevada very friendly. Assemblywoman Angle said she supported the bill as it came from the Senate.

Assemblyman Gustavson said he supported education and trying to find every way possible to increase funding for education. He said he would support the fee increases; the bill as a whole was good. But he said he did not support the amendment, so he would be voting no.

Assemblyman Brower asked if the Chair would reconsider the original motion to "do pass" rather than "amend and do pass."

Assemblyman Carpenter said he did not agree with the amendments to Section 1. He suggested only amending the language to include "or promote an injustice."

Chairman Anderson restated the motion from Assemblywoman Buckley, seconded by Assemblyman Manendo to amend and do pass S.B. 577.

Assemblyman Brower said he had made a motion. Chairman Anderson stated that he had not recognized the motion. Assemblyman Brower said he would be forced to vote no.

A ROLL CALL VOTE WAS CALLED.

Assemblyman Nolan asked if the motion failed, would the Chair reconsider a do pass motion. Chairman Anderson said, "No."

MOTION PASSED 10-4 WITH MRS. ANGLE, MR. BROWER, MR. CARPENTER, AND MR. GUSTAVSON VOTING NO.

Chairman Anderson recessed the meeting at 11:30 a.m. to the call of the Chair.

RESPECTFULLY SUBMITTED:

Deborah Rengler, Ley Clc
Deborah Rengler
Committee Secretary

APPROVED BY:

Bernard J. Anderson, Jr.
Assemblyman Bernie Anderson, Chairman

DATE: July 10, 2001

REVISED Amendment

Amendment to SB 577
Presented by Nevada Trial Lawyers Association
5/30/01

1. Amend Section 1 to read as follows:

*1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation ~~formed under the laws of this state~~ is individually liable for a debt or liability of the corporation, **unless** ~~without regard to whether a court determines that~~ the stockholder, director or officer **acts as** ~~should be considered~~ the alter ego of the corporation or ~~that~~ the corporate fiction of a separate entity should be disregarded for any other reason, ~~unless:~~*

~~(a) Otherwise provided in an agreement to which the stockholder, director or officer is a party; or~~

~~(b) A court of competent jurisdiction finds that:~~

2. A stockholder, director or officer acts as the alter ego of the corporation if:

(1) The corporation is influenced and governed by the stockholder, director or officer;

(2) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

*(3) Adherence to the corporate fiction of a separate entity would sanction fraud **or promote injustice**.*

~~2. For a court to make a finding in satisfaction of subparagraph (3) of paragraph (b) of subsection 1, the court must find that the stockholder, director or officer has committed fraud in connection with the debt or liability of the corporation.~~

2. Section 3 - sub 7 is amended to read as follows:

*"Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270 668.045 and 694A.030, a director or officer is not individually liable **to the corporation or its stockholders** for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven that:*
*a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; ~~and~~ **or***
b) His breach of those duties involved intentional misconduct, fraud or knowing violation of law."

4835

D 1 of 2

ASSEMBLY COMMITTEE ON JUDICIARY EXHIBIT D
Date 6-1-01 Pages 1-2
Submitted by N. Anthony Committee

PA002186

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3. Section 59 - sub 2 (b) should be amended to delete that the bill is effective on passage and approval and changed to read, ***"shall apply to claims that arise after October 1, 2001."***

4. Section 8 should be changed to restore the statute of limitations to three (3) years as opposed to the two (2) years in the bill.

5. Section 55 should be deleted. Legislative intent should either not be included or redrafted to state that the legislature, in enacting section 1, does not intend to change the common law doctrine.

more frequently traveled highways of this state a system of ~~[telephones]~~ *communication* for members of the *general* public to report fires, accidents or other emergencies ~~[or]~~ *and* to receive information concerning the conditions for driving on certain highways.

Sec. 2. 1. There is hereby appropriated from the state highway fund to the department of transportation the sum of $500,000 for the establishment and maintenance of an emergency system of call boxes located on Interstate Highway No. 15 from the boundary of the State of California to Lake Mead Drive in Clark County, Nevada.

2. Any remaining balance of the appropriation made by subsection 1 must not be committed for expenditure after June 30, 2003, and reverts to the state highway fund as soon as all payments of money committed have been made.

Sec. 3. This act becomes effective upon passage and approval.".

Amend the title of the bill to read as follows:

"AN ACT relating to highways; requiring the department of transportation to establish along certain highways a system of communication for members of the general public to report emergencies and receive information concerning conditions for driving on those highways; making an appropriation; and providing other matters properly relating thereto.".

Amend the summary of the bill to read as follows:

"SUMMARY-Requires department of transportation to establish along certain highways system of communication for members of general public to report emergencies and receive information concerning conditions for driving on those highways. (BDR 35-820)".

Assemblywoman Giunchigliani moved the adoption of the amendment.

Remarks by Assemblywoman Giunchigliani.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 143.

Bill read second time.

The following amendment was proposed by the Committee on Ways and Means:

Amendment No. 1195.

Amend the bill as a whole by renumbering sections 3 and 4 as sections 4 and 5 and adding a new section designated sec. 3, following sec. 2, to read as follows:

"Sec. 3. There is hereby appropriated from the state general fund to the administrative office of the courts the sum of $300,000 for the establishment of programs of treatment for the abuse of alcohol or controlled substances pursuant to NRS 453.580 in the First, Third and Ninth Judicial Districts of the State of Nevada which include Carson City and Churchill, Douglas, Lyon and Storey counties.".

Amend sec. 3, page 2, line 2, by deleting: "1 and 2" and inserting: "1, 2 and 3".

Amend the title of the bill, first and second lines, by deleting: "the Second and Eighth Judicial District Courts for continuation" and inserting: "certain judicial districts for continuation or establishment".

Amend the summary of the bill to read as follows:

"SUMMARY—Makes appropriations to certain judicial districts for continuation or establishment of programs of treatment for abuse of alcohol or controlled substances. (BDR S-178)".

Assemblywoman Giunchigliani moved the adoption of the amendment.

Remarks by Assemblymen Giunchigliani and Beers

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 577.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1172.

Amend section 1, page 1, by deleting lines 4 through 13 and inserting: "*director or officer of a corporation is individually liable for a debt or liability of the corporation, unless:*

(a) The stockholder, director or officer acts as the alter ego of the corporation; or

(b) The corporate fiction of a separate entity should be disregarded for any other reason.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder,".

Amend section 1, page 2, line 1, by deleting "*(2)*" and inserting "*(b)*".

Amend section 1, page 2, line 4, by deleting "*(3)*" and inserting "*(c)*".

Amend section 1, page 2, by deleting lines 5 through 9 and inserting: "*sanction fraud or promote injustice.*".

Amend the bill as a whole by adding a new section designated sec. 1.5, following section 1, to read as follows:

"Sec. 1.5. NRS 78.0295 is hereby amended to read as follows:

78.0295 1. A corporation may correct a document filed by the secretary of state with respect to the corporation if the document contains an inaccurate record of a corporate action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the corporation shall:

(a) Prepare a certificate of correction which:

(1) States the name of the corporation;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by an officer of the corporation.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.".

Amend sec. 3, page 3, line 18, after "*35.230,*" by inserting "*78.300,*".

Amend sec. 3, page 3, line 20, after "*liable*" by inserting: "*to the corporation or its stockholders*".

Amend sec. 3, page 3, line 23, by deleting "*and*" and inserting "*or*".

Amend sec. 4, page 3, line 27, by deleting "under" and inserting "pursuant to".

Amend sec. 4, page 3, line 45, by deleting "amended" and inserting "annual".

Amend sec. 4, pages 3 and 4, by deleting line 49 on page 3 and lines 1 through 3 on page 4, and inserting:

"*4.* Upon filing the ~~[annual]~~ list required by ~~[subsection]~~ *:*

(a) Subsection 1, the corporation shall pay to the secretary of state a fee of $165.

(b) Subsection 2, the corporation shall pay to the secretary of state a fee".

Amend sec. 4, page 4, by deleting lines 9 and 10 and inserting: "of the fee due pursuant to subsection ~~[3]~~ *4* and a reminder to file the annual list required by subsection 2. Failure of any".

Amend sec. 4, page 4, line 14, by deleting: "~~[3 or 7]~~" and inserting: "~~[3, 6 or 7]~~".

Amend sec. 4, page 4, line 19, after "and" by inserting: "must be accompanied by a fee of $85 for filing. A payment submitted pursuant to this subsection".

Amend sec. 7, page 4, line 47, by deleting "under" and inserting "pursuant to".

Amend sec. 7, page 5, lines 4 and 5, by deleting: "its charter was revoked;" and inserting: "it failed to file each required annual list in a timely manner;".

Amend sec. 7, page 5, line 9, after "fee" by inserting "or fees".

Amend the bill as a whole by deleting sec. 8 and inserting:

"Sec. 8. (Deleted by amendment.)".

Amend the bill as a whole by adding a new section designated sec. 8.5, following sec. 8, to read as follows:

"Sec. 8.5. NRS 78.390 is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and either call a special meeting of the stockholders entitled to vote on the amendment or direct that the proposed amendment be considered at the next annual meeting of the stockholders entitled to vote on the amendment.

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the provisions of the

articles of incorporation, have voted in favor of the amendment, an officer of the corporation shall sign a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so signed must be filed with the secretary of state.

2. If any proposed amendment would adversely alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series adversely affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized
to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*".

Amend sec. 10, page 6, line 46, by deleting "or agreement".

Amend sec. 10, page 7, line 7, by deleting "under" and inserting "pusuant to".

Amend sec. 11, page 7, after line 46, by inserting:

"4. The fee for filing a certificate of termination pursuant to NRS 78.1955, 78.209 or 78.380 is ~~[$75.]~~ *$150.*".

Amend sec. 14, page 8, line 33, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 14, page 8, line 44, by deleting "~~[78.770,]~~ *92A.210*" and inserting "92A.210,".

Amend the bill as a whole by adding a new section designated sec. 19.5, following sec. 19, to read as follows:

"Sec. 19.5. NRS 86.226 is hereby amended to read as follows:

86.226 1. A signed certificate of amendment, or a certified copy of a judicial decree of amendment, must be filed with the secretary of state. A person who executes a certificate as an agent, officer or fiduciary of the limited-liability company need not exhibit evidence of his authority as a prerequisite to filing. Unless the secretary of state finds that a certificate does not conform to law, upon his receipt of all required filing fees he shall file the certificate.

2. A certificate of amendment or judicial decree of amendment is effective upon filing with the secretary of state or upon a later date specified in the certificate or judicial decree, which must not be more than 90 days after the certificate or judicial decree is filed.

3. If a certificate specifies an effective date and if the resolution of the members approving the proposed amendment provides that one or more managers or, if management is not vested in a manager, one or more members may abandon the proposed amendment, then those managers or members may terminate the effectiveness of the certificate by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate or judicial decree filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the members, the manager of the company or, if management is not vested in a manager, a designated member is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by a manager of the company or, if management is not vested in a manager, a designated member; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*".

Amend sec. 23, page 12, line 27, by deleting "under" and inserting "pursuant to".

Amend sec. 23, page 12, lines 33 and 34, by deleting: "its charter has been revoked;" and inserting: "it failed to file in a timely manner each required annual list;".

Amend sec. 24, page 13, by deleting lines 5 and 6 and inserting:

"(b) Amending or restating the articles of organization, amending the registration of a foreign company or filing a certificate of correction, ~~[$75;]~~ *$150;*".

Amend sec. 24, page 13, by deleting lines 15 and 16 and inserting:

"(h) Filing a certificate of cancellation, ~~[$30;]~~ *$60;*

(i) Executing, filing or certifying any other document, ~~[$20;]~~ *$40;* and

(j) Copies made at the office of the secretary of state, $1 per page.".

Amend sec. 32, page 16, line 36, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 33, page 17, between lines 35 and 36, by inserting:

"6. A filing made pursuant to this section does not satisfy the provisions of NRS 88.355 and may not be substituted for filings submitted pursuant to NRS 88.355.".

Amend sec. 34, page 17, line 37, by deleting "corporation" and inserting "limited partnership".

Amend sec. 40, page 20, line 32, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 42, page 21, by deleting lines 14 through 40 and inserting:

"89.250 1. Except as otherwise provided in subsection 2, a professional association shall, *on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter* on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state showing the names and residence addresses of all members and employees in ~~[such]~~ *the* association and ~~[shall certify]~~ *certifying* that all members and employees are licensed to render professional service in this state.

2. A professional association organized and practicing pursuant to the provisions of this chapter and NRS 623.349 shall, *on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter* on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state:

(a) Showing the names and residence addresses of all members and employees of the association who are licensed or otherwise authorized by law to render professional service in this state;

(b) Certifying that all members and employees who render professional service are licensed or otherwise authorized by law to render professional service in this state; and

(c) Certifying that all members who are not licensed to render professional service in this state do not render professional service on behalf of the association except as authorized by law.

3. ~~[The statement must:~~

~~(a) Be made]~~ *Each statement filed pursuant to this section must be:*

(a) Made on a form prescribed by the secretary of state and must not contain any fiscal or other information except that expressly called for by this section.

(b) ~~[Be signed]~~ *Signed* by the chief executive officer of the association.

(c) Accompanied by a declaration under penalty of perjury that the professional association has complied with the provisions of chapter 364A of NRS.

4. Upon filing ~~[the annual]~~ *:*

(a) The initial statement required by this section, the association shall pay to the secretary of state a fee of $165.

(b) Each annual statement required by this section, the association shall pay to the secretary of state a fee of ~~[$15.]~~ *$85.*

5. As used in this section, "signed" means to have executed or adopted a name, word or mark, including, without limitation, a digital signature as defined in NRS 720.060, with the present intention to authenticate a document.".

Amend sec. 46, page 23, by deleting lines 20 through 39 and inserting:

"92A.210 1. Except as otherwise provided in this section, the fee for filing articles of merger, articles of conversion, articles of exchange, articles of domestication or articles of termination is ~~[$125.]~~ *$325.* The fee for filing the constituent documents of a domestic resulting entity is the fee for filing the constituent documents determined by the chapter of NRS governing the particular domestic resulting entity.

2. The fee for filing articles of merger of two or more domestic corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporation.

3. The fee for filing articles of merger of one or more domestic corporations with one or more foreign corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporations which have paid the fees required by NRS 78.760 and 80.050.

4. The fee for filing articles of merger of two or more domestic or foreign corporations must not be less than ~~[$125.]~~ *$325.* The amount paid pursuant to subsection 3 must not exceed $25,000.".

Amend the bill as a whole by deleting sections 54 and 55, renumbering sections 56 through 59 as sections 60 through 63 and adding new sections designated sections 54 to 59, following sec. 53, to read as follows:

"Sec. 54. Section 29 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 29. NRS 78.390 is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and either call a special meeting of the stockholders entitled to vote on the amendment or direct that the proposed amendment be considered at the next annual meeting of the stockholders entitled to vote on the amendment.

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater

proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the provisions of the articles of incorporation, have voted in favor of the amendment, an officer of the corporation shall sign a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so signed must be filed with the secretary of state.

2. If any proposed amendment would adversely alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series adversely affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*

Sec. 55. Section 55 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 55. 1. A limited-liability company may correct a document filed by the secretary of state with respect to the limited-liability company if the document contains an inaccurate record of a company action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability company must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability company;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a manager of the company, or if management is not vested in a manager, by a member of the company.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 56. Section 90 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 90. Chapter 87 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A limited-liability partnership may correct a document filed by the secretary of state with respect to the limited-liability partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability partnership;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a managing partner of the limited-liability partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 57. Section 93 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 93. 1. A limited partnership may correct a document filed by the secretary of state with respect to the limited partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited partnership;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a general partner of the limited partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 58. Section 102 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 102. 1. A business trust may correct a document filed by the secretary of state with respect to the business trust if the document contains an inaccurate record of a trust action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the business trust must:

(a) Prepare a certificate of correction that:

(1) States the name of the business trust;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a trustee of the business trust.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 59. Senate Bill No. 51 is hereby amended by adding thereto a new section designated sec. 138, following sec. 137, to read as follows:

Sec. 138. This act becomes effective on August 1, 2001.".

Amend sec. 56, page 27, by deleting lines 29 and 30 and inserting:

"Sec. 60. Sections 1, 2, 3, 9 and 47 of this act do not apply to a claim that arises before the effective date of this section.".

Amend sec. 57, page 27, line 31, by deleting "59" and inserting "63".

Amend sec. 59, page 28, by deleting lines 5 through 14 and inserting:

"Sec. 63. 1. This section and sections 1, 2, 3, 9, 47, 59, 60, 61 and 62 of this act become effective upon passage and approval.

2. Sections 5, 6, 12, 13 to 19, inclusive, 20, 21, 22, 25 to 31, inclusive, 35 to 39, inclusive, 41 to 45, inclusive, and 47 to 53, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On August 1, 2001, for all other purposes.

3. Sections 1.5, 4, 7, 8.5, 10, 11, 14, 19.5, 23, 24, 32, 33, 34, 40, 46 and 54 to 58, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) At 12:01 a.m. on August 1, 2001, for all other purposes.".

Amend the title of the bill by deleting the first line and inserting:

"AN ACT relating to business associations; revising the statutory liability of".

Amend the summary of the bill to read as follows:

"SUMMARY—Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)".

Assemblywoman Buckley moved the adoption of the amendment.

Remarks by Assemblymen Buckley and Lee.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 421.

Bill read second time.

The following amendment was proposed by the Committee on Ways and Means:

Amendment No. 1189.

Amend section 1, page 1, line 2, by deleting "43," and inserting "20,".

Amend the bill as a whole by deleting sec. 3 and renumbering sec. 4 as sec. 3.

Amend the bill as a whole by deleting sec. 5 and renumbering sections 6 through 8 as sections 4 through 6.

Amend the bill as a whole by deleting sec. 9 and renumbering sec. 10 as sec. 7.

Amend the bill as a whole by deleting sections 11 through 28, renumbering sections 29 through 35 as sections 9 through 15 and adding a new section designated sec. 8, following sec. 10, to read as follows:

"Sec. 8. *In conducting any meetings, a rural agricultural residential common-interest community must comply with the provisions set forth in chapter 241 of NRS concerning open meetings which are generally applicable to public bodies.*".

Amend sec. 29, page 8, by deleting lines 13 and 14 and inserting:

"Sec. 9. *An application for a certificate to act as a community manager must:*".

Amend sec. 29, page 8, line 16, by deleting "*30*" and inserting "*10*".

Amend sec. 30, page 8, by deleting lines 18 and 19 and inserting:

"Sec. 10. *1. An applicant for a certificate to act as a community manager must*".

Amend sec. 30, page 8, line 26, by deleting "*license or*".

Amend sec. 30, page 8, line 28, by deleting "*license or*".

Amend sec. 31, page 8, by deleting lines 46 through 48 and inserting: "*permits issued to the holder of a certificate to act as a community manager, the division shall deem the certificate to be suspended at the end of*".

Amend sec. 31, page 9, line 1, by deleting "*license or*".

Amend sec. 31, page 9, line 3, by deleting "*license or*".

Amend sec. 31, page 9, line 5, by deleting: "*a license or*".

Amend sec. 31, page 9, line 8, by deleting "*license or*".

Amend sec. 35, page 9, line 37, by deleting "*A*" and inserting: "*An officer or a*".

Amend sec. 35, page 9, line 47, after "*to*" by inserting: "*an officer or*".

Amend the bill as a whole by deleting sections 36 and 37 and renumbering sections 38 through 41 as sections 16 through 19.

Amend sec. 38, page 11, by deleting lines 28 through 31 and inserting: "*a common-interest community that has at least 2,000 units, some or all of the authority of the members of a master association may be exercised by delegates, including, without limitation, the voting rights of the members of the master association, if the declaration so provides.*".

Amend sec. 39, pages 11 and 12, by deleting lines 39 through 49 on page 11 and lines 1 through 9 on page 12 and inserting: "*constructing any common elements that will be added to the association's common elements, the declarant is responsible for:*

(a) Paying all expenses related to the common elements which are incurred before the conveyance of the common elements to the association; and

(b) Except as otherwise provided in NRS 116.31038, delivering to the association the declarant's share of the amount specified in the study of reserves completed pursuant to subsection 2.

2. Before conveying the common elements to the association, the declarant shall deliver to the association a study of the reserves for the additional common elements which satisfies the requirements of NRS 116.31152.".

Amend sec. 40, page 12, line 10, by deleting "*In*" and inserting: "*Except as otherwise provided in subsection 2, in*".

Amend sec. 40, page 12, by deleting lines 14 through 32 and inserting: "*commercial use only if:*

(a) The governing documents of the association and any master association do not prohibit such use; and

(b) Persons entitled to cast at least a majority of the votes in the association and any master association approve the transient commercial use of the unit.

For the full text of this reprint, go to http://www.leg.state.nv.us/71st/bills/SB/SB577_R2.pdf

REQUIRES TWO-THIRDS MAJORITY VOTE (§§ 1.5, 4, 6, 7, 8.5, 10, 11, 12, 13, 14, 15, 16, 18, 19, 19.5, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58)

(REPRINTED WITH ADOPTED AMENDMENTS)

SECOND REPRINT **S.B. 577**

SENATE BILL NO. 577–SENATORS JAMES, RAGGIO, O'DONNELL, AMODEI, RAWSON, JACOBSEN AND MCGINNESS

MAY 24, 2001

Referred to Committee on Judiciary

SUMMARY—Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to business associations; revising the statutory liability of the stockholders, directors and officers of a corporation; increasing the fees and revising certain requirements for filing certain documents with the secretary of state; requiring certain fees charged by the secretary of state for special services to be deposited in the state general fund; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless:

(a) The stockholder, director or officer acts as the alter ego of the corporation; or

(b) The corporate fiction of a separate entity should be disregarded for any other reason.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder, director or officer;

(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

THIS BILL IS 33 PAGES LONG.
CONTACT THE RESEARCH LIBRARY FOR A COPY OF THE COMPLETE BILL.

Senate Bill No. 496.
Bill read third time.
Remarks by Assemblyman Carpenter.
Roll call on Senate Bill No. 496:
YEAS—39.
NAYS—None.
NOT VOTING—Goldwater.
EXCUSED—Freeman, Humke—2.

Senate Bill No. 496 having received a constitutional majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Senate Bill No. 576.
Bill read third time.
Remarks by Assemblymen Chowning, Gustavson, Lee and Buckley.
Conflict of interest declared by Assemblyman Lee.
Roll call on Senate Bill No. 576:
YEAS—36.
NAYS—Angle, Gustavson—2.
NOT VOTING—Arberry Jr., Lee—2.
EXCUSED—Freeman, Humke—2.

Senate Bill No. 576 having received a two-thirds majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Senate Bill No. 577.
Bill read third time.
Remarks by Assemblymen Anderson, Angle, Buckley and Brower.
Assemblyman Parks requested that the following remarks be entered in the Journal.
(To Be Included In Final Journal)
Roll call on Senate Bill No. 577:
YEAS—40.
NAYS—None.
EXCUSED—Freeman, Humke—2.

Senate Bill No. 577 having received a two-thirds majority, Mr. Speaker declared it passed, as amended.
Bill ordered transmitted to the Senate.

Senate Bill No. 372.
Bill read third time.
Remarks by Assemblymen Bache, de Braga, Collins, Gibbons and Beers.
Potential conflict of interest declared by Assemblyman de Braga.
Roll call on Senate Bill No. 372:
YEAS—39.
NAYS—None.
NOT VOTING—Carpenter.
EXCUSED—Freeman, Humke—2.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-First Session
June 3, 2001

The Senate Committee on Judiciary was called to order by Chairman Mark A. James at 7:45 p.m. on Sunday, June 3, 2001, on the Senate Floor of the Legislative Building, Carson City, Nevada. There was no Agenda. There was no Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Mike McGinness
Senator Maurice Washington
Senator Dina Titus
Senator Valerie Wiener
Senator Terry Care

STAFF MEMBERS PRESENT:

Bradley A. Wilkinson, Committee Counsel
Allison Combs, Committee Policy Analyst
Barbara Moss, Committee Secretary

Chairman James said the committee had one bill to discuss, Senate Bill (S.B.) 577.

SENATE BILL 577: Limits common-law and statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

SENATOR MCGINNESS MOVED TO NOT CONCUR WITH AMENDMENT NO. 1172 TO S.B. 577.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS AND SENATOR WIENER VOTED NO.)

*****

There being no further business, Chairman James adjourned the meeting at 7:50 p.m.

RESPECTFULLY SUBMITTED:

Heather Dion,
Committee Secretary

APPROVED BY:

Senator Mark A. James, Chairman

DATE: 6-14-01

duct for such drivers; providing for the impoundment of certain vehicles by the transportation services authority; requiring certain actions with regard to defects and unsafe conditions in vehicles; exempting certain holders of unrestricted gaming licenses that operate motor vehicles from the provisions governing fully regulated carriers; authorizing the transportation services authority to impose a fee for the issuance of identification decals to such exempted holders of unrestricted gaming licenses; requiring the transportation services authority to establish a system of allocation for limousines; providing that certain acts of drivers of fully regulated carriers of passengers are unlawful; providing penalties; and providing other matters properly relating thereto.".

Senator O'Donnell moved that the Senate do not concur in the Assembly amendment to Senate Bill No. 576.

Remarks by Senator O'Donnell.

Conflict of interest declared by Senator Care.

Motion carried.

Bill ordered transmitted to the Assembly.

Senate Bill No. 577.

The following Assembly amendment was read:

Amendment No. 1172.

Amend section 1, page 1, by deleting lines 4 through 13 and inserting: "*director or officer of a corporation is individually liable for a debt or liability of the corporation, unless:*

(a) The stockholder, director or officer acts as the alter ego of the corporation; or

(b) The corporate fiction of a separate entity should be disregarded for any other reason.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder,.".

Amend section 1, page 2, line 1, by deleting "*(2)*" and inserting "*(b)*".

Amend section 1, page 2, line 4, by deleting "*(3)*" and inserting "*(c)*".

Amend section 1, page 2, by deleting lines 5 through 9 and inserting: "*sanction fraud or promote injustice.*".

Amend the bill as a whole by adding a new section designated sec. 1.5, following section 1, to read as follows:

"Sec. 1.5. NRS 78.0295 is hereby amended to read as follows:

78.0295 1. A corporation may correct a document filed by the secretary of state with respect to the corporation if the document contains an inaccurate record of a corporate action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the corporation shall:

(a) Prepare a certificate of correction which:

(1) States the name of the corporation;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by an officer of the corporation.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.".

Amend sec. 3, page 3, line 18, after "*35.230,*" by inserting "*78.300,*".

Amend sec. 3, page 3, line 20, after "*liable*" by inserting: "*to the corporation or its stockholders*".

Amend sec. 3, page 3, line 23, by deleting "*and*" and inserting "*or*".

Amend sec. 4, page 3, line 27, by deleting "under" and inserting "pursuant to".

Amend sec. 4, page 3, line 45, by deleting "amended" and inserting "annual".

Amend sec. 4, pages 3 and 4, by deleting line 49 on page 3 and lines 1 through 3 on page 4, and inserting:

"*4.* Upon filing the ~~[annual]~~ list required by ~~[subsection]~~ *:*

(a) Subsection 1, the corporation shall pay to the secretary of state a fee of $165.

(b) Subsection 2, the corporation shall pay to the secretary of state a fee".

Amend sec. 4, page 4, by deleting lines 9 and 10 and inserting: "of the fee due pursuant to subsection ~~[3]~~ *4* and a reminder to file the annual list required by subsection 2. Failure of any".

Amend sec. 4, page 4, line 14, by deleting: "~~[3 or 7]~~" and inserting: "~~[3, 6 or 7]~~".

Amend sec. 4, page 4, line 19, after "and" by inserting: "must be accompanied by a fee of $85 for filing. A payment submitted pursuant to this subsection".

Amend sec. 7, page 4, line 47, by deleting "under" and inserting "pursuant to".

Amend sec. 7, page 5, lines 4 and 5, by deleting: "its charter was revoked;" and inserting: "it failed to file each required annual list in a timely manner;".

Amend sec. 7, page 5, line 9, after "fee" by inserting "or fees".

Amend the bill as a whole by deleting sec. 8 and inserting:

"Sec. 8. (Deleted by amendment.)".

Amend the bill as a whole by adding a new section designated sec. 8.5, following sec. 8, to read as follows:

"Sec. 8.5. NRS 78.390 is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and either call a special meeting of the stockholders entitled to vote on the amendment or direct that the

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proposed amendment be considered at the next annual meeting of the stockholders entitled to vote on the amendment.

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the provisions of the articles of incorporation, have voted in favor of the amendment, an officer of the corporation shall sign a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so signed must be filed with the secretary of state.

2. If any proposed amendment would adversely alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series adversely affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*".

Amend sec. 10, page 6, line 46, by deleting "or agreement".

Amend sec. 10, page 7, line 7, by deleting "under" and inserting "pursuant to".

Amend sec. 11, page 7, after line 46, by inserting:

"4. The fee for filing a certificate of termination pursuant to NRS 78.1955, 78.209 or 78.380 is ~~[$75.]~~ *$150.*".

Amend sec. 14, page 8, line 33, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 14, page 8, line 44, by deleting "~~[78.770,]~~ *92A.210*" and inserting "92A.210,".

Amend the bill as a whole by adding a new section designated sec. 19.5, following sec. 19, to read as follows:

"Sec. 19.5. NRS 86.226 is hereby amended to read as follows:

86.226 1. A signed certificate of amendment, or a certified copy of a judicial decree of amendment, must be filed with the secretary of state. A person who executes a certificate as an agent, officer or fiduciary of the limited-liability company need not exhibit evidence of his authority as a prerequisite to filing. Unless the secretary of state finds that a certificate does not conform to law, upon his receipt of all required filing fees he shall file the certificate.

2. A certificate of amendment or judicial decree of amendment is effective upon filing with the secretary of state or upon a later date specified in the certificate or judicial decree, which must not be more than 90 days after the certificate or judicial decree is filed.

3. If a certificate specifies an effective date and if the resolution of the members approving the proposed amendment provides that one or more managers or, if management is not vested in a manager, one or more members may abandon the proposed amendment, then those managers or members may terminate the effectiveness of the certificate by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate or judicial decree filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the members, the manager of the company or, if management is not vested in a manager, a designated member is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by a manager of the company or, if management is not vested in a manager, a designated member; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*".

Amend sec. 23, page 12, line 27, by deleting "under" and inserting "pursuant to".

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Amend sec. 23, page 12, lines 33 and 34, by deleting: "its charter has been revoked;" and inserting: "it failed to file in a timely manner each required annual list;".

Amend sec. 24, page 13, by deleting lines 5 and 6 and inserting:

"(b) Amending or restating the articles of organization, amending the registration of a foreign company or filing a certificate of correction, ~~[$75;]~~ *$150;*".

Amend sec. 24, page 13, by deleting lines 15 and 16 and inserting:

"(h) Filing a certificate of cancellation, ~~[$30;]~~ *$60;*

(i) Executing, filing or certifying any other document, ~~[$20;]~~ *$40;* and

(j) Copies made at the office of the secretary of state, $1 per page.".

Amend sec. 32, page 16, line 36, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 33, page 17, between lines 35 and 36, by inserting:

"6. A filing made pursuant to this section does not satisfy the provisions of NRS 88.355 and may not be substituted for filings submitted pursuant to NRS 88.355.".

Amend sec. 34, page 17, line 37, by deleting "corporation" and inserting "limited partnership".

Amend sec. 40, page 20, line 32, by deleting "~~[$15.]~~ *$30.*" and inserting "~~[$20.]~~ *$40.*".

Amend sec. 42, page 21, by deleting lines 14 through 40 and inserting:

"89.250 1. Except as otherwise provided in subsection 2, a professional association shall, *on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter* on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state showing the names and residence addresses of all members and employees in ~~[such]~~ *the* association and ~~[shall certify]~~ *certifying* that all members and employees are licensed to render professional service in this state.

2. A professional association organized and practicing pursuant to the provisions of this chapter and NRS 623.349 shall, *on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter* on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state:

(a) Showing the names and residence addresses of all members and employees of the association who are licensed or otherwise authorized by law to render professional service in this state;

(b) Certifying that all members and employees who render professional service are licensed or otherwise authorized by law to render professional service in this state; and

(c) Certifying that all members who are not licensed to render professional service in this state do not render professional service on behalf of the association except as authorized by law.

3. ~~[The statement must:~~

~~(a) Be made]~~ *Each statement filed pursuant to this section must be:*

(a) Made on a form prescribed by the secretary of state and must not contain any fiscal or other information except that expressly called for by this section.

(b) ~~[Be signed]~~ *Signed* by the chief executive officer of the association.

(c) Accompanied by a declaration under penalty of perjury that the professional association has complied with the provisions of chapter 364A of NRS.

4. Upon filing ~~[the annual]~~ :

(a) The initial statement required by this section, the association shall pay to the secretary of state a fee of $165.

(b) Each annual statement required by this section, the association shall pay to the secretary of state a fee of ~~[$15.]~~ *$85.*

5. As used in this section, "signed" means to have executed or adopted a name, word or mark, including, without limitation, a digital signature as defined in NRS 720.060, with the present intention to authenticate a document.".

Amend sec. 46, page 23, by deleting lines 20 through 39 and inserting:

"92A.210 1. Except as otherwise provided in this section, the fee for filing articles of merger, articles of conversion, articles of exchange, articles of domestication or articles of termination is ~~[$125.]~~ *$325.* The fee for filing the constituent documents of a domestic resulting entity is the fee for filing the constituent documents determined by the chapter of NRS governing the particular domestic resulting entity.

2. The fee for filing articles of merger of two or more domestic corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporation.

3. The fee for filing articles of merger of one or more domestic corporations with one or more foreign corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporations which have paid the fees required by NRS 78.760 and 80.050.

4. The fee for filing articles of merger of two or more domestic or foreign corporations must not be less than ~~[$125.]~~ *$325.* The amount paid pursuant to subsection 3 must not exceed $25,000.".

Amend the bill as a whole by deleting sections 54 and 55, renumbering sections 56 through 59 as sections 60 through 63 and adding new sections designated sections 54 to 59, following sec. 53, to read as follows:

"Sec. 54. Section 29 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 29. NRS 78.390 is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and either call a special meeting of the stockholders entitled to vote on the amendment or direct that the proposed amendment be considered at the next annual meeting of the stockholders entitled to vote on the amendment.

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the provisions of the articles of incorporation, have voted in favor of the amendment, an officer of the corporation shall sign a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so signed must be filed with the secretary of state.

2. If any proposed amendment would adversely alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series adversely affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*

Sec. 55. Section 55 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 55. 1. A limited-liability company may correct a document filed by the secretary of state with respect to the limited-liability company if the document contains an inaccurate record of a company action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability company must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability company;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a manager of the company, or if management is not vested in a manager, by a member of the company.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 56. Section 90 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 90. Chapter 87 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A limited-liability partnership may correct a document filed by the secretary of state with respect to the limited-liability partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability partnership;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a managing partner of the limited-liability partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 57. Section 93 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 93. 1. A limited partnership may correct a document filed by the secretary of state with respect to the limited partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited partnership;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a general partner of the limited partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 58. Section 102 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 102. 1. A business trust may correct a document filed by the secretary of state with respect to the business trust if the document contains an inaccurate record of a trust action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the business trust must:

(a) Prepare a certificate of correction that:

(1) States the name of the business trust;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

PA002202 2331

(5) Is signed by a trustee of the business trust.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ *$150* to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 59. Senate Bill No. 51 is hereby amended by adding thereto a new section designated sec. 138, following sec. 137, to read as follows:

Sec. 138. This act becomes effective on August 1, 2001.".

Amend sec. 56, page 27, by deleting lines 29 and 30 and inserting:

"Sec. 60. Sections 1, 2, 3, 9 and 47 of this act do not apply to a claim that arises before the effective date of this section.".

Amend sec. 57, page 27, line 31, by deleting "59" and inserting "63".

Amend sec. 59, page 28, by deleting lines 5 through 14 and inserting:

"Sec. 63. 1. This section and sections 1, 2, 3, 9, 47, 59, 60, 61 and 62 of this act become effective upon passage and approval.

2. Sections 5, 6, 12, 13 to 19, inclusive, 20, 21, 22, 25 to 31, inclusive, 35 to 39, inclusive, 41 to 45, inclusive, and 47 to 53, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On August 1, 2001, for all other purposes.

3. Sections 1.5, 4, 7, 8.5, 10, 11, 14, 19.5, 23, 24, 32, 33, 34, 40, 46 and 54 to 58, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) At 12:01 a.m. on August 1, 2001, for all other purposes.".

Amend the title of the bill by deleting the first line and inserting:

"AN ACT relating to business associations; revising the statutory liability of".

Amend the summary of the bill to read as follows:

"SUMMARY—Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)".

Senator James moved that the Senate do not concur in the Assembly amendment to Senate Bill No. 577.

Remarks by Senators James and Titus.

Senator James requested that the following remarks be entered in the Journal.

* (The remarks will be in the final Journal.)

Senator Titus moved that the Senate recess subject to the call of the Chair. Motion carried.

Senate in recess at 9:19 p.m.

* ATTACHED

SENATE IN SESSION

At 9:26 p.m.

President Hunt presiding.

Quorum present.

Senators James, Amodei and Raggio requested a roll call vote on Senator James' motion.

Roll call on Senator James' motion:

YEAS—21.

NAYS—None.

The motion having received a majority, Madam President declared it carried.

Motion carried.

Bill ordered transmitted to the Assembly.

Senator Titus requested that her remarks be entered in the Journal.

My vote to not concur on the amendment we just considered is in no way a reflection of my support for the bill as it originally left this house.

REPORTS OF CONFERENCE COMMITTEES

Madam President:

The first Conference Committee concerning Assembly Bill No. 653, consisting of the undersigned members, has met and reports that:

No decision was reached, and recommends the appointment of a second Conference Committee, to consist of 3 members, for the further consideration of the measure.

MICHAEL SCHNEIDER	DAVID R. PARKS
ANN O'CONNELL	P.M. "ROY" NEIGHBORS
BOB COFFIN	SANDRA J. TIFFANY
Senate Conference Committee	*Assembly Conference Committee*

Senator McGinness moved that the Senate adopt the report of the first Conference Committee concerning Assembly No. 653.

Remarks by Senator McGinness.

Motion carried.

APPOINTMENT OF CONFERENCE COMMITTEES

Madam President appointed Senators McGinness, Townsend and Neal as a second Conference Committee to meet with a like committee of the Assembly for the further consideration of Assembly Bill No. 653.

MESSAGES FROM THE ASSEMBLY

ASSEMBLY CHAMBER, Carson City, June 3, 2001

To the Honorable the Senate:

I have the honor to inform your honorable body that the Assembly on this day passed, as amended, Assembly Bill No. 424; Assembly Joint Resolution No. 14.

PATRICIA R. WILLIAMS
Assistant Chief Clerk of the Assembly

MOTIONS, RESOLUTIONS AND NOTICES

Assembly Joint Resolution No. 14.

Read first time.

PA002203232

Senator Rawson moved that the resolution be referred to the Committee on Government Affairs.

Motion carried.

INTRODUCTION, FIRST READING AND REFERENCE

Assembly Bill No. 424.

Senator Rawson moved that the bill be referred to the Committee on Finance.

Motion carried.

UNFINISHED BUSINESS

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the President and Secretary signed Senate Bills Nos. 87, 208, 319, 367, 428, 444, 464, 477, 494, 500, 505, 531, 573, 574; Senate Concurrent Resolution No. 52; Senate Resolution No. 10; Assembly Bills Nos. 48, 60, 209, 250, 326, 505, 510, 519, 555, 588, 620, 658.

GUESTS EXTENDED PRIVILEGE OF SENATE FLOOR

On request of Senator Schneider, the privilege of the floor of the Senate Chamber for this day was extended to Mary Jo Reed and Paul Reed.

Senator Raggio moved that the Senate adjourn until Monday, June 4, 2001 at 10 a.m.

Motion carried.

Senate adjourned at 9:33 p.m.

Approved:

LORRAINE T. HUNT
President of the Senate

Attest: CLAIRE J. CLIFT
Secretary of the Senate

Senator James moved that the Senate do not concur in the Assembly amendment to Senate Bill No. 577.

Remarks by Senators James and Titus.

Senator James requested that his remarks be entered in the Journal.

I would like to make certain that the Senate has a clear understanding of what the Assembly has done in adopting the amendment to this bill. I know that you are looking at the amendment. If you wish to look at the second reprint of the bill in your bill book, it might be easier to follow.

Whether you are looking at the first page of the first reprint, which is on the front under section 1 at lines 7-10 or whether you are looking at the amendment which is the first page, I would direct your attention to the discussion of the doctrine of alter-ego. Under current law, the alter-ego doctrine allows the fiction of the corporation, the corporate entity, to be disregarded if there are two circumstances at issue. If the director, officer or stockholder of the corporation acts as the alter-ego, and continuing to recognize the corporation, would, in the words of our Supreme Court, "sanction a fraud or promote injustice." The Senate version of this bill simply changed the doctrine to say that it would only apply if it were to sanction a fraud. We took out the promoting injustice language. The Assembly has not suggested codifying existing Nevada case law. The Assembly has rewritten this doctrine in a way that has never been rewritten in this country. They have done it where it says, "the stockholder director or officer acts as the alter-ego of the corporation or, in the Assembly amendment, the corporate fiction of a separate entity should be disregarded for any other reason." Any reason—not fraud, not injustice—just any reason. That is the first major change. That change would be a major departure from corporate law throughout the country regarding the alter-ego doctrine. It would set no standard. It would say that for any other reason, the corporate fiction should be disregarded. That is not a change to existing case law. That is not a codification of existing case law. It is taking a huge step backwards in Nevada and making it a place where no one would want to have a corporation. There would be no standard for when the corporation would be disregarded and the personal assets of a person would be at risk.

The second change, if you look at the first reprint of the bill, on the second page, you will see in section 2 there is some stricken language. That language says that the articles of incorporation of a corporation may contain language that limits the liability of the director to two circumstances, fraud or the payment of a dividend at a time when a corporation is insolvent. There are many articles of incorporation on file in the Secretary of State's office that have that provision in them. Those directors have the protection of the articles that they can only be held libel in the instance of fraud or payment of a dividend at a time when the corporation is insolvent. That language is stricken in the Assembly amendment. Look to the next page, the liability protection, now available to a director, is not that protection? What they have under existing law, if they put the provision in their articles, is a mere breach of fiduciary duty. It is mere negligence. Therefore, what this means, if this bill as passed by the Assembly, should pass into law in Nevada then every single attorney in this country that has advised a corporation to incorporate in Nevada has to send a letter. It would be legal malpractice for an attorney who has incorporated his clients' corporation in Nevada not to send a letter to tell them that the law in Nevada has been changed, and the protection they had under their articles is now gone. The protection they have in Nevada law is less than what they used to have. The provision they have in their articles, that limited their liability, is an illegal provision under Nevada law. They must amend their articles and remove it.

Why did I go through that, Madam President? Because those 172,000 corporations, who we have computed conservatively, would continue to increase in numbers of corporations over this coming biennium by 10 or 15 percent and would generate the $29 million, conservatively, for the teacher salaries in this State in the education program proposed by this Senate, myself and the Governor. That money will not, under any circumstances, be generated under the formulation of this bill.

Just the opposite. Many of those 172,000 corporations will disincorporate in Nevada. They will go to Delaware. They will go to Wyoming where they can get this protection in their articles. Remember, we have not given them the option any more under the Assembly version. We have taken out the ability to get that protection. They cannot get it so they have to disincorporate. They have to leave our State. We won't get the $29 million that we need for the education fund under this bill. We won't get the approximately $30 million that we get already, collected by the Secretary of State's office, for the various fees collected from corporations.

This is not a serious endeavor, in my judgment, Madam President and members of the Senate, to come up with an alternate proposal regarding director liability. What the Assembly amendment has done is to make a mockery of corporate law in Nevada. It is to make a mockery of this bill and place us seriously at risk, the entire package of funding for our education system. I do not know if I would agree with, but I could understand having taken this bill and made some modifications, perhaps, attempted to change it back to existing law. But to take this bill and adopt an amendment to it takes us backward. Puts us in a position where every lawyer, and I do not say that lightly, would have to say to his client, "You need to disincorporate in Nevada." If they didn't, they would be guilty of malpractice. To do that is to trifle with the process, Madam President, to trifle with a very serious proposal to fund the under-funded education system in the State, to trifle with the corporate laws of the State, one of the major attractions that Nevada has is favorable corporation laws.

We received a letter from John Fowler. He is the attorney who has represented the State Bar Business Law section in this Legislature for all five sessions that I have been here, and has brought forward the reform in corporate laws to our committee and to the committee in the other House. John Fowler wrote a letter that said in essences, "this would be a disaster." I could show you the letter if anyone has a question, but his letter says essentially this would be a disaster for Nevada corporate law for us to adopt this. Those are the words of John Fowler who has helped us carefully craft our laws and make them the most attractive in the country. We would, in one fell swoop, destroy all of that work and make Nevada the lease attractive place in which to incorporate. I find that to simply make a mockery of not only what this bill is about, the subject matter that is Nevada corporate law, but what it tries to accomplish—raise funds that are desperately needed for our teachers, for our children, for our education system. That is what it has done. I would strongly urge the members of the Senate to not concur in this amendment and hopefully the Assembly will see the great damage this would cause and will recede from their amendment.

Senator Titus moved that the Senate recess subject to the call of the Chair.

Motion carried.

Senate in recess at 9:19 p.m.

SENATE IN SESSION

At 9:26 p.m.

President Hunt presiding.

Quorum present.

Senators James, Amodei and Raggio requested a roll call vote on Senator James' motion.

Roll call on Senator James' motion:

YEAS—21.

NAYS—None.

The motion having received a majority, Madam President declared it carried.

Bill ordered transmitted to the Assembly.

Senator Titus requested that her remarks be entered in the Journal.

My vote to not concur on the amendment we just considered is in no way a reflection of my support for the bill as it originally left this house.

UNFINISHED BUSINESS

RECEDE FROM ASSEMBLY AMENDMENTS

Assemblyman Anderson moved that the Assembly do not recede from its action on Senate Bill No. 286, that a conference be requested, and that Mr. Speaker appoint a first Conference Committee consisting of three members to meet with a like committee of the Senate.

Remarks by Assemblyman Anderson.

Motion carried.

APPOINTMENT OF CONFERENCE COMMITTEES

Mr. Speaker appointed Assemblymen McClain, Gustavson and Claborn as a first Conference Committee to meet with a like committee of the Senate for the further consideration of Senate Bill No. 286.

RECEDE FROM ASSEMBLY AMENDMENTS

Assemblyman Anderson moved that the Assembly do not recede from its action on Senate Bill No. 577, that a conference be requested, and that Mr. Speaker appoint a first Conference Committee consisting of three members to meet with a like committee of the Senate.

Remarks by Assemblyman Anderson.

Motion carried.

APPOINTMENT OF CONFERENCE COMMITTEES

Mr. Speaker appointed Assemblymen Anderson, Brower and Oceguera as a first Conference Committee to meet with a like committee of the Senate for the further consideration of Senate Bill No. 577.

MOTIONS, RESOLUTIONS AND NOTICES

Assembly Concurrent Resolution No. 3.

Resolution read.

The following amendment was proposed by the Committee on Elections, Procedures, and Ethics:

Amendment No. 1239.

Amend the resolution, page 1, line 12, by deleting "subcommittee" and inserting: "committee consisting of three members of the Assembly, two of whom are members of the Assembly Standing Committee on Judiciary and three members of the Senate, two of whom are members of the Senate Standing Committee on Judiciary,".

Amend the resolution, page 1, line 26, by deleting "subcommittee;" and inserting "committee;".

Amend the resolution, page 1, line 28, by deleting "subcommittee" and inserting "committee".

Amend the resolution, page 2, line 2, by deleting "subcommittee;" and inserting "committee;".

Assemblywoman Giunchigliani moved the adoption of the amendment.

Remarks by Assemblywoman Giunchigliani.

Amendment adopted.

Also, I have the honor to inform your honorable body that the Assembly on this day respectfully refused to recede from its action on Senate Bill No. 421, and requests a conference, and appointed Assemblymen Anderson Buckley and Carpenter as a first Conference Committee to meet with a like committee of the Senate.

Also, I have the honor to inform your honorable body that the Assembly on this day appointed Assemblymen McClain, Carpenter and Parks as a first Conference Committee concerning Assembly Bill No. 460.

Also, I have the honor to inform your honorable body that the Assembly on this day adopted the reports of the first Conference Committees concerning Senate Bills Nos. 286, 489, Assembly Bills Nos. 94, 133, 271, 483.

Also, I have the honor to inform your honorable body that the Assembly on this day appointed Assemblymen Collins, Lee and Carpenter as a second Conference Committee concerning Assembly Bill No. 246.

Also, I have the honor to inform your honorable body that the Assembly on this day appointed Assemblymen Koivisto, Brower and Collins as a second Conference Committee concerning Assembly Bill No. 305.

Also, I have the honor to inform your honorable body that the Assembly on this day adopted the reports of the second Conference Committees concerning Assembly Bills Nos. 246, 653.

PATRICIA R. WILLIAMS
Assistant Chief Clerk of the Assembly

UNFINISHED BUSINESS

REPORTS OF CONFERENCE COMMITTEES

Madam President:

The first Conference Committee concerning Senate Bill No. 577, consisting of the undersigned members, has met and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. 41, which is attached to and hereby made a part of this report.

Conference Amendment.

Amend section 1, page 1, by deleting lines 5 through 9 and inserting: "*liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.*".

Amend section 1, page 2, by deleting line 2 and inserting: "*sanction fraud or promote a manifest injustice.*

3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.".

Amend sec. 3, page 3, line 33, by deleting "*78.300,*".

Amend sec. 3, page 3, line 39, by deleting: "*officer; or*" and inserting: "*officer; and*".

Amend sec. 8, page 5, by deleting line 36 and inserting:

"Sec. 8. NRS 78.300 is hereby amended to read as follows:

78.300 1. The directors of a corporation shall not make distributions to stockholders except as provided by this chapter.

2. ~~[In]~~ *Except as otherwise provided in subsection 3 and NRS 78.138, in* case of any ~~[willful or grossly negligent]~~ violation of the provisions of this section, the directors under whose administration the violation occurred ~~[, except those who caused their dissent to be entered upon the minutes of the meeting of the directors at the time, or who not then being present caused their dissent to be entered on learning of such action,]~~ are jointly and severally liable, at any time within 3 years after each violation, to the corporation, and, in the event of its dissolution or insolvency, to its creditors at the time of the violation, or any of them, to the lesser of the full amount of the distribution made or of any loss sustained by the corporation by reason of the distribution to stockholders.

3. The liability imposed pursuant to subsection 2 does not apply to a director who caused his dissent to be entered upon the minutes of the meeting of the directors at the time the action was taken or who was not present at the meeting and caused his dissent to be entered on learning of the action.".

Amend sec. 54, page 30, line 35, by deleting "~~[$75.]~~ *$150.*" and inserting "*$75.*".
Amend sec. 60, page 32, line 35, after "3," by inserting "8,".
Amend sec. 63, page 33, line 9, after "3," by inserting "8,".

MARK A. JAMES
MARK AMODEI
Senate Conference Committee

BERNIE ANDERSON
GREG BROWER
JOHN OCEGUERA
Assembly Conference Committee

Senator James moved that the Senate adopt the report of the first Conference Committee concerning Senate Bill No. 577.

Remarks by Senator James.

Motion carried by a two-thirds majority.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved to take Assembly Bills Nos. 661, 615, as the next orders of business.

Motion carried.

GENERAL FILE AND THIRD READING

Assembly Bill No. 661.

Bill read third time.

Remarks by Senator Neal.

Senator Neal requested that his remarks be entered in the Journal.

Madam President, Assembly Bill No. 661 seems to be proceeding on the notion that what is good for the casinos in Nevada is good for the public. The larger customers with lucrative accounts are demanding that they be able to seek lower costs for electricity. Assembly Bill No. 661 would allow this to happen.

The following consequences will be that the individual household would lack the bargaining power to gain lower rates.

Upon leaving, the utilities will have little incentive to devote resources to maintaining or improving services to low-income people.

Amendment 1235, which was amended into Assembly Bill No. 661 as a consumer measure is a sham. Section 26.65 which allows a large corporation to become a non-profit corporation to get around any mill assessment for the poor and needy because if such non-profits are formed, it seems they would not have to pay any mill tax.

The mill tax is assessed in Section 26.7 when electricity is purchased by a retailer from another for consumption but if they are purchasing power themselves, they would not have to pay the mill tax of 39 cents on each kilowatt-hour of electricity.

Roll call on Assembly Bill No. 661:

YEAS—15.

NAYS—Neal, O'Connell, O'Donnell, Titus, Wiener—5.

NOT VOTING—Raggio.

Assembly Bill No. 661 having received a two-thirds majority, Madam President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved to withdraw the amendment on Assembly Bill No. 343 and take it as the next order of business.

Motion carried.

Assemblywoman Buckley moved that the Assembly concur in the Senate amendment to Assembly Bill No. 460.

Remarks by Assemblywoman Buckley.

Motion carried by a constitutional majority.

Bill ordered to enrollment.

MESSAGES FROM THE SENATE

SENATE CHAMBER, Carson City, June 4, 2001

To the Honorable the Assembly:

I have the honor to inform your honorable body that the Senate on this day adopted the report of the first Conference Committee concerning Senate Bill No. 577.

MARY JO MONGELLI
Assistant Secretary of the Senate

UNFINISHED BUSINESS

REPORTS OF CONFERENCE COMMITTEES

Mr. Speaker:

The first Conference Committee concerning Senate Bill No. 577, consisting of the undersigned members, has met and reports that:

It has agreed to recommend that the amendment of the Assembly be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. CA41, which is attached to and hereby made a part of this report.

BERNIE ANDERSON
GREG BROWER
JOHN OCEGUERA
Assembly Conference Committee

MARK A. JAMES
MARK AMODEI
TERRY CARE
Senate Conference Committee

Conference Amendment No. CA41.

Amend section 1, page 1, by deleting lines 5 through 9 and inserting: "*liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.*".

Amend section 1, page 2, by deleting line 2 and inserting: "*sanction fraud or promote a manifest injustice.*

3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.".

Amend sec. 3, page 3, line 33, by deleting "*78.300,*".

Amend sec. 3, page 3, line 39, by deleting: "*officer; or*" and inserting: "*officer; and*".

Amend sec. 8, page 5, by deleting line 36 and inserting:

"Sec. 8. NRS 78.300 is hereby amended to read as follows:

78.300 1. The directors of a corporation shall not make distributions to stockholders except as provided by this chapter.

2. ~~[In]~~ *Except as otherwise provided in subsection 3 and NRS 78.138, in* case of any ~~[willful or grossly negligent]~~ violation of the provisions of this section, the directors under whose administration the violation occurred ~~[, except those who caused their dissent to be entered upon the minutes of the meeting of the directors at the time, or who not then being present caused their dissent to be entered on learning of such action,]~~ are jointly and severally liable, at any time within 3 years after each violation, to the corpora-

tion, and, in the event of its dissolution or insolvency, to its creditors at the time of the violation, or any of them, to the lesser of the full amount of the distribution made or of any loss sustained by the corporation by reason of the distribution to stockholders.

3. The liability imposed pursuant to subsection 2 does not apply to a director who caused his dissent to be entered upon the minutes of the meeting of the directors at the time the action was taken or who was not present at the meeting and caused his dissent to be entered on learning of the action.".

Amend sec. 54, page 30, line 35, by deleting "~~[$75.]~~ *$150.*" and inserting "*$75.*".

Amend sec. 60, page 32, line 35, after "3," by inserting "8,".

Amend sec. 63, page 33, line 9, after "3," by inserting "8,".

Assemblywoman Buckley moved that the Assembly adopt the report of the first Conference Committee concerning Senate Bill No. 577.

Remarks by Assemblywoman Buckley.

Motion carried.

Mr. Speaker:

The second Conference Committee concerning Assembly Bill No. 653, consisting of the undersigned members, has met and reports that:

It has agreed to recommend that the amendment of the Senate be concurred in.

It has agreed to recommend that the bill be further amended as set forth in Conference Amendment No. CA38, which is attached to and hereby made a part of this report.

DAVID E. GOLDWATER	MIKE MCGINNESS
BERNIE ANDERSON	RANDOLPH J. TOWNSEND
DAVID BROWN	JOSEPH NEAL
Assembly Conference Committee	*Senate Conference Committee*

Conference Amendment No. CA38.

Amend section 1, page 1, by deleting lines 10 through 12 and inserting: "to NRS 360.670 an amount from the account that is".

Amend section 1, pages 1 and 2, by deleting lines 19 and 20 on page 1 and lines 1 through 5 on page 2.

Amend the bill as a whole by deleting sections 2 and 2.5 and adding new sections designated sections 2 through 2.7, following section 1, to read as follows:

"Sec. 2. NRS 360.690 is hereby amended to read as follows:

360.690 1. Except as otherwise provided in NRS 360.730, the executive director shall estimate monthly the amount each local government, special district and enterprise district will receive from the account pursuant to the provisions of this section.

2. The executive director shall establish a base monthly allocation for each local government, special district and enterprise district by dividing the amount determined pursuant to NRS 360.680 for each local government, special district and enterprise district by 12 and the state treasurer shall, except as otherwise provided in subsections 3, 4 and 5, remit monthly that amount to each local government, special district and enterprise district.

3. If, after making the allocation to each enterprise district for the month, the executive director determines there is not sufficient money ava

For the full text of this reprint, go to http://www.leg.state.nv.us/71st/bills/SB/SB577_R3.pdf

REQUIRES TWO-THIRDS MAJORITY VOTE (§§ 1.5, 4, 6, 7, 8.5, 10, 11, 12, 13, 14, 15, 16, 18, 19, 19.5, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58)

(REPRINTED WITH ADOPTED AMENDMENTS)
THIRD REPRINT **S.B. 577**

SENATE BILL NO. 577–SENATORS JAMES, RAGGIO, O'DONNELL, AMODEI, RAWSON, JACOBSEN AND MCGINNESS

MAY 24, 2001

Referred to Committee on Judiciary

SUMMARY—Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to business associations; revising the statutory liability of the stockholders, directors and officers of a corporation; increasing the fees and revising certain requirements for filing certain documents with the secretary of state; requiring certain fees charged by the secretary of state for special services to be deposited in the state general fund; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder, director or officer;

(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

(c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.

THIS BILL IS 33 PAGES LONG.
CONTACT THE RESEARCH LIBRARY FOR A COPY OF THE COMPLETE BILL.
* S B 5 7 7 R 3 *
PAO02211 240

Sec. 3. 1. There is hereby appropriated from the state general fund to the real estate division of the department of business and industry to investigate complaints, conduct audits and perform any other activities necessary to ensure compliance with Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended:

For the fiscal year 2001-2002 ..... $22,000

For the fiscal year 2002-2003 ..... $22,000

2. Any balance of the sums appropriated by subsection 1 remaining at the end of the respective fiscal years must not be committed for expenditure after June 30 of the respective fiscal years and reverts to the state general fund as soon as all payments of money committed have been made.

Sec. 4. This act becomes effective on July 1, 2001.

Senate Bill No. 577–Senators James, Raggio, O'Donnell, Amodei, Rawson, Jacobsen and McGinness

CHAPTER 601

AN ACT relating to business associations; revising the statutory liability of the stockholders, directors and officers of a corporation; increasing the fees and revising certain requirements for filing certain documents with the secretary of state; requiring certain fees charged by the secretary of state for special services to be deposited in the state general fund; and providing other matters properly relating thereto.

[Approved: June 15, 2001]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation.

2. A stockholder, director or officer acts as the alter ego of a corporation if:

(a) The corporation is influenced and governed by the stockholder, director or officer;

(b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and

(c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice.

3. The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law.

Sec. 1.5. NRS 78.0295 is hereby amended to read as follows:

78.0295 1. A corporation may correct a document filed by the secretary of state with respect to the corporation if the document contains an inaccurate record of a corporate action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the corporation shall:

(a) Prepare a certificate of correction which:

(1) States the name of the corporation;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by an officer of the corporation.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ ***$150*** to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 2. NRS 78.037 is hereby amended to read as follows:

78.037 The articles of incorporation may also contain ~~[:~~

~~1. A provision eliminating or limiting the personal liability of a director or officer to the corporation or its stockholders for damages for breach of fiduciary duty as a director or officer, but such a provision must not eliminate or limit the liability of a director or officer for:~~

~~(a) Acts or omissions which involve intentional misconduct, fraud or a knowing violation of law; or~~

~~(b) The payment of distributions in violation of NRS 78.300.~~

~~2. Any]~~ ***any*** provision, not contrary to the laws of this state ~~[, for]~~ ***:***

1. For the management of the business and for the conduct of the affairs of the corporation ~~[, and any provision creating,]~~ ***;***

2. Creating, defining, limiting or regulating the powers of the corporation or the rights, powers or duties of the directors, ~~[and]~~ ***the officers or*** the stockholders, or any class of the stockholders, or the holders of bonds or other obligations of the corporation ~~[, or governing]~~ ***; or***

3. Governing the distribution or division of the profits of the corporation.

Sec. 3. NRS 78.138 is hereby amended to read as follows:

78.138 1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.

2. In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, ***financial advisers, valuation advisers, investment bankers*** or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if he has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may consider:

(a) The interests of the corporation's employees, suppliers, creditors and customers;

(b) The economy of the state and nation;

(c) The interests of the community and of society; and

(d) The long-term as well as short-term interests of the corporation and its stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

5. Directors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, a director or officer is not individually liable to the corporation or its stockholders for any damages as a result of any act or failure to act in his capacity as a director or officer unless it is proven that:

(a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; and

(b) His breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

Sec. 4. **NRS 78.150** is hereby amended to read as follows:

78.150 1. A corporation organized pursuant to the laws of this state shall, on or before the first day of the second month after the filing of its articles of incorporation with the secretary of state, file with the secretary of state a list, on a form furnished by him, containing:

(a) The name of the corporation;

(b) The file number of the corporation, if known;

(c) The names and titles of the president, secretary, treasurer and of all the directors of the corporation;

(d) The mailing or street address, either residence or business, of each officer and director listed, following the name of the officer or director; ~~[and]~~

(e) ***The name and street address of the resident agent of the corporation; and***

(f) The signature of an officer of the corporation certifying that the list is true, complete and accurate.

2. The corporation shall annually thereafter, on or before the last day of the month in which the anniversary date of incorporation occurs in each year, file with the secretary of state, on a form furnished by him, an annual list containing all of the information required in subsection 1.

3. ***Each list required by subsection 1 or 2 must be accompanied by a declaration under penalty of perjury that the corporation has complied with the provisions of chapter 364A of NRS.***

4. Upon filing the ~~[annual]~~ list required by ~~[subsection]~~ ***:***

(a) Subsection 1, the corporation shall pay to the secretary of state a fee of $165.

(b) Subsection 2, the corporation shall pay to the secretary of state a fee of $85.

~~[4.]~~ ***5.*** The secretary of state shall, 60 days before the last day for filing ~~[the]~~ ***each*** annual list required by subsection 2, cause to be mailed to each corporation which is required to comply with the provisions of NRS 78.150 to 78.185, inclusive, and which has not become delinquent, a notice of the fee due pursuant to subsection ~~[3]~~ ***4*** and a reminder to file the annual list required by subsection 2. Failure of any corporation to receive a notice or form does not excuse it from the penalty imposed by law.

~~[5.]~~ ***6.*** If the list to be filed pursuant to the provisions of subsection 1 or 2 is defective in any respect or the fee required by subsection ~~[3, 6 or 7]~~ ***4 or 8*** is not paid, the secretary of state may return the list for correction or payment.

~~[6.]~~ ***7.*** An annual list for a corporation not in default which is received by the secretary of state more than 60 days before its due date shall be deemed an amended list for the previous year and must be accompanied by a fee of $85 for filing. A payment submitted pursuant to this subsection does not satisfy the requirements of subsection 2 for the year to which the due date is applicable.

~~[7.]~~ ***8.*** If the corporation is an association as defined in NRS 116.110315, the secretary of state shall not accept the filing required by this section unless it is accompanied by evidence of the payment of the fee required to be paid pursuant to NRS 116.31155 that is provided to the association pursuant to subsection 4 of that section.

Sec. 5. **NRS 78.155** is hereby amended to read as follows:

78.155 If a corporation has filed the initial or annual list ~~[of officers and directors and designation of resident agent]~~ in compliance with NRS 78.150 and has paid the appropriate fee for the filing, the canceled check received by the corporation constitutes a certificate authorizing it to transact its business within this state until the last day of the month in which the anniversary of its incorporation occurs in the next succeeding calendar year. If the corporation desires a formal certificate upon its payment of the initial or annual fee, its payment must be accompanied by a self-addressed, stamped envelope.

Sec. 6. **NRS 78.170** is hereby amended to read as follows:

78.170 1. Each corporation required to make a filing and pay the fee prescribed in NRS 78.150 to 78.185, inclusive, which refuses or neglects to do so within the time provided shall be deemed in default.

2. For default there must be added to the amount of the fee a penalty of ~~[$15.]~~ ***$50.*** The fee and penalty must be collected as provided in this chapter.

Sec. 7. **NRS 78.180** is hereby amended to read as follows:

78.180 1. Except as otherwise provided in subsections 3 and 4, the secretary of state shall reinstate a corporation which has forfeited its right to transact business pursuant to the provisions of this chapter and restore to the corporation its right to carry on business in this state, and to exercise its corporate privileges and immunities, if it:

(a) Files with the secretary of state the list required by NRS 78.150; and

(b) Pays to the secretary of state:

(1) The ~~[annual]~~ filing fee and penalty set forth in NRS 78.150 and 78.170 for each year or portion thereof during which it failed to file each required annual list in a timely manner; and

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(2) A fee of ~~[$50]~~ *$200* for reinstatement.

2. When the secretary of state reinstates the corporation, he shall:

(a) Immediately issue and deliver to the corporation a certificate of reinstatement authorizing it to transact business as if the filing fee or fees had been paid when due; and

(b) Upon demand, issue to the corporation one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation of the charter occurred only by reason of failure to pay the fees and penalties.

4. If a corporate charter has been revoked pursuant to the provisions of this chapter and has remained revoked for a period of 5 consecutive years, the charter must not be reinstated.

Sec. 8. **NRS 78.300** is hereby amended to read as follows:

78.300 1. The directors of a corporation shall not make distributions to stockholders except as provided by this chapter.

2. ~~[In]~~ ***Except as otherwise provided in subsection 3 and NRS 78.138, in*** case of any ~~[willful or grossly negligent]~~ violation of the provisions of this section, the directors under whose administration the violation occurred ~~[, except those who caused their dissent to be entered upon the minutes of the meeting of the directors at the time, or who not then being present caused their dissent to be entered on learning of such action,]~~ are jointly and severally liable, at any time within 3 years after each violation, to the corporation, and, in the event of its dissolution or insolvency, to its creditors at the time of the violation, or any of them, to the lesser of the full amount of the distribution made or of any loss sustained by the corporation by reason of the distribution to stockholders.

3. The liability imposed pursuant to subsection 2 does not apply to a director who caused his dissent to be entered upon the minutes of the meeting of the directors at the time the action was taken or who was not present at the meeting and caused his dissent to be entered on learning of the action.

Sec. 8.5. **NRS 78.390** is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and either call a special meeting of the stockholders entitled to vote on the amendment or direct that the proposed amendment be considered at the next annual meeting of the stockholders entitled to vote on the amendment.

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections 2 and 4, or as may be required by the provisions of the articles of incorporation, have voted in favor of the amendment, an officer of the corporation shall sign a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so signed must be filed with the secretary of state.

2. If any proposed amendment would adversely alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series adversely affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized
to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ *$150.*

Sec. 9. **NRS 78.7502** is hereby amended to read as follows:

78.7502 1. A corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, except an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses, including attorneys' fees, judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action, suit or proceeding if he ~~[acted]~~ *:*

(a) Is not liable pursuant to NRS 78.138; or

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(b) Acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful.

The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the person ***is liable pursuant to NRS 78.138 or*** did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation, ~~[and]~~ ***or*** that, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

2. A corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses, including amounts paid in settlement and attorneys' fees actually and reasonably incurred by him in connection with the defense or settlement of the action or suit if he ~~[acted]~~ ***:***

(a) Is not liable pursuant to NRS 78.138; or

(b) Acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation.

Indemnification may not be made for any claim, issue or matter as to which such a person has been adjudged by a court of competent jurisdiction, after exhaustion of all appeals therefrom, to be liable to the corporation or for amounts paid in settlement to the corporation, unless and only to the extent that the court in which the action or suit was brought or other court of competent jurisdiction determines upon application that in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the court deems proper.

3. To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections 1 and 2, or in defense of any claim, issue or matter therein, the corporation shall indemnify him against expenses, including attorneys' fees, actually and reasonably incurred by him in connection with the defense.

Sec. 10. **NRS 78.760** is hereby amended to read as follows:

78.760 1. The fee for filing articles of incorporation is prescribed in the following schedule:

If the amount represented by the total number of shares provided for in the articles is:	
~~[$25,000 or less~~	~~$125~~
~~Over $25,000 and not over]~~ $75,000 ***or less***	$175
Over $75,000 and not over $200,000	225
Over $200,000 and not over $500,000	325
Over $500,000 and not over $1,000,000	425
Over $1,000,000:	
For the first $1,000,000	425
For each additional $500,000 or fraction thereof	225

2. The maximum fee which may be charged pursuant to this section is $25,000 for:

(a) The original filing of articles of incorporation.

(b) A subsequent filing of any instrument which authorizes an increase in stock.

3. For the purposes of computing the filing fees according to the schedule in subsection 1, the amount represented by the total number of shares provided for in the articles of incorporation is:

(a) The aggregate par value of the shares, if only shares with a par value are therein provided for;

(b) The product of the number of shares multiplied by $1, regardless of any lesser amount prescribed as the value or consideration for which shares may be issued and disposed of, if only shares without par value are therein provided for; or

(c) The aggregate par value of the shares with a par value plus the product of the number of shares without par value multiplied by $1, regardless of any lesser amount prescribed as the value or consideration for which the shares without par value may be issued and disposed of, if shares with and without par value are therein provided for.

For the purposes of this subsection, shares with no prescribed par value shall be deemed shares without par value.

4. The secretary of state shall calculate filing fees pursuant to this section with respect to shares with a par value of less than one-tenth of a cent as if the par value were one-tenth of a cent.

Sec. 11. **NRS 78.765** is hereby amended to read as follows:

78.765 1. The fee for filing a certificate changing the number of authorized shares pursuant to NRS 78.209 or a certificate of amendment to articles of incorporation that increases the corporation's authorized stock or a certificate of correction that increases the corporation's authorized stock is the difference between the fee computed at the rates specified in NRS 78.760 upon the total authorized stock of the corporation, including the proposed increase, and the fee computed at the rates specified in NRS 78.760 upon the total authorized capital, excluding the proposed increase. In no case may the amount be less than ~~[$75.]~~ ***$150.***

2. The fee for filing a certificate of amendment to articles of incorporation that does not increase the corporation's authorized stock or a certificate of correction that does not increase the corporation's authorized stock is ~~[$75.]~~ ***$150.***

3. The fee for filing a certificate or an amended certificate pursuant to NRS 78.1955 is ~~[$75.]~~ ***$150.***

4. The fee for filing a certificate of termination pursuant to NRS 78.1955, 78.209 or 78.380 is ~~[$75.]~~ ***$150.***

Sec. 12. **NRS 78.767** is hereby amended to read as follows:

78.767 1. The fee for filing a certificate of restated articles of incorporation that does not increase the corporation's authorized stock is ~~[$75.]~~ ***$150.***

2. The fee for filing a certificate of restated articles of incorporation that increases the corporation's authorized stock is the difference between the fee computed pursuant to NRS 78.760 based upon the total authorized stock of the corporation, including the proposed increase, and the fee computed pursuant to NRS 78.760 based upon the total authorized stock of the

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corporation, excluding the proposed increase. In no case may the amount be less than ~~[$75.]~~ ***$150.***

Sec. 13. **NRS 78.780** is hereby amended to read as follows:

78.780 1. The fee for filing a certificate of extension of corporate existence of any corporation is an amount equal to one-fourth of the fee computed at the rates specified in NRS 78.760 for filing articles of incorporation.

2. The fee for filing a certificate of dissolution whether it occurs before or after payment of capital and beginning of business is ~~[$30.]~~ ***$60.***

Sec. 14. **NRS 78.785** is hereby amended to read as follows:

78.785 1. The fee for filing a certificate of change of location of a corporation's registered office and resident agent, or a new designation of resident agent, is ~~[$15.]~~ ***$30.***

2. The fee for certifying articles of incorporation where a copy is provided is ~~[$10.]~~ ***$20.***

3. The fee for certifying a copy of an amendment to articles of incorporation, or to a copy of the articles as amended, where a copy is furnished, is ~~[$10.]~~ ***$20.***

4. The fee for certifying an authorized printed copy of the general corporation law as compiled by the secretary of state is ~~[$10.]~~ ***$20.***

5. The fee for reserving a corporate name is $20.

6. The fee for executing a certificate of corporate existence which does not list the previous documents relating to the corporation, or a certificate of change in a corporate name, is ~~[$20.]~~ ***$40.***

7. The fee for executing a certificate of corporate existence which lists the previous documents relating to the corporation is ~~[$20.]~~ ***$40.***

8. The fee for executing, certifying or filing any certificate or document not provided for in NRS 78.760 to 78.785, inclusive, is ~~[$20.]~~ ***$40.***

9. The fee for copies made at the office of the secretary of state is $1 per page.

10. The ~~[fee]~~ ***fees*** for filing articles of incorporation, articles of merger, or certificates of amendment increasing the basic surplus of a mutual or reciprocal insurer must be computed pursuant to NRS 78.760, 78.765 and 92A.210, on the basis of the amount of basic surplus of the insurer.

11. The fee for examining and provisionally approving any document at any time before the document is presented for filing is $100.

Sec. 15. **NRS 80.050** is hereby amended to read as follows:

80.050 1. Except as otherwise provided in subsection 3, foreign corporations shall pay the same fees to the secretary of state as are required to be paid by corporations organized pursuant to the laws of this state, but the amount of fees to be charged must not exceed:

(a) The sum of $25,000 for filing documents for initial qualification; or

(b) The sum of $25,000 for each subsequent filing of a certificate increasing authorized capital stock.

2. If the corporate documents required to be filed set forth only the total number of shares of stock the corporation is authorized to issue without reference to value, the authorized shares shall be deemed to be without par value and the filing fee must be computed pursuant to paragraph (b) of subsection 3 of NRS 78.760.

3. Foreign corporations which are nonprofit corporations and do not have or issue shares of stock shall pay the same fees to the secretary of state as are required to be paid by nonprofit corporations organized pursuant to the laws of this state.

4. The fee for filing a notice of withdrawal from the State of Nevada by a foreign corporation is ~~[$30.]~~ ***$60.***

Sec. 16. **NRS 80.110** is hereby amended to read as follows:

80.110 1. Each foreign corporation doing business in this state shall, on or before the first day of the second month after the filing of its certificate of corporate existence with the secretary of state, and annually thereafter on or before the last day of the month in which the anniversary date of its qualification to do business in this state occurs in each year, file with the secretary of state ~~[,]~~ ***a list,*** on a form furnished by him, ~~[a list of]~~ ***that contains:***

(a) The names of its president, secretary and treasurer or their equivalent, and all of its directors ~~[and a]~~ ***;***

(b) A designation of its resident agent in this state ~~[, signed by]~~ ***; and***

(c) The signature of an officer of the corporation.

Each list filed pursuant to this subsection must be accompanied by a declaration under penalty of perjury that the foreign corporation has complied with the provisions of chapter 364A of NRS.

2. Upon filing ~~[the list and designation.]~~ ***:***

(a) The initial list required by subsection 1, the corporation shall pay to the secretary of state a fee of $165.

(b) Each annual list required by subsection 1, the corporation shall pay to the secretary of state a fee of $85.

3. The secretary of state shall, 60 days before the last day for filing ~~[the]~~ ***each*** annual list required by subsection 1, cause to be mailed to each corporation required to comply with the provisions of NRS 80.110 to 80.170, inclusive, which has not become delinquent, the blank forms to be completed and filed with him. Failure of any corporation to receive the forms does not excuse it from the penalty imposed by the provisions of NRS 80.110 to 80.170, inclusive.

4. An annual list for a corporation not in default which is received by the secretary of state more than 60 days before its due date shall be deemed an amended list for the previous year and does not satisfy the requirements of subsection 1 for the year to which the due date is applicable.

Sec. 17. **NRS 80.120** is hereby amended to read as follows:

80.120 If a corporation has filed the initial or annual list ~~[of officers and directors and designation of resident agent]~~ in compliance with NRS 80.110 and has paid the appropriate fee for the filing, the canceled check received by the corporation constitutes a certificate authorizing it to transact its business within this state until the last day of the month in which the anniversary of its qualification to transact business occurs in the next succeeding calendar year. If the corporation desires a formal certificate upon its payment of the initial or annual fee, its payment must be accompanied by a self-addressed, stamped envelope.

Sec. 18. **NRS 80.150** is hereby amended to read as follows:

80.150 1. Any corporation required to make a filing and pay the fee prescribed in NRS 80.110 to 80.170, inclusive, which refuses or neglects to do so within the time provided, is in default.

2. For default there must be added to the amount of the fee a penalty of ~~[$15.]~~ ***$50,*** and unless the filing is made and the fee and penalty are paid on or before the first day of the ninth month following the month in which filing

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was required, the defaulting corporation by reason of its default forfeits its right to transact any business within this state. The fee and penalty must be collected as provided in this chapter.

Sec. 19. **NRS 80.170** is hereby amended to read as follows:

80.170 1. Except as otherwise provided in subsections 3 and 4, the secretary of state shall reinstate a corporation which has forfeited or which forfeits its right to transact business under the provisions of this chapter and restore to the corporation its right to transact business in this state, and to exercise its corporate privileges and immunities if it:

(a) Files with the secretary of state a list ~~[of officers and directors]~~ as provided in NRS 80.110 and 80.140; and

(b) Pays to the secretary of state:

(1) The ~~[annual]~~ filing fee and penalty set forth in NRS 80.110 and 80.150 for each year or portion thereof that its right to transact business was forfeited; and

(2) A fee of ~~[$50]~~ ***$200*** for reinstatement.

2. If payment is made and the secretary of state reinstates the corporation to its former rights, he shall:

(a) Immediately issue and deliver to the corporation so reinstated a certificate of reinstatement authorizing it to transact business in the same manner as if the filing fee had been paid when due; and

(b) Upon demand, issue to the corporation one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation of the right to transact business occurred only by reason of failure to pay the fees and penalties.

4. If the right of a corporation to transact business in this state has been forfeited pursuant to the provisions of NRS 80.160 and has remained forfeited for a period of 5 consecutive years, the right is not subject to reinstatement.

Sec. 19.5. **NRS 86.226** is hereby amended to read as follows:

86.226 1. A signed certificate of amendment, or a certified copy of a judicial decree of amendment, must be filed with the secretary of state. A person who executes a certificate as an agent, officer or fiduciary of the limited-liability company need not exhibit evidence of his authority as a prerequisite to filing. Unless the secretary of state finds that a certificate does not conform to law, upon his receipt of all required filing fees he shall file the certificate.

2. A certificate of amendment or judicial decree of amendment is effective upon filing with the secretary of state or upon a later date specified in the certificate or judicial decree, which must not be more than 90 days after the certificate or judicial decree is filed.

3. If a certificate specifies an effective date and if the resolution of the members approving the proposed amendment provides that one or more managers or, if management is not vested in a manager, one or more members may abandon the proposed amendment, then those managers or members may terminate the effectiveness of the certificate by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate or judicial decree filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the members, the manager of the company or, if management is not vested in a manager, a designated member is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by a manager of the company or, if management is not vested in a manager, a designated member; and

(f) Is accompanied by a filing fee of ~~[$75.]~~ ***$150.***

Sec. 20. **NRS 86.263** is hereby amended to read as follows:

86.263 1. A limited-liability company shall, on or before the ~~[last]~~ ***first*** day of the ***second*** month ~~[in which the anniversary date of its formation occurs,]~~ ***after the filing of its articles of organization with the secretary of state,*** file with the secretary of state, on a form furnished by him, a list ~~[containing:]~~ ***that contains:***

(a) The name of the limited-liability company;

(b) The file number of the limited-liability company, if known;

(c) The names and titles of all of its managers or, if there is no manager, all of its managing members;

(d) The mailing or street address, either residence or business, of each manager or managing member listed, following the name of the manager or managing member; ~~[and]~~

(e) ***The name and street address of the resident agent of the limited-liability company; and***

(f) The signature of a manager or managing member of the limited-liability company certifying that the list is true, complete and accurate.

2. The limited-liability company shall annually thereafter, on or before the last day of the month in which the anniversary date of ***its*** organization occurs, file with the secretary of state, on a form furnished by him, an amended list containing all of the information required in subsection 1. If the limited-liability company has had no changes in its managers or, if there is no manager, its managing members, since its previous list was filed, no amended list need be filed if a manager or managing member of the limited-liability company certifies to the secretary of state as a true and accurate statement that no changes in the managers or managing members have occurred.

3. ***Each list required by subsection 1 and each list or certification required by subsection 2 must be accompanied by a declaration under penalty of perjury that the limited-liability company has complied with the provisions of chapter 364A of NRS.***

4. Upon filing ~~[the list of managers or managing members,]~~ ***:***

(a) The initial list required by subsection 1, the limited-liability company shall pay to the secretary of state a fee of $165.

(b) Each annual list required by subsection 2 or certifying that no changes have occurred, the limited-liability company shall pay to the secretary of state a fee of $85.

~~[4.]~~ ***5.*** The secretary of state shall, 60 days before the last day for filing ~~[the]~~ ***each*** list required by subsection ~~[1,]~~ ***2,*** cause to be mailed to each limited-liability company required to comply with the provisions of this section, which has not become delinquent, a notice of the fee due under subsection ~~[3]~~ ***4*** and a reminder to file a list ~~[of managers or managing members]~~ ***required by subsection 2*** or a certification of no change. Failure of any company to receive a notice or form does not excuse it from the penalty imposed by law.

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~~[5.]~~ *6.* If the list to be filed pursuant to the provisions of subsection 1 or 2 is defective or the fee required by subsection ~~[3]~~ *4* is not paid, the secretary of state may return the list for correction or payment.

~~[6.]~~ *7.* An annual list for a limited-liability company not in default received by the secretary of state more than 60 days before its due date shall be deemed an amended list for the previous year.

Sec. 21. **NRS 86.266** is hereby amended to read as follows:

86.266 If a limited-liability company has filed the ***initial or*** annual list ~~[of managers or members and designation of a resident agent]~~ in compliance with NRS 86.263 and has paid the appropriate fee for the filing, the canceled check received by the limited-liability company constitutes a certificate authorizing it to transact its business within this state until the last day of the month in which the anniversary of its formation occurs in the next succeeding calendar year. If the company desires a formal certificate upon its payment of the annual fee, its payment must be accompanied by a self-addressed, stamped envelope.

Sec. 22. **NRS 86.272** is hereby amended to read as follows:

86.272 1. Each limited-liability company required to make a filing and pay the fee prescribed in NRS 86.263 which refuses or neglects to do so within the time provided is in default.

2. For default there must be added to the amount of the fee a penalty of ~~[$15.]~~ ***$50.*** The fee and penalty must be collected as provided in this chapter.

Sec. 23. **NRS 86.276** is hereby amended to read as follows:

86.276 1. Except as otherwise provided in subsections 3 and 4, the secretary of state shall reinstate any limited-liability company which has forfeited its right to transact business pursuant to the provisions of this chapter and restore to the company its right to carry on business in this state, and to exercise its privileges and immunities, if it:

(a) Files with the secretary of state the list required by NRS 86.263; and

(b) Pays to the secretary of state:

(1) The ~~[annual]~~ filing fee and penalty set forth in NRS 86.263 and 86.272 for each year or portion thereof during which it failed to file in a timely manner each required annual list; and

(2) A fee of ~~[$50]~~ ***$200*** for reinstatement.

2. When the secretary of state reinstates the limited-liability company, he shall:

(a) Immediately issue and deliver to the company a certificate of reinstatement authorizing it to transact business as if the filing fee had been paid when due; and

(b) Upon demand, issue to the company one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation of the charter occurred only by reason of failure to pay the fees and penalties.

4. If a company's charter has been revoked pursuant to the provisions of this chapter and has remained revoked for a period of 5 consecutive years, the charter must not be reinstated.

Sec. 24. **NRS 86.561** is hereby amended to read as follows:

86.561 1. The secretary of state shall charge and collect for:

(a) Filing the original articles of organization, or for registration of a foreign company, ~~[$125;]~~ ***$175;***

(b) Amending or restating the articles of organization, amending the registration of a foreign company or filing a certificate of correction, ~~[$75;]~~ ***$150;***

(c) Filing the articles of dissolution of a domestic or foreign company, ~~[$30;]~~ ***$60;***

(d) Filing a statement of change of address of a records or registered office, or change of the resident agent, ~~[$15;]~~ ***$30;***

(e) Certifying articles of organization or an amendment to the articles, in both cases where a copy is provided, ~~[$10;]~~ ***$20;***

(f) Certifying an authorized printed copy of this chapter, ~~[$10;]~~ ***$20;***

(g) Reserving a name for a limited-liability company, $20;

(h) Filing a certificate of cancellation, ~~[$30;]~~ ***$60;***

(i) Executing, filing or certifying any other document, ~~[$20;]~~ ***$40;*** and

(j) Copies made at the office of the secretary of state, $1 per page.

2. The secretary of state shall charge and collect at the time of any service of process on him as agent for service of process of a limited-liability company, $10 which may be recovered as taxable costs by the party to the action causing the service to be made if the party prevails in the action.

3. Except as otherwise provided in this section, the fees set forth in NRS 78.785 apply to this chapter.

Sec. 25. **NRS 87.440** is hereby amended to read as follows:

87.440 1. To become a registered limited-liability partnership, a partnership shall file with the secretary of state a certificate of registration stating each of the following:

(a) The name of the partnership.

(b) The street address of its principal office.

(c) The name of the person designated as the partnership's resident agent, the street address of the resident agent where process may be served upon the partnership and the mailing address of the resident agent if it is different than his street address.

(d) The name and business address of each managing partner in this state.

(e) A brief statement of the professional service rendered by the partnership.

(f) That the partnership thereafter will be a registered limited-liability partnership.

(g) Any other information that the partnership wishes to include.

2. The certificate of registration must be executed by a majority in interest of the partners or by one or more partners authorized to execute such a certificate.

3. The certificate of registration must be accompanied by a fee of ~~[$125.]~~ ***$175.***

4. The secretary of state shall register as a registered limited-liability partnership any partnership that submits a completed certificate of registration with the required fee.

5. The registration of a registered limited-liability partnership is effective at the time of the filing of the certificate of registration.

Sec. 26. **NRS 87.460** is hereby amended to read as follows:

87.460 1. A certificate of registration of a registered limited-liability partnership may be amended by filing with the secretary of state a certificate of amendment. The certificate of amendment must set forth:

(a) The name of the registered limited-liability partnership;

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(b) The dates on which the registered limited-liability partnership filed its original certificate of registration and any other certificates of amendment; and

(c) The change to the information contained in the original certificate of registration or any other certificates of amendment.

2. The certificate of amendment must be:

(a) Signed by a managing partner of the registered limited-liability partnership; and

(b) Accompanied by a fee of ~~[$75.]~~ ***$150.***

Sec. 27. **NRS 87.470** is hereby amended to read as follows:

87.470 The registration of a registered limited-liability partnership is effective until:

1. Its certificate of registration is revoked pursuant to NRS 87.520; or

2. The registered limited-liability partnership files with the secretary of state a written notice of withdrawal executed by a managing partner. The notice must be accompanied by a fee of ~~[$30.]~~ ***$60.***

Sec. 28. **NRS 87.490** is hereby amended to read as follows:

87.490 1. If a registered limited-liability partnership wishes to change the location of its principal office in this state or its resident agent, it shall first file with the secretary of state a certificate of change that sets forth:

(a) The name of the registered limited-liability partnership;

(b) The street address of its principal office;

(c) If the location of its principal office will be changed, the street address of its new principal office;

(d) The name of its resident agent; and

(e) If its resident agent will be changed, the name of its new resident agent.

The certificate of acceptance of its new resident agent must accompany the certificate of change.

2. A certificate of change filed pursuant to this section must be:

(a) Signed by a managing partner of the registered limited-liability partnership; and

(b) Accompanied by a fee of ~~[$15.]~~ ***$30.***

Sec. 29. **NRS 87.510** is hereby amended to read as follows:

87.510 1. A registered limited-liability partnership shall ~~[annually,]~~ ***, on or before the first day of the second month after the filing of its certificate of registration with the secretary of state, and annually thereafter*** on or before the last day of the month in which the anniversary date of the filing of its certificate of registration ~~[of limited partnership]~~ with the secretary of state occurs, file with the secretary of state, on a form furnished by him, a list ~~[containing:]~~ ***that contains:***

(a) The name of the registered limited-liability partnership;

(b) The file number of the registered limited-liability partnership, if known;

(c) The names of all of its managing partners;

(d) The mailing or street address, either residence or business, of each managing partner; ~~[and]~~

(e) ***The name and street address of the resident agent of the registered limited-liability partnership; and***

(f) The signature of a managing partner of the registered limited-liability partnership certifying that the list is true, complete and accurate.

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Each list filed pursuant to this subsection must be accompanied by a declaration under penalty of perjury that the registered limited-liability partnership has complied with the provisions of chapter 364A of NRS.

2. Upon filing ~~[the list of managing partners,]~~ ***:***

(a) The initial list required by subsection 1, the registered limited-liability partnership shall pay to the secretary of state a fee of $165.

(b) Each annual list required by subsection 1, the registered limited-liability partnership shall pay to the secretary of state a fee of $85.

3. The secretary of state shall, at least 60 days before the last day for filing ~~[the]~~ ***each*** annual list required by subsection 1, cause to be mailed to the registered limited-liability partnership a notice of the fee due pursuant to subsection 2 and a reminder to file the annual list ~~[of managing partners.]~~ ***required by subsection 1.*** The failure of any registered limited-liability partnership to receive a notice or form does not excuse it from complying with the provisions of this section.

4. If the list to be filed pursuant to the provisions of subsection 1 is defective, or the fee required by subsection 2 is not paid, the secretary of state may return the list for correction or payment.

5. An annual list that is filed by a registered limited-liability partnership which is not in default more than 60 days before it is due shall be deemed an amended list for the previous year and does not satisfy the requirements of subsection 1 for the year to which the due date is applicable.

Sec. 30. **NRS 87.520** is hereby amended to read as follows:

87.520 1. A registered limited-liability partnership that fails to comply with the provisions of NRS 87.510 is in default.

2. Any registered limited-liability partnership that is in default pursuant to subsection 1 must, in addition to the fee required to be paid pursuant to NRS 87.510, pay a penalty of ~~[$15.]~~ ***$50.***

3. On or before the 15th day of the third month after the month in which the fee required to be paid pursuant to NRS 87.510 is due, the secretary of state shall notify, by certified mail, the resident agent of any registered limited-liability partnership that is in default. The notice must include the amount of any payment that is due from the registered limited-liability partnership.

4. If a registered limited-liability partnership fails to pay the amount that is due, the certificate of registration of the registered limited-liability partnership shall be deemed revoked on the first day of the ninth month after the month in which the fee required to be paid pursuant to NRS 87.510 was due. The secretary of state shall notify a registered limited-liability partnership, by certified mail, addressed to its resident agent or, if the registered limited-liability partnership does not have a resident agent, to a managing partner, that its certificate of registration is revoked and the amount of any fees and penalties that are due.

Sec. 31. **NRS 87.530** is hereby amended to read as follows:

87.530 1. Except as otherwise provided in subsection 3, the secretary of state shall reinstate the certificate of registration of a registered limited-liability partnership that is revoked pursuant to NRS 87.520 if the registered limited-liability partnership:

(a) Files with the secretary of state the information required by NRS 87.510; and

(b) Pays to the secretary of state:

(1) The fee required to be paid by that section;

(2) Any penalty required to be paid pursuant to NRS 87.520; and
(3) A reinstatement fee of ~~[$50.]~~ ***$200.***

2. Upon reinstatement of a certificate of registration pursuant to this section, the secretary of state shall:

(a) Deliver to the registered limited-liability partnership a certificate of reinstatement authorizing it to transact business retroactively from the date the fee required by NRS 87.510 was due; and

(b) Upon request, issue to the registered limited-liability partnership one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not reinstate the certificate of registration of a registered limited-liability partnership if the certificate was revoked pursuant to NRS 87.520 at least 5 years before the date of the proposed reinstatement.

Sec. 32. **NRS 87.550** is hereby amended to read as follows:

87.550 In addition to any other fees required by NRS 87.440 to 87.540, inclusive, and 87.560, the secretary of state shall charge and collect the following fees for services rendered pursuant to those sections:

1. For certifying documents required by NRS 87.440 to 87.540, inclusive, and 87.560, ~~[$10]~~ ***$20*** per certification.

2. For executing a certificate verifying the existence of a registered limited-liability partnership, if the registered limited-liability partnership has not filed a certificate of amendment, ~~[$20.]~~ ***$40.***

3. For executing a certificate verifying the existence of a registered limited-liability partnership, if the registered limited-liability partnership has filed a certificate of amendment, ~~[$20.]~~ ***$40.***

4. For executing, certifying or filing any certificate or document not required by NRS 87.440 to 87.540, inclusive, and 87.560, ~~[$20.]~~ ***$40.***

5. For any copies made by the office of the secretary of state, $1 per page.

6. For examining and provisionally approving any document before the document is presented for filing, $100.

Sec. 33. **NRS 88.395** is hereby amended to read as follows:

88.395 1. A limited partnership shall ~~[annually,]~~ ***, on or before the first day of the second month after the filing of its certificate of limited partnership with the secretary of state, and annually thereafter*** on or before the last day of the month in which the anniversary date of the filing of its certificate of limited partnership occurs, file with the secretary of state, on a form furnished by him, a list ~~[containing:]~~ ***that contains:***

(a) The name of the limited partnership;

(b) The file number of the limited partnership, if known;

(c) The names of all of its general partners;

(d) The mailing or street address, either residence or business, of each general partner; ~~[and]~~

(e) ***The name and street address of the resident agent of the limited partnership; and***

(f) The signature of a general partner of the limited partnership certifying that the list is true, complete and accurate.

Each list filed pursuant to this subsection must be accompanied by a declaration under penalty of perjury that the limited partnership has complied with the provisions of chapter 364A of NRS.

2. Upon filing ~~[the list of general partners,]~~ ***:***

(a) The initial list required by subsection 1, the limited partnership shall pay to the secretary of state a fee of $165.

(b) Each annual list required by subsection 1, the limited partnership shall pay to the secretary of state a fee of $85.

3. The secretary of state shall, 60 days before the last day for filing ~~[the]~~ ***each annual*** list required by subsection 1, cause to be mailed to each limited partnership required to comply with the provisions of this section which has not become delinquent a notice of the fee due pursuant to the provisions of subsection 2 and a reminder to file the annual list. Failure of any limited partnership to receive a notice or form does not excuse it from the penalty imposed by NRS 88.400.

4. If the list to be filed pursuant to the provisions of subsection 1 is defective or the fee required by subsection 2 is not paid, the secretary of state may return the list for correction or payment.

5. An annual list for a limited partnership not in default that is received by the secretary of state more than 60 days before its due date shall be deemed an amended list for the previous year and does not satisfy the requirements of subsection 1 for the year to which the due date is applicable.

6. A filing made pursuant to this section does not satisfy the provisions of NRS 88.355 and may not be substituted for filings submitted pursuant to NRS 88.355.

Sec. 34. **NRS 88.400** is hereby amended to read as follows:

88.400 1. If a limited partnership has filed the list in compliance with NRS 88.395 and has paid the appropriate fee for the filing, the canceled check received by the limited partnership constitutes a certificate authorizing it to transact its business within this state until the anniversary date of the filing of its certificate of limited partnership in the next succeeding calendar year. If the limited partnership desires a formal certificate upon its payment of the annual fee, its payment must be accompanied by a self-addressed, stamped envelope.

2. Each limited partnership which refuses or neglects to file the list and pay the fee within the time provided is in default.

3. For default there must be added to the amount of the fee a penalty of ~~[$15,]~~ ***$50,*** and unless the filings are made and the fee and penalty are paid on or before the first day of the ninth month following the month in which filing was required, the defaulting limited partnership, by reason of its default, forfeits its right to transact any business within this state.

Sec. 35. **NRS 88.410** is hereby amended to read as follows:

88.410 1. Except as otherwise provided in subsections 3 and 4, the secretary of state may:

(a) Reinstate any limited partnership which has forfeited its right to transact business; and

(b) Restore to the limited partnership its right to carry on business in this state, and to exercise its privileges and immunities,

upon the filing with the secretary of state of the list required pursuant to NRS 88.395, and upon payment to the secretary of state of the ~~[annual]~~ filing fee and penalty set forth in NRS 88.395 and 88.400 for each year or portion thereof during which the certificate has been revoked, and a fee of ~~[$50]~~ ***$200*** for reinstatement.

2. When payment is made and the secretary of state reinstates the limited partnership to its former rights , he shall:

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(a) Immediately issue and deliver to the limited partnership a certificate of reinstatement authorizing it to transact business as if the filing fee had been paid when due; and

(b) Upon demand, issue to the limited partnership one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation occurred only by reason of failure to pay the fees and penalties.

4. If a limited partnership's certificate has been revoked pursuant to the provisions of this chapter and has remained revoked for a period of 5 years, the certificate must not be reinstated.

Sec. 36. **NRS 88.415** is hereby amended to read as follows:

88.415 The secretary of state, for services relating to his official duties and the records of his office, shall charge and collect the following fees:

1. For filing a certificate of limited partnership, or for registering a foreign limited partnership, ~~[$125.]~~ ***$175.***

2. For filing a certificate of amendment of limited partnership or restated certificate of limited partnership, ~~[$75.~~

~~3. For filing a reinstated certificate of limited partnership, $50.~~

~~4. For filing the annual list of general partners and designation of a resident agent, $85.~~

~~5.]~~ ***$150.***

3. For filing a certificate of a change of location of the records office of a limited partnership or the office of its resident agent, or a designation of a new resident agent, ~~[$15.~~

~~6.]~~ ***$30.***

4. For certifying a certificate of limited partnership, an amendment to the certificate, or a certificate as amended where a copy is provided, ~~[$10]~~ ***$20*** per certification.

~~[7.]~~ *5.* For certifying an authorized printed copy of the limited partnership law, ~~[$10.~~

~~8.]~~ ***$20.***

6. For reserving a limited partnership name, or for executing, filing or certifying any other document, $20.

~~[9.]~~ *7.* For copies made at the office of the secretary of state, $1 per page.

~~[10.]~~ *8.* For filing a certificate of cancellation of a limited partnership, ~~[$30.]~~ ***$60.***

Except as otherwise provided in this section, the fees set forth in NRS 78.785 apply to this chapter.

Sec. 37. **NRS 88A.600** is hereby amended to read as follows:

88A.600 1. A business trust formed pursuant to this chapter shall ~~[annually,]~~ ***, on or before the first day of the second month after the filing of its certificate of trust with the secretary of state, and annually thereafter*** on or before the last day of the month in which the anniversary date of the filing of its certificate of trust with the secretary of state occurs, file with the secretary of state , on a form furnished by him , a list signed by at least one trustee ~~[containing]~~ ***that contains*** the name and mailing address of its resident agent and at least one trustee. ***Each list filed pursuant to this subsection must be accompanied by a declaration under penalty of perjury that the business trust has complied with the provisions of chapter 364A of NRS.***

2. Upon filing ~~[the list,]~~ ***:***

(a) The initial list required by subsection 1, the business trust shall pay to the secretary of state a fee of $165.

(b) Each annual list required by subsection 1, the business trust shall pay to the secretary of state a fee of $85.

~~[2.]~~ *3.* The secretary of state shall, 60 days before the last day for filing ~~[the]~~ ***each*** annual list required by subsection 1, cause to be mailed to each business trust which is required to comply with the provisions of NRS 88A.600 to 88A.660, inclusive, and which has not become delinquent, the blank forms to be completed and filed with him. Failure of a business trust to receive the forms does not excuse it from the penalty imposed by law.

~~[3.]~~ *4.* An annual list for a business trust not in default which is received by the secretary of state more than 60 days before its due date shall be deemed an amended list for the previous year.

Sec. 38. **NRS 88A.630** is hereby amended to read as follows:

88A.630 1. Each business trust required to file the ~~[annual]~~ list and pay the fee prescribed in NRS 88A.600 to 88A.660, inclusive, which refuses or neglects to do so within the time provided shall be deemed in default.

2. For default, there must be added to the amount of the fee a penalty of ~~[$15.]~~ ***$50.*** The fee and penalty must be collected as provided in this chapter.

Sec. 39. **NRS 88A.650** is hereby amended to read as follows:

88A.650 1. Except as otherwise provided in subsection 3, the secretary of state shall reinstate a business trust which has forfeited its right to transact business pursuant to the provisions of this chapter and restore to the business trust its right to carry on business in this state, and to exercise its privileges and immunities, if it:

(a) Files with the secretary of state the list ~~[and designation]~~ required by NRS 88A.600; and

(b) Pays to the secretary of state:

(1) The ~~[annual]~~ filing fee and penalty set forth in NRS 88A.600 and 88A.630 for each year or portion thereof during which its certificate of trust was revoked; and

(2) A fee of ~~[$50]~~ ***$200*** for reinstatement.

2. When the secretary of state reinstates the business trust, he shall:

(a) Immediately issue and deliver to the business trust a certificate of reinstatement authorizing it to transact business as if the filing fee had been paid when due; and

(b) Upon demand, issue to the business trust one or more certified copies of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation of the certificate of trust occurred only by reason of the failure to file the list or pay the fees and penalties.

Sec. 40. **NRS 88A.900** is hereby amended to read as follows:

88A.900 The secretary of state shall charge and collect the following fees for:

1. Filing an original certificate of trust, or for registering a foreign business trust, ~~[$125.]~~ ***$175.***

2. Filing an amendment or restatement, or a combination thereof, to a certificate of trust, ~~[$75.]~~ ***$150.***

3. Filing a certificate of cancellation, ~~[$125.]~~ ***$175.***

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4. Certifying a copy of a certificate of trust or an amendment or restatement, or a combination thereof, ~~[$10]~~ ***$20*** per certification.
5. Certifying an authorized printed copy of this chapter, ~~[$10.]~~ ***$20.***
6. Reserving a name for a business trust, $20.
7. Executing a certificate of existence of a business trust which does not list the previous documents relating to it, or a certificate of change in the name of a business trust, ~~[$20.]~~ ***$40.***
8. Executing a certificate of existence of a business trust which lists the previous documents relating to it, ~~[$20.]~~ ***$40.***
9. Filing a statement of change of address of the registered office for each business trust, ~~[$15.]~~ ***$30.***
10. Filing a statement of change of the registered agent, ~~[$15.]~~ ***$30.***
11. Executing, certifying or filing any certificate or document not otherwise provided for in this section, ~~[$20.]~~ ***$40.***
12. Examining and provisionally approving a document before the document is presented for filing, $100.
13. Copying a document on file with him, for each page, $1.

Sec. 41. **NRS 89.210** is hereby amended to read as follows:

89.210 1. Within 30 days ~~[following]~~ ***after*** the organization of a professional association under this chapter, the association shall file with the secretary of state a copy of the articles of association, duly executed, and shall pay at that time a filing fee of ~~[$25.]~~ ***$175.*** Any such association formed as a common law association before July 1, 1969, shall file, within 30 days ~~[of]~~ ***after*** July 1, 1969, a certified copy of its articles of association, with any amendments thereto, with the secretary of state, and shall pay at that time a filing fee of $25. A copy of any amendments to the articles of association adopted after July 1, 1969, must also be filed with the secretary of state within 30 days after the adoption of such amendments. Each copy of amendments so filed must be certified as true and correct and be accompanied by a filing fee of ~~[$10.]~~ ***$150.***

2. The name of such a professional association must contain the words "Professional Association," "Professional Organization" or the abbreviations "Prof. Ass'n" or "Prof. Org." The association may render professional services and exercise its authorized powers under a fictitious name if the association has first registered the name in the manner required under chapter 602 of NRS.

Sec. 42. **NRS 89.250** is hereby amended to read as follows:

89.250 1. Except as otherwise provided in subsection 2, a professional association shall, ***on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter*** on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state showing the names and residence addresses of all members and employees in ~~[such]~~ ***the*** association and ~~[shall certify]~~ ***certifying*** that all members and employees are licensed to render professional service in this state.

2. A professional association organized and practicing pursuant to the provisions of this chapter and NRS 623.349 shall, ***on or before the first day of the second month after the filing of its articles of association with the secretary of state, and annually thereafter*** on or before the last day of the month in which the anniversary date of its organization occurs in each year, furnish a statement to the secretary of state:

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(a) Showing the names and residence addresses of all members and employees of the association who are licensed or otherwise authorized by law to render professional service in this state;

(b) Certifying that all members and employees who render professional service are licensed or otherwise authorized by law to render professional service in this state; and

(c) Certifying that all members who are not licensed to render professional service in this state do not render professional service on behalf of the association except as authorized by law.

3. ~~[The statement must:~~

~~(a) Be made]~~ ***Each statement filed pursuant to this section must be:***

(a) Made on a form prescribed by the secretary of state and must not contain any fiscal or other information except that expressly called for by this section.

(b) ~~[Be signed]~~ ***Signed*** by the chief executive officer of the association.

(c) Accompanied by a declaration under penalty of perjury that the professional association has complied with the provisions of chapter 364A of NRS.

4. Upon filing ~~[the annual]~~ ***:***

(a) The initial statement required by this section, the association shall pay to the secretary of state a fee of $165.

(b) Each annual statement required by this section, the association shall pay to the secretary of state a fee of ~~[$15.]~~ ***$85.***

5. As used in this section, "signed" means to have executed or adopted a name, word or mark, including, without limitation, a digital signature as defined in NRS 720.060, with the present intention to authenticate a document.

Sec. 43. **NRS 89.252** is hereby amended to read as follows:

89.252 1. Each professional association that is required to make a filing and pay the fee prescribed in NRS 89.250 but refuses to do so within the time provided is in default.

2. For default, there must be added to the amount of the fee a penalty of ~~[$5.]~~ ***$50.*** The fee and penalty must be collected as provided in this chapter.

Sec. 44. **NRS 89.256** is hereby amended to read as follows:

89.256 1. Except as otherwise provided in subsections 3 and 4, the secretary of state shall reinstate any professional association which has forfeited its right to transact business under the provisions of this chapter and restore the right to carry on business in this state and exercise its privileges and immunities if it:

(a) Files with the secretary of state the statement and certification required by NRS 89.250; and

(b) Pays to the secretary of state:

(1) The ~~[annual]~~ filing fee and penalty set forth in NRS 89.250 and 89.252 for each year or portion thereof during which the articles of association have been revoked; and

(2) A fee of ~~[$25]~~ ***$200*** for reinstatement.

2. When the secretary of state reinstates the association to its former rights, he shall:

(a) Immediately issue and deliver to the association a certificate of reinstatement authorizing it to transact business, as if the fees had been paid when due; and

(b) Upon demand, issue to the association a certified copy of the certificate of reinstatement.

3. The secretary of state shall not order a reinstatement unless all delinquent fees and penalties have been paid, and the revocation of the association's articles of association occurred only by reason of its failure to pay the fees and penalties.

4. If the articles of association of a professional association have been revoked pursuant to the provisions of this chapter and have remained revoked for 10 consecutive years, the articles must not be reinstated.

Sec. 45. **NRS 92A.190** is hereby amended to read as follows:

92A.190 1. One or more foreign entities may merge or enter into an exchange of owner's interests with one or more domestic entities if:

(a) In a merger, the merger is permitted by the law of the jurisdiction under whose law each foreign entity is organized and governed and each foreign entity complies with that law in effecting the merger;

(b) In an exchange, the entity whose owner's interests will be acquired is a domestic entity, whether or not an exchange of owner's interests is permitted by the law of the jurisdiction under whose law the acquiring entity is organized;

(c) The foreign entity complies with NRS 92A.200 to 92A.240, inclusive, if it is the surviving entity in the merger or acquiring entity in the exchange and sets forth in the articles of merger or exchange its address where copies of process may be sent by the secretary of state; and

(d) Each domestic entity complies with the applicable provisions of NRS 92A.100 to 92A.180, inclusive, and, if it is the surviving entity in the merger or acquiring entity in the exchange, with NRS 92A.200 to 92A.240, inclusive.

2. When the merger or exchange takes effect, the surviving foreign entity in a merger and the acquiring foreign entity in an exchange shall be deemed:

(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting owners of each domestic entity that was a party to the merger or exchange. Service of such process must be made by personally delivering to and leaving with the secretary of state duplicate copies of the process and the payment of a fee of ~~[$25]~~ ***$50*** for accepting and transmitting the process. The secretary of state shall forthwith send by registered or certified mail one of the copies to the surviving or acquiring entity at its specified address, unless the surviving or acquiring entity has designated in writing to the secretary of state a different address for that purpose, in which case it must be mailed to the last address so designated.

(b) To agree that it will promptly pay to the dissenting owners of each domestic entity that is a party to the merger or exchange the amount, if any, to which they are entitled under or created pursuant to NRS 92A.300 to 92A.500, inclusive.

3. This section does not limit the power of a foreign entity to acquire all or part of the owner's interests of one or more classes or series of a domestic entity through a voluntary exchange or otherwise.

Sec. 46. **NRS 92A.210** is hereby amended to read as follows:

92A.210 1. Except as otherwise provided in this section, the fee for filing articles of merger, articles of conversion, articles of exchange, articles of domestication or articles of termination is ~~[$125.]~~ ***$325.*** The fee for filing the constituent documents of a domestic resulting entity is the fee for filing the constituent documents determined by the chapter of NRS governing the particular domestic resulting entity.

2. The fee for filing articles of merger of two or more domestic corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporation.

3. The fee for filing articles of merger of one or more domestic corporations with one or more foreign corporations is the difference between the fee computed at the rates specified in NRS 78.760 upon the aggregate authorized stock of the corporation created by the merger and the fee computed upon the aggregate amount of the total authorized stock of the constituent corporations which have paid the fees required by NRS 78.760 and 80.050.

4. The fee for filing articles of merger of two or more domestic or foreign corporations must not be less than ~~[$125.]~~ ***$325.*** The amount paid pursuant to subsection 3 must not exceed $25,000.

Sec. 47. **NRS 116.3103** is hereby amended to read as follows:

116.3103 1. Except as otherwise provided in the declaration, the bylaws, this section or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board are fiduciaries. ~~[and are subject to the insulation from liability provided for directors of corporations by the laws of this state.]~~ The members of the executive board are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business-judgment rule.

2. The executive board may not act on behalf of the association to amend the declaration , ~~[(NRS 116.2117),]~~ to terminate the common-interest community , ~~[(NRS 116.2118),]~~ or to elect members of the executive board or determine their qualifications, powers and duties or terms of office , ~~[(subsection 1 of NRS 116.31034),]~~ but the executive board may fill vacancies in its membership for the unexpired portion of any term.

3. Within 30 days after adoption of any proposed budget for the common-interest community, the executive board shall provide a summary of the budget to all the units' owners, and shall set a date for a meeting of the units' owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. Unless at that meeting a majority of all units' owners or any larger vote specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. If the proposed budget is rejected, the periodic budget last ratified by the units' owners must be continued until such time as the units' owners ratify a subsequent budget proposed by the executive board.

Sec. 48. **NRS 225.140** is hereby amended to read as follows:

225.140 1. Except as otherwise provided in subsection 2, in addition to other fees authorized by law, the secretary of state shall charge and collect the following fees:

For a copy of any law, joint resolution, transcript of record, or other paper on file or of record in his office, other than a document required to be filed pursuant to Title 24 of NRS, per page	$1.00

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For a copy of any document required to be filed pursuant to Title 24 of NRS, per page ..... .50
For certifying to any such copy and use of the state seal, for each impression 10.00
For each passport or other document signed by the governor and attested by the secretary of state 10.00
For a negotiable instrument returned unpaid 10.00

2. The secretary of state:

(a) Shall charge a reasonable fee for searching records and documents kept in his office.

(b) May charge or collect any filing or other fees for services rendered by him to the State of Nevada, any local governmental agency or agency of the Federal Government, or any officer thereof in his official capacity or respecting his office or official duties.

(c) May not charge or collect a filing or other fee for:

(1) Attesting extradition papers or executive warrants for other states.

(2) Any commission or appointment issued or made by the governor, either for the use of the state seal or otherwise.

(d) May charge a reasonable fee, not to exceed:

(1) Five hundred dollars, for providing service within 2 hours after the time the service is requested; and

(2) One hundred dollars, for providing any other special service, including, but not limited to, providing service more than 2 hours but within 24 hours after the time the service is requested, accepting documents filed by facsimile machine and other use of new technology.

(e) Shall charge a fee, not to exceed the actual cost to the secretary of state, for providing:

(1) A copy of any record kept in his office that is stored on a computer or on microfilm if the copy is provided on a tape, disk or other medium used for the storage of information by a computer or on duplicate film.

(2) Access to his computer data base on which records are stored.

3. ~~[All fees]~~ ***From each fee*** collected pursuant to paragraph (d) of subsection 2 *:*

(a) The entire amount or $50, whichever is less, of the fee collected pursuant to subparagraph (1) of that paragraph and half of the fee collected pursuant to subparagraph (2) of that paragraph must be deposited with the state treasurer for credit to the account for special services of the secretary of state in the state general fund. Any amount remaining in the account at the end of a fiscal year in excess of $2,000,000 must be transferred to the state general fund. Money in the account may be transferred to the secretary of state's operating general fund budget account and must only be used to create and maintain the capability of the office of the secretary of state to provide special services, including, but not limited to, providing service:

~~[(a)]~~ *(1)* On the day it is requested or within 24 hours; or

~~[(b)]~~ *(2)* Necessary to increase or maintain the efficiency of the office.

Any transfer of money from the account for expenditure by the secretary of state must be approved by the interim finance committee.

(b) After deducting the amount required pursuant to paragraph (a), the remainder must be deposited with the state treasurer for credit to the state general fund.

Sec. 49. **NRS 600.340** is hereby amended to read as follows:

600.340 1. A person who has adopted and is using a mark in this state may file in the office of the secretary of state, on a form to be furnished by the secretary of state, an application for registration of that mark setting forth, but not limited to, the following information:

(a) Whether the mark to be registered is a trade-mark, trade name or service mark;

(b) A description of the mark by name, words displayed in it ~~[.]~~ or other information;

(c) The name and business address of the person applying for the registration and, if it is a corporation, limited-liability company, limited partnership or registered limited-liability partnership, the state of incorporation or organization;

(d) The specific goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with those goods or services and the class as designated by the secretary of state which includes those goods or services;

(e) The date when the mark was first used anywhere and the date when it was first used in this state by the applicant or his predecessor in business which must precede the filing of the application; and

(f) A statement that the applicant is the owner of the mark and that no other person has the right to use the mark in this state either in the form set forth in the application or in such near resemblance to it as might deceive or cause mistake.

2. The application must:

(a) Be signed and verified by the applicant or by a member of the firm or an officer of the corporation or association applying.

(b) Be accompanied by a specimen or facsimile of the mark in duplicate and by a filing fee of ~~[$50]~~ ***$100*** payable to the secretary of state.

3. If the application fails to comply with this section or NRS 600.343, the secretary of state shall return it for correction.

Sec. 50. **NRS 600.355** is hereby amended to read as follows:

600.355 1. If any statement in an application for registration of a mark was incorrect when made or any arrangements or other facts described in the application have changed, making the application inaccurate in any respect without materially altering the mark, the registrant shall promptly file in the office of the secretary of state a certificate, signed by the registrant or his successor or by a member of the firm or an officer of the corporation or association to which the mark is registered, correcting the statement.

2. Upon the filing of a certificate of amendment or judicial decree of amendment and the payment of a filing fee of ~~[$30,]~~ ***$60,*** the secretary of state shall issue, in accordance with NRS 600.350, an amended certificate of registration for the remainder of the period of the registration.

Sec. 51. **NRS 600.360** is hereby amended to read as follows:

600.360 1. The registration of a mark is effective for 5 years from the date of registration and, upon application filed within 6 months before the expiration of that period, on a form to be furnished by the secretary of state, the registration may be renewed for a successive period of 5 years. A

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renewal fee of ~~[$25.]~~ ***$50,*** payable to the secretary of state, must accompany the application for renewal of the registration.

2. The registration of a mark may be renewed for additional successive 5-year periods if the requirements of subsection 1 are satisfied.

3. The secretary of state shall give notice to each registrant when his registration is about to expire. The notice must be given within the year next preceding the expiration date, by writing to the registrant's last known address.

4. All applications for renewals must include a statement that the mark is still in use in this state.

Sec. 52. **NRS 600.370** is hereby amended to read as follows:

600.370 1. A mark and its registration are assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark. An assignment must:

(a) Be in writing;

(b) Be signed and acknowledged by the registrant or his successor or a member of the firm or an officer of the corporation or association under whose name the mark is registered; and

(c) Be recorded with the secretary of state upon the payment of a fee of ~~[$50]~~ ***$100*** to the secretary of state who, upon recording the assignment, shall issue in the name of the assignee a certificate of assignment for the remainder of the period of the registration.

2. An assignment of any registration is void as against any subsequent purchaser for valuable consideration without notice, unless:

(a) The assignment is recorded with the secretary of state within 3 months after the date of the assignment; or

(b) The assignment is recorded before the subsequent purchase.

Sec. 53. **NRS 600.395** is hereby amended to read as follows:

600.395 The fee for filing a cancellation of registration pursuant to NRS 600.390 is ~~[$25.]~~ ***$50.***

Sec. 54. **Section 29 of Senate Bill No. 51 of this session** is hereby amended to read as follows:

Sec. 29. NRS 78.390 is hereby amended to read as follows:

78.390 1. Every amendment adopted pursuant to the provisions of NRS 78.385 must be made in the following manner:

(a) The board of directors must adopt a resolution setting forth the amendment proposed and declaring its advisability, and ***either*** call a ***special*** meeting ***of the stockholders entitled to vote on the amendment or direct that the proposed amendment be considered at the next annual meeting*** of the stockholders entitled to vote ***on the amendment.***

(b) At the meeting, of which notice must be given to each stockholder entitled to vote pursuant to the provisions of this section, a vote of the stockholders entitled to vote in person or by proxy must be taken for and against the proposed amendment. If it appears upon the canvassing of the votes that stockholders holding shares in the corporation entitling them to exercise at least a majority of the voting power, or such greater proportion of the voting power as may be required in the case of a vote by classes or series, as provided in subsections ***2 and 4,*** or as may be required by the provisions of the articles of incorporation, have voted in favor of the amendment, ***an officer of the corporation shall sign*** a certificate setting forth the amendment, or setting forth the articles of incorporation as amended, and the vote by which the amendment was adopted.

(c) The certificate so ***signed*** must be filed ***with*** the secretary of state.

2. If any proposed amendment would ***adversely*** alter or change any preference or any relative or other right given to any class or series of outstanding shares, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of shares representing a majority of the voting power of each class or series ***adversely*** affected by the amendment regardless of limitations or restrictions on the voting power thereof.

3. Provision may be made in the articles of incorporation requiring, in the case of any specified amendments, a larger proportion of the voting power of stockholders than that required by this section.

4. Different series of the same class of shares do not constitute different classes of shares for the purpose of voting by classes except when the series is adversely affected by an amendment in a different manner than other series of the same class.

5. The resolution of the stockholders approving the proposed amendment may provide that at any time before the effective date of the amendment, notwithstanding approval of the proposed amendment by the stockholders, the board of directors may, by resolution, abandon the proposed amendment without further action by the stockholders.

6. A certificate filed pursuant to subsection 1 becomes effective upon filing with the secretary of state or upon a later date specified in the certificate, which must not be later than 90 days after the certificate is filed.

7. If a certificate filed pursuant to subsection 1 specifies an effective date and if the resolution of the stockholders approving the proposed amendment provides that the board of directors may abandon the proposed amendment pursuant to subsection 5, the board of directors may terminate the effectiveness of the certificate by resolution and by filing a certificate of termination with the secretary of state that:

(a) Is filed before the effective date specified in the certificate filed pursuant to subsection 1;

(b) Identifies the certificate being terminated;

(c) States that, pursuant to the resolution of the stockholders, the board of directors is authorized to terminate the effectiveness of the certificate;

(d) States that the effectiveness of the certificate has been terminated;

(e) Is signed by an officer of the corporation; and

(f) Is accompanied by a filing fee of $75.

Sec. 55. **Section 55 of Senate Bill No. 51 of this session** is hereby amended to read as follows:

Sec. 55. 1. A limited-liability company may correct a document filed by the secretary of state with respect to the limited-liability company if the document contains an inaccurate record of a company action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability company must:

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(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability company;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a manager of the company, or if management is not vested in a manager, by a member of the company.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ ***$150*** to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 56. Section 90 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 90. Chapter 87 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A limited-liability partnership may correct a document filed by the secretary of state with respect to the limited-liability partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited-liability partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited-liability partnership;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a managing partner of the limited-liability partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ ***$150*** to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 57. Section 93 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 93. 1. A limited partnership may correct a document filed by the secretary of state with respect to the limited partnership if the document contains an inaccurate record of a partnership action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the limited partnership must:

(a) Prepare a certificate of correction that:

(1) States the name of the limited partnership;

(2) Describes the document, including, without limitation, its filing date;

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(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a general partner of the limited partnership.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ ***$150*** to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 58. Section 102 of Senate Bill No. 51 of this session is hereby amended to read as follows:

Sec. 102. 1. A business trust may correct a document filed by the secretary of state with respect to the business trust if the document contains an inaccurate record of a trust action described in the document or was defectively executed, attested, sealed, verified or acknowledged.

2. To correct a document, the business trust must:

(a) Prepare a certificate of correction that:

(1) States the name of the business trust;

(2) Describes the document, including, without limitation, its filing date;

(3) Specifies the inaccuracy or defect;

(4) Sets forth the inaccurate or defective portion of the document in an accurate or corrected form; and

(5) Is signed by a trustee of the business trust.

(b) Deliver the certificate to the secretary of state for filing.

(c) Pay a filing fee of ~~[$75]~~ ***$150*** to the secretary of state.

3. A certificate of correction is effective on the effective date of the document it corrects except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, the certificate is effective when filed.

Sec. 59. Senate Bill No. 51 is hereby amended by adding thereto a new section designated sec. 138, following sec. 137, to read as follows:

Sec. 138. This act becomes effective on August 1, 2001.

Sec. 60. Sections 1, 2, 3, 8, 9 and 47 of this act do not apply to a claim that arises before the effective date of this section.

Sec. 61. Notwithstanding the provisions of section 63 of this act to the contrary, the amendatory provisions of section 42 of this act do not apply to the filing of the statement of a professional association, or the fee for that filing, before August 1, 2001, except that a professional association whose anniversary date for the 2001 calendar year falls on or after August 1, 2001, shall comply with that section as amended by this act, even if the filing is made before August 1, 2001.

Sec. 62. Notwithstanding any provision of NRS 225.140 to the contrary:

1. The state controller shall, without obtaining the approval of the interim finance committee and in addition to any amounts transferred pursuant to that section with the approval of the interim finance committee, transfer from the account for special services of the secretary of state to the secretary of state's operating general fund budget account:

For the fiscal year 2001-2002 ..... $300,000

For the fiscal year 2002-2003 ..... $250,000

2. The secretary of state may expend the amounts transferred pursuant to subsection 1 for such additional personnel, equipment, supplies, office space and other costs as are necessary to carry out the provisions of this act.

Sec. 63. 1. This section and sections 1, 2, 3, 8, 9, 47, 59, 60, 61 and 62 of this act become effective upon passage and approval.

2. Sections 5, 6, 12, 13 to 19, inclusive, 20, 21, 22, 25 to 31, inclusive, 35 to 39, inclusive, 41 to 45, inclusive, and 47 to 53, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) On August 1, 2001, for all other purposes.

3. Sections 1.5, 4, 7, 8.5, 10, 11, 14, 19.5, 23, 24, 32, 33, 34, 40, 46 and 54 to 58, inclusive, of this act become effective:

(a) Upon passage and approval for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of this act; and

(b) At 12:01 a.m. on August 1, 2001, for all other purposes.

Senate Bill No. 570–Committee on Legislative Affairs and Operations

CHAPTER 602

AN ACT relating to the legislature; making various changes relating to the legislature and the legislative counsel bureau; and providing other matters properly relating thereto.

[Approved: June 15, 2001]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 218 of NRS is hereby amended by adding thereto a new section to read as follows:

1. The legislative counsel bureau may contract for the establishment of an on-site child care facility for children of employees of the legislative branch of government. No money appropriated to the legislative fund or the legislative counsel bureau may be used to pay the cost of establishing and operating the facility.

2. All employees of the child-care facility shall be deemed employees of the state for the purposes of NRS 41.0305 to 41.039, inclusive.

3. The legislative counsel bureau may use the property described in NRS 331.135 for a child-care facility established pursuant to this section.

4. As used in this section, "on-site child care facility" has the meaning ascribed to it in NRS 432A.0275.

Sec. 2. NRS 218.2423 is hereby amended to read as follows:

218.2423 1. Each:

(a) Incumbent assemblyman may request the drafting of not more than 5 legislative measures submitted to the legislative counsel ***on or*** before September 1 preceding the commencement of a regular session of the legislature and not more than 5 legislative measures submitted to the legislative counsel ~~[on or]~~ after September 1 but on or before December 15 preceding the commencement of a regular session of the legislature.

(b) Incumbent senator may request the drafting of not more than 10 legislative measures submitted to the legislative counsel ***on or*** before September 1 preceding the commencement of a regular session of the legislature and not more than 10 legislative measures submitted to the legislative counsel ~~[on or]~~ after September 1 but on or before December 15 preceding the commencement of a regular session of the legislature.

(c) Newly elected assemblyman may request the drafting of not more than 5 legislative measures submitted to the legislative counsel on or before December 15 preceding the commencement of a regular session of the legislature.

(d) Newly elected senator may request the drafting of not more than 10 legislative measures submitted to the legislative counsel on or before December 15 preceding the commencement of a regular session of the legislature.

2. In addition to the number authorized pursuant to subsection 1:

(a) The chairman of each standing committee of the immediately preceding regular legislative session, or a person designated in the place of the chairman by the speaker of the assembly or the majority leader of the senate, as the case may be, may request before the commencement of the next regular legislative session the drafting of not more than 1 legislative measure for introduction by the committee in a subject within the jurisdiction of the committee for every 15 legislative measures that were referred to the respective standing committee during the immediately preceding regular legislative session.

(b) A person designated after a general election as a chairman of a standing committee for the next regular legislative session, or a person designated in the place of a chairman by the person designated as the speaker of the assembly or majority leader of the senate for the next regular legislative session, may request before the commencement of the next regular legislative session the drafting of the remaining number of the legislative measures allowed for the respective standing committee that were not requested by the previous chairman or designee.

Sec. 3. NRS 218.2426 is hereby amended to read as follows:

218.2426 1. In addition to the number authorized pursuant to NRS 218.2423:

(a) The speaker of the assembly and the majority leader of the senate may each request before or during a regular legislative session, without limitation, the drafting of not more than 15 legislative measures for that session.

(b) The minority leader of the assembly and the minority leader of the senate may each request before or during a regular legislative session, without limitation, the drafting of not more than 10 legislative measures for that session.

(c) A person designated after a general election as the speaker of the assembly, the majority leader of the senate, the minority leader of the assembly or the minority leader of the senate for the next regular legislative session may request the drafting of the remaining number of the legislative measures allowed for the respective officer that were not requested by the previous officer.

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EXHIBIT "C"

EXHIBIT "C"

2017 Nevada Laws Ch. 559 (S.B. 203)

NEVADA 2017 SESSION LAWS

REGULAR SESSION OF THE 79TH LEGISLATURE (2017)

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~Text~~ .

Ch. 559
S.B. No. 203
CORPORATIONS—DIRECTORS—LIABILITIES

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless: (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (NRS 78.138)

Section 4 of this bill specifies that to establish liability on the part of a corporate director or officer requires: (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law. **Sections 4 and 5** of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2.

<< NV ST 78. >>

The Legislature hereby finds and declares that:

1. It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible.

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

4. The directors and officers of a domestic corporation, in exercising their duties under NRS 78.138 and 78.139, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3. (Deleted by amendment.)

Sec. 4. NRS 78.138 is hereby amended to read as follows:

<< NV ST 78.138 >>

1. ~~Directors~~ **The fiduciary duties of directors** and officers ~~shall~~ **are to** exercise their **respective** powers in good faith and with a view to the interests of the corporation.

2. In ~~performing~~ **exercising** their respective ~~duties,~~ **powers,** directors and officers **may, and** are entitled to ~~,~~ rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ~~Directors~~ **Except as otherwise provided in subsection 1 of NRS 78.139, directors** and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. **A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.**

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may : ~~consider:~~

(a) **Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:**

(1) The interests of the corporation's employees, suppliers, creditors ~~and~~ **or** customers;

~~(b)~~ **(2)** The economy of the State ~~and~~ **or** Nation;

~~(c)~~ **(3)** The interests of the community ~~and~~ **or** of society; ~~and~~

~~(d)~~ **(4)** The long-term ~~as well as~~ **or** short- term interests of the corporation ~~and its~~ **, including the possibility that these interests may be best served by the continued independence of the corporation; or**

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider **, as a dominant factor,** the effect of a proposed corporate action upon any particular group **or constituency** having an interest in the corporation **.** ~~as a dominant factor.~~

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless ~~it~~ **:**

(a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

~~(a)~~ **(1)** The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

~~(b) The~~

(2) Such breach ~~of those duties~~ involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

Sec. 5. NRS 78.139 is hereby amended to read as follows:

<< NV ST 78.139 >>

1. ~~Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:~~

~~(a) The duties imposed upon them by subsection 1 of NRS 78.138;~~

~~(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and~~

~~(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS 78.138.~~

~~2.~~ If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

(a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and

(b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat.

If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of NRS 78.138.

~~3.~~ **2.** The provisions of subsection ~~2~~ **1** do not apply to:

(a) Actions that only affect the time of the exercise of stockholders' voting rights; or

(b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number or fraction of shares or fraction of voting power.

~~4.~~ **3.** The provisions of subsections **1 and** 2 ~~and 3~~ do not permit directors or officers to abrogate any right conferred by ~~statute~~ **the laws of this State** or the articles of incorporation.

~~5. Directors~~

4. Without limiting the provisions of NRS 78.138, a director may resist a change or potential change in control of the corporation if the **board of** directors ~~by a majority vote of a quorum determine~~ **determines** that the change or potential change is opposed to or not in the best interest of the corporation ~~:~~

~~(a) Upon~~ **upon** consideration of ~~the interests of the corporation's stockholders or any of the matters set forth in~~ **any relevant facts, circumstances, contingencies or constituencies pursuant to** subsection 4 of NRS 78.138 ~~; or~~

~~(b) Because~~ **, including, without limitation,** the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

~~(1)~~ **(a)** The assets of the corporation or any successor would be or become less than its liabilities;

~~(2)~~ **(b)** The corporation or any successor would be or become insolvent; or

~~(3)~~ (c) Any voluntary or involuntary proceeding concerning the corporation or any successor would be commenced by any person pursuant to the federal bankruptcy laws.

Secs. 6 and 7. (Deleted by amendment.)

Approved by the Governor June 12, 2017.

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DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, inclusive; Defendants.	Case No.: A-14-711535-C Dept. No.: XXVII **PLAINTIFF'S:** **(1) OPPOSITION TO DIRECTOR DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** **And** **(2) COUNTERMOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ONLY:** **Date of Hearing: October 11, 2018** **Time of Hearing: 9:30 a.m.**

Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff") and hereby submits its: (1) Opposition to the Directors'[1] Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) ("Directors' 12(c) Motion"); and (2) Countermotion for Summary Judgment only as to the Directors' liability. The Opposition and Countermotions are made and based on the attached Memorandum of Points and Authorities, all pleadings and documents on file in this action, and oral argument, if any, at the

[1] Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels.

Case Number: A-14-711535-C

hearing on this matter.

DATED this 19th day of September, 2018.

FENNEMORE CRAIG, P.C.

By: _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND REQUESTED RELIEF

This is the Directors' third attempt at pleadings stage dismissal based on the business judgment rule. Their 12(c) Motion should be denied for a variety of reasons. First, it is not even supported by the correct "legislative history." Second, the correct legislative history shows the inconsequential nature of the amendments. Third, the amendments are plainly not retroactive. Fourth, post-amendment case law confirms the viability of gross negligence against directors.

Further, not only should the Directors' 12(c) Motion be denied, Plaintiff's Countermotion for Summary Judgment herein should be granted. According to the Directors, all relevant evidence regarding them has been produced. This evidence, however, undisputedly shows the Directors failed to inform themselves before making numerous critical decisions. It also undisputedly shows the Directors abdicated their responsibilities and merely rubberstamped the self-interested decisions by the UniTer Defendants.[2] It further shows that, after they received actual knowledge of both the severe financial distress of L&C and the unreliability of the UniTer Defendants, the Directors continued to blindly and unreasonably rely on the UniTer Defendants while L&C collapsed. Based thereon, this Court should grant summary judgment in favor of Plaintiff and against the Directors on the issue of liability (with only the amount of the related

[2] For purposes of this Opposition and Countermotion, the term "UniTer Defendants" will refer to all of the non-Director defendants collectively.

damages remaining for trial).

II. PLAINTIFF'S OPPOSITION TO THE DIRECTOR' NRCP 12(c) MOTION

A. STANDARD OF REVIEW ON NRCP 12(C) MOTION

"Ordinarily, a motion for judgment on the pleadings should be made promptly after the close of the pleadings." See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1367 (1969). Review under NRCP 12(c) is essentially the same as for a 12(b)(5) motion. See Sadler v. PacifiCare of Nev., 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1266–67 (2014); Gumpad v. Comm'r of Soc. Sec. Admin., 19 F. Supp. 3d 325, 328 (D.D.C. 2014) ("A [Rule 12(c)] motion ... is resolved essentially in the same manner as a motion to dismiss ... for failure to state a claim[.]"). "[A] defendant will not succeed on a motion under Rule 12(c) if there are allegations in the plaintiff's pleadings that, if proved, would permit recovery." See Bernard v. Rockhill Dev. Co., 103 Nev. 132, 135–36, 734 P.2d 1238, 1241 (1987) (citing favorably, 5 C. Wright & A. Miller, at § 1368). As part of a NRCP 12(c) motion, the moving party concedes both the truth and sufficiency of the factual allegations. See Howell v. Lodge, No. 69578, 2016 WL 4579086, at *1 (Nev. App.); see also, Directors' 12(c) Motion, already on file, at 4:13-14 (admitting this Court already decided Plaintiff adequately pleaded gross negligence).

"The court either may consider a motion for judgment on the pleadings at a preliminary hearing ... or may postpone its determination until trial." See 5 C. Wright & A. Miller, at §§ 1367, 1368.

> [I]f the case involves novel factual or legal questions, ..., it may be advisable to delay consideration of the motion until trial if the court is left in doubt[.] This will give the parties additional time to ... more completely investigate the issues presented, thus facilitating and insuring ... adjudication of the case on its merits.

See id.

B. APPLICATION TO THIS CASE

1. The Directors misstate the mechanics of NRS 78.138.

The Directors improperly characterize the business judgment rule ("BJR") as a single step, "get out of jail free" card. See Directors' 12(c) Motion, at 9:26-10:3 ("[A] Nevada officer or

director cannot be personally liable for anything less than fraud."), and at 4:23-5:1, 6:18-20, 9:9-13. That is incorrect. Rather, NRS 78.138(7) sets up a two-step process regarding director liability. More importantly, the BJR is only a conditionally applied defense and liability remains possible even if the BJR can be asserted. As explained by the Nevada Supreme Court in Shoen v. SAC Holding Corp., 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006):

> In explaining how the business judgment rule presumption works, the Aronson court first noted that only disinterested directors can claim its protections. Then, if that threshold is met, the business judgment rule presumes that the directors have complied with their duties to **reasonably** inform themselves of **all** relevant, material information **and have acted with the requisite care** in making the business decision. Consequently, a plaintiff challenging a business decision and asserting demand futility must sufficiently show that either the board is incapable of invoking the business judgment rule's protections (*e.g.*, because the directors are financially or otherwise interested in the challenged transaction) or, if the board is capable of invoking the business judgment rule's protections, that that rule is not likely to in fact protect the decision (*i.e.*, because there exists a possibility of overcoming the business judgment rule's presumptions that the requisite due care was taken when the business decision was made).

See also Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 342-43 (Nev. 2017) (quoting Shoen v. SAC Holding Corp., 122 Nev. 621, 636-37, 137 P.3d 1171, 1181 (2006)) (emphasis added); see also Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("Technically speaking, [the BJR] has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.").

The proper, initial question, then, is whether the subject board is even capable of raising the BJR's protections in the first place. See id. Plaintiff submits that according to Aronson, a case directly confirmed as good law by the Nevada Supreme Court **after** the 2017 amendment to NRS 78.138 (see Wynn Resorts, 399 P.3d at 344), the Directors are **not** capable of ever invoking the BJR because they admit (and the evidence shows) they totally abdicated their functions to the UniTer Defendants. See Aronson, 473 A.2d at 813; Exh. 2-A, Complaint, at ¶¶ 28, 45, 48 (the Directors admit they acted "at UniTer's **direction**" as opposed to upon their "recommendations");

Exh. 2-B, Directors' Opposition, at 9:18-22[3], p.11, 1st and 2nd bullets. Because they fully abdicated the responsibilities they owed to L&C, they have no right to assert the BJR and their 12(c) Motion must be denied. See Aronson, 473 A.2d at 813. But even assuming the Directors were capable of asserting the BJR, Plaintiff's allegations in this case – as this Court has already found – adequately raise questions regarding whether the BJR "is not likely to in fact protect the [Directors'] decision[s]." See Shoen, 122 Nev. at 636-37, 137 P.3d at 1181; Howell, 2016 WL 4579086, at *1.

Moreover, in Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 13-14, 62 P.3d 720, 729 (2003), the Nevada Supreme Court discussed that the term "fraudulent" in the context of the Model Business Corporations Act ("Model Act") is not the same as in other common law contexts. Rather, the term is broader and "encompasses a variety of acts involving breach of fiduciary duties[.]" See id.[4] With respect to this case, then, Plaintiff is not obligated to either: (1) plead with particularity under NRCP 9(b); or (2) demonstrate a particular state of mind by the Directors. See id.; Shoen, 122 Nev. at 634, 137 P.3d at 1179-80 (noting NRCP 8 pleading standard); Cohen, 119 Nev. at 13-14, 62 P.3d at 729.

Still further, in their own action against the UniTer Defendants, the Directors themselves argued that a certain degree of recklessness constitutes "conscious" misconduct sufficient for the scienter aspects of a fraud-related claim. See Exh. 2-B, Directors' Opposition, at 20:18-22. The Directors argued that a single, inaccurate set of financial statements omitting the impacts of the Praxis report "alone [was] enough to defeat [the UniTer] Defendants' claims of innocent intent." See id. at 22:5-6. But that is significantly less than Plaintiff has alleged here and, therefore, the Directors' 12(c) Motion is disingenuous. As alleged in the Third Amended Complaint, as well as set forth below in Plaintiff's Countermotion, the Directors acted with conscious – meaning, "knowing" and "appreciated" (see https://www.merriam-webster.com/dictionary/conscious) – disregard for and total abdication of their duties to L&C. As such, even if this Court used the

[3] Page references are to the court-stamped number at the top of the motion papers, as opposed to the party-inserted numbering at the bottom of the page. For example, this citation to the Directors' Opposition is to "Page 9 of 223" at the top of the page, as opposed to the numbering inserted by the Directors at the bottom of the page ("2").

[4] NRS 78.138 is based on the Model Act and, therefore, the use of terms like "fraud" therein should be read consistently with their scope under the Model Act. See also Wynn Resorts, 399 P.3d at 343.

Directors' legally incorrect approach to the BJR which has been rejected numerous times by the Supreme Court of Nevada, the allegations (and facts) are more than sufficient for purposes of the "intentional misconduct, fraud **or a knowing** violation of law" language. See NRS 78.138(7)(b)(2) (emphasis added).

A key point of clarification is that there are distinct types of fiduciary duties owed by directors: (1) the duty of loyalty; and (2) the duty of care. See Shoen, 122 Nev. at 632, 137 P.3d at 1178 ("The board[] … is governed by the directors' fiduciary relationship with the corporation … which imparts upon the directors duties of care and loyalty.").

> **With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers.** And directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if **that** breach *[of the duty of loyalty]* involves intentional misconduct, fraud, or a knowing violation of the law.

See Shoen, 122 Nev. at 639, 137 P.3d at 1184 (emphasis added). This is a duty of care case and, therefore, all Plaintiff is required to do is allege the Directors' gross negligence under an NRCP 8 standard. See id.; Wynn Resorts, 399 P.3d at 343; see also Matter of DISH Network Derivative Litig. ("DISH Network"), 401 P.3d 1081, 1092 (Nev. 2017), reh'g denied (Dec. 8, 2017); Cohen, 119 Nev. at 13-14, 62 P.3d at 729. Plaintiff has, in fact, already successfully done this. See Order denying Directors' Motion to Dismiss, entered October 10, 2016, already on file. This Court should deny the instant Directors' 12(c) Motion as well and consistent with that prior order.

2. The Directors mischaracterize the 2017 amendment

Even though there are plenty of cases construing the amended statute, the Directors avoid them and instead try to lead the analysis down the rabbit hole of "legislative history." See Wynn Resorts, 399 P.3d at 342 n.5 ("[T]he amendments to NRS 78.138 do not change our conclusion."). The problem with the Directors' gambit, however, is that they do not even go to the correct history. They attach some two hundred (200) pages from the **2001** legislative efforts behind the now replaced 2003 version of the statute, but **zero** from the 2017 session. See generally, Directors' 12(c) Motion. The omission is glaring and undercuts their Motion entirely.

Further, the Directors also make the following wholly unsupported and conclusory statements regarding the 2003-17 history of NRS 78.138:

> "Many interpreted this passage *[from the Shoen case]*, which cited the Supreme Court of Delaware's Aronson decision for authority, as holding that NRS 78.138 does not protect Nevada directors and officers who were grossly negligent and breached their fiduciary duties." See Directors' 12(c) Motion, at 7:21-24.

The Directors do not identify who these "many" are, but they do not include the 2017 legislature or the Supreme Court of Nevada. In fact, the Nevada Supreme Court, sitting in a post-2017 amendment world, ***expressly relied on that Shoen holding*** (as well as numerous other foreign cases). See Wynn Resorts, 399 P.3d at 342 (expressly citing to Shoen twice and confirming the viability of gross negligence claims), 343-44 (citing to the various WLR Foods cases four times), and 344 (citing to Aronson). The Directors also assert the following:

> "In June 2017, dissatisfied with the Nevada courts' interpretation and application of NRS 78.138, the Legislature amended the statute ..." See Directors' 12(c) Motion, at 7:25-26.

> "Before the June 2017 amendment to NRS 78.138, some debated whether Shoen conflicted with the statutory protections afforded under NRS 78.138. With the June 2017 amendment to NRS 78.138, the Nevada Legislature purposefully ended that debate." See id. at 9:22-25.

Again, the Director Defendants fail to provide any evidence in support of these bare, conclusory contentions which contradict Nevada case law before and after the amendments. In fact, the Senate Judiciary Committee members neither appeared dissatisfied with Shoen (or any other particular case) nor enamored with so explicitly rebuking the judiciary. See April 10, 2017 Senate Judiciary Committee Minutes, at p.36 (Chair Segerblom: "... It raises some red flags with me with regard to telling the Supreme Court what to do."), at p.37 (Senator Ford: "I have some heartburn about the legislative intent component. ...").

Rather, the question was squarely put to the corporate director proponent by Senator Ford:

> ... SB 203 references cases out of Delaware that 'have been, and are hereby, rejected by the Legislature.' What is the most recent case in Nevada that you are attempting to address? What I have seen done, and I am not suggesting that I am amenable to doing this

> either, is a specific mention of a case that we want to overturn by legislation. If there is such a case, I would like to know what it is so that I can get a better understanding, as opposed to this roundabout way of declaring legislative intent in a way that does in fact poke the Supreme Court in the eye.

See id. at p.37-38. The response: "**There is no case we are seeking to overturn**." See id. (emphasis added).

> "After the Court decided the Directors' motion to dismiss the amended complaint, the Nevada Legislature retroactively amended NRS 78.138." See Directors' 12(c) Motion, at 4:23-24.

This statement by the Directors is inaccurate. "The other point that I want to put on the record is that **there is no retroactive effect in this bill**. There are no issues that I know of, or cases that point to the need to change. This bill simply looks forward ..." See May 25 2017 Assembly Judiciary Committee Minutes, at p.55 (emphasis added); see also Wynn Resorts, 399 P.3d at 342 n.5. Nor does NRS 78.138 make any reference to retroactive application. See id. The Directors' interpretation of the 2017 amendments are inconsistent with the legislative history, the effect of the amendments, and subsequent case law from the Nevada Supreme Court.[5]

3. Post-amendment decisions at various levels of the Nevada Judiciary mandate denial of the Directors' 12(c) Motion.

This Court need look no further than Nevada controlling case law, such as the Wynn Resorts case, to deny the Directors' 12(c) Motion.

In the Wynn Resorts case, the Nevada Supreme Court reiterated:

- The continuing viability of Shoen as one of the seminal Nevada cases regarding the BJR. See id., 399 P.3d at 341-42.
- That the BJR is successfully rebutted by showing "**either** that the decision was the product of fraud or self-interest **or** that the director failed to exercise due care in

[5] Though not directly pertinent to their 12(c) Motion, the Directors also incorrectly declare the invalidity of the deepening of the insolvency claim. "The pleadings closed and discovery opened, with **one** remaining cause of action – a claim against the Directors for gross negligence." See Directors' 12(c) Motion, at 4:15-17 (emphasis added). In fact, quite the opposite; the deepening of the insolvency claim remains valid and viable. See Hearing Transcript, March 24, 2016, at 8:8-10 ("[I]f the plaintiff chooses to amend the first cause of action *[for gross negligence, which Plaintiff did so amend, and which this Court approved]*, then I will allow the second cause of action *[deepening of the insolvency]* to continue."); Order Denying Directors' 12(b)(5) Motion, entered October 10, 2016, already on file.

reaching that decision." See id. at 343 (quoting Joseph F. Troy & William D. Gould, *Advising & Defending Corporate Directors and Officers* § 3.15 (Cal CEB rev. ed. 2007)) (emphasis added).

- That a court can inquire "into the procedural indicia of whether the directors resorted in good faith to an informed decision making process." See Wynn Resorts, 399 P.3d at 343.

The Supreme Court also expressly adopted foreign BJR jurisprudence set forth in the WLR Foods[6] cases:

> We take this opportunity *[notwithstanding the recent amendments to NRS 78.138]* to adopt the factors developed ... in WLR Foods for determining whether an individual director or board of directors acted in good faith, and, in turn, whether protection under the business judgment rule is available.

See Wynn Resorts, 399 P.3d at 343-44.

But numerous other cases support denial of the Directors' 12(c) Motion, including all the cases cited by the Directors themselves.

For example, in In re Newport Corp. Shareholder Litig. ("Newport Shareholder"), 2018 WL 1475469 (Nev.Dist.Ct.), the trial court quoted directly from Wynn Resorts in finding that a plaintiff "can 'rebut the [BJR] by showing **either** that the decision was the product of fraud or self-interest **or that the director failed to exercise due care**[.]" See id. at *1 (emphasis added). Based thereon, the Newport Shareholder court denied those director defendants' motion to dismiss. See id. at *2.

The other case cited by the Directors, In re Parametric Sound Corp. Shareholders' Litig. ("Parametric Shareholder"), 2018 WL 1867909 (Nev.Dist.Ct.), had the same result: denial of the director defendants' motion to dismiss. See id. The Parametric Shareholder trial court once again directly quoted from Wynn Resorts that a plaintiff "can 'rebut the [BJR] by showing **either** that the decision was the product of fraud or self-interest **or that the director failed to exercise due care**[.]" See id. at *2, ¶ 10 (emphasis added).

[6] WLR Foods, Inc. v. Tyson Foods, Inc., 869 F.Supp. 419 (W.D.Va. 1994) and 857 F.Supp. 492 (W.D.Va. 1994).

In DISH Network, the Supreme Court again reiterated that lack of good faith is both distinguishable from "fraud" and, by itself, sufficient to rebut the BJR:

> Proof, however, that the [disputed procedures were] so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise questions of good faith **or** conceivably fraud which would never be shielded by that doctrine.

See id., 401 P.3d at 1092 (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1003 (N.Y. 1979) (emphasis added)); see also EXX, Inc. v. Stabosz, 2014 WL 10251999 (Nev.Dist.Ct.)(Trial Order, Case No. 10-A-627976, J. Scann). The Supreme Court affirmed the trial court's decision to defer to the year-long investigation and 300-page report of a "special litigation committee" ("SLC") formed by that board. That deference and application of the BJR, however, was not given merely based on the pleadings (as the Directors seek here), but only after several evidentiary hearings as to the SLC's actual procedures and actions. See id. In other words, the motion to defer in the DISH Network case was more akin to a motion for summary judgment. As applied to this case, an NRCP 12(c) motion is inappropriate for any definitive decision on the application of the BJR. See id. Accordingly, the Directors' Motion must be denied.

III. PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT

The undisputed facts set forth herein demonstrate that the Directors: (1) failed to adequately inform themselves and/or actually make any decisions, but merely rubberstamped the self-interested desires of the UniTer Defendants; and (2) unreasonably prolonged the worsening condition of L&C after gaining actual knowledge of its impairment and/or insolvency. Thus, Plaintiff seeks summary judgment in its favor as to the Directors' liability only.

A. STATEMENT OF RELEVANT, UNDISPUTED FACTS

The following are the relevant, undisputed facts supporting Plaintiff's Countermotion.

1. L&C's General Background[7]

- In December 2003, the UniTer Defendants formed Lewis & Clark LTC RRG ("L&C") in

[7] In the interests of clarity in the presentation of the many relevant facts, Plaintiff attaches as "**Exhibit 1**" a detailed list of all exhibit references to the Countermotion.

Nevada (but to do business in the broader western United States). See Exh. 2-A, Complaint, at ¶ 39; Exh. 2-B, Directors' Opposition, at p.11, 1st bullet; Exh. 2-C, Elsass MTD, at 9:3-4; Exh. 3, US RE Agreement, LC0130516-17 ("In recognition of … essential efforts expended by US RE and its affiliates …").

- "None of the [Directors] had any experience managing an insurance company." See Exh. 2-B, Directors' Opposition, at p.11, 1st bullet.
  - Each Director (except for Ms. Lumpkin perhaps), however, had experience with financial statements and managing corporate entities or public institutions.
- The Directors, on behalf of L&C, entered into contractual relationships with the UniTer Defendants. See id.; Exh. 4, UniTer Agreement.
  - There is no evidence, however, that the Directors actually evaluated: (a) the qualifications and suitability of any of the UniTer Defendants; or (b) any alternative management entities.
  - While the UniTer Defendants formed two (2) other RRG's around the same time as L&C – (1) Ponce de Leon LTC RRG ("Ponce"); (2) Henry Hudson LTC RRG ("Hudson") – there is no evidence that the UniTer Defendants ever had any management experience relating to RRG's prior thereto. See Exh. 2-A, Complaint, at ¶¶ 34-41.
  - Instead, those agreements were a *fait accompli*, a mere rubberstamp based on the personal relationship between Director Stickels and Messrs. Elsass and Piccione of the UniTer Defendants. See Exh. 2-A, Complaint, at ¶¶ 34-41; Exh. 2-C, Elsass MTD, at 9:3-4.
    - Defendant Stickels participated in the formation of at least Hudson on behalf of his primary principal, Oneida Savings Bank. See id.
- The UniTer Agreement required the UniTer Defendants to provide monthly accounting reports to the Directors. See Exh. 4, UniTer Agreement, at Art. III.H.

- The UniTer Defendants also formed two (2) other RRG's: (1) Sophia Palmer Nurses RRG ("Sophia"); and (2) JM Woodworth RRG RRG ("JMW"). See Exh. 2-A, Complaint, at ¶¶ 34-41.
    - Unlike Ponce, L&C, and Hudson, Sophia and JMW were not in the business of insuring long-term care facilities ("LTC's").
    - The UniTer Defendants entered into contractual relationships with each of these other RRG's. See id.
- The original business plan for L&C imposed certain restrictions on the type of insurance it would write. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 1st and 3rd bullets; Exh. 2-C, Elsass MTD, at 9:9-11.

2. L&C's Merger History

- In early 2005, at the unsolicited suggestion of the UniTer Defendants, the Directors approved the merger of L&C with Hudson. See Exh. 5, 3/1/05 Meeting Minutes.
    - No prior Meeting Minutes makes any mention of a potential merger. See Exh. 6, 1/21/04–11/8/04 Meeting Minutes.
    - The Directors actually knew that the UniTer Defendants had a vested interest in the proposed merger. See Exh. 2-A, Complaint, at ¶¶ 34-41.
    - Nonetheless, the Directors failed to obtain any independent analysis of the valuation, financial impact, and/or other aspects of and reasoning for the Hudson merger. See Exhs. 5 and 6, 3/1/05, and 1/21/04–11/8/04 Meeting Minutes.
    - Nor is there any evidence the Directors actually received any detailed analysis of the proposed merger from the UniTer Defendants.
    - Instead, the only and undisputed evidence is that the Directors merely rubberstamped the merger recommendation. See Exh. 5, 3/1/05 Meeting Minutes.
- In April 2009, the UniTer Defendants recommended significant deviations from L&C's niche business plan, one of which was yet another merger, this time with Sophia. See Exh. 7, 4/8/09 Meeting Minutes, at ¶ 4.

- There is no evidence that L&C had such merger and acquisition activity in mind at that time. See id.
- There is also no evidence that L&C solicited merger targets from the UniTer Defendants. See id.
- There is also no dispute that the Directors did not have enough information to properly evaluate the proposed Sophia merger at the time it was originally proposed. See id. ("Board deferred ... until more detailed information was presented.")

- The next reference to the Sophia merger was a couple of weeks later. See Exh. 8, Sophia Merger Emails, BD002319-20, BD002492-2516, BD005437-39.
  - Director Stickels (ricka@oneidabank.com) admitted the Directors' duty to "have a **complete** understanding of the possible transaction." See id., BD005437 (emphasis added).
  - Director Stickels also admitted the supporting information provided to that date by the UniTer Defendants was still incomplete: "I encourage Sandy and Co. *[the UniTer Defendants]* to develop the [supporting] financial analysis ... necessary (as the attachment sent was a one-page 'Notes' page without the referenced financials)"). See id., BD005437.
  - There is no dispute, then, that as of April 27, the Directors: (1) had not actually considered the merits of the merger; and (2) did not have even have complete information to do so.
- On May 6, 2009, the UniTer Defendants forwarded additional merger information. See id., BD002492-2516.
  - None of this additional information, however, included analysis by independent, specially retained advisors. See id.
- On May 14, 2009, only eight (8) days later, the Directors approved the merger "in principle **subject to receipt of further relevant information**[.]" See Exh. 9, 5/14/09 Meeting Minutes (emphasis added).

- There is no dispute, then, that, as of May 14, 2009, the Directors still did not have adequate information to make a properly and fully informed decision. See id.

- Only two weeks later, the Directors formally approved the merger. See Exh. 10, 5/28/09 Meeting Minutes.
  - There is no evidence, however, that the Directors received the "further relevant information" they noted was necessary. See Exh. 9, 5/14/09 Meeting Minutes.
  - There is also no evidence the Directors ever sought, received, or considered any independent information or advice regarding the proposed Sophia merger. See Exhs. 7, 9, and 10, 4/8/09, 5/14/09, and 5/28/09 Meeting Minutes; Exh. 8, Sophia Merger Emails.
  - There is also no evidence the Directors ever considered any alternative transactions or merger candidates. See id.
- In September 2010, the Nevada DOI expressly admonished L&C about its "capital deterioration." See Exh. 11, DOI 9/2/2010 Deterioration Letter, LC005608-09.
  - The DOI initially linked the capital deterioration specifically to the Sophia merger, but based on the UniTer Defendants' request, removed that reference from the final version of their 2010 capital deterioration letter. See id.; Exh. 13, DOI 9/8/2010 Deterioration Letter, LC0261491-92; Exh. 12, UniTer-DOI 2010 Deterioration Emails, SWMLCEM006154-55, SWMLCEM006164-68.

3. The "Country Villa" Fiasco

- Also in 2009, the Directors approved another significant deviation from L&C's prior business plan, this time in underwriting larger facilities with known higher risk profiles.[8] See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 1st and 3rd bullets; Exh. 2-C, Elsass MTD, at 9:9-11.
  - There is no dispute that the Directors approved this significant deviation from the established L&C business plan. See Exh. 2-A, Complaint, at ¶¶ 48-50 (the

[8] There were several such larger and riskier LTC facilities taken on by L&C beginning in 2009, but for purposes of this Countermotion, these will be collectively referred to as "Country Villa." See Exh. 2-A, Complaint, at ¶ 48.

Directors nowhere allege ignorance of the change but merely allege it was "at UniTer's direction"); Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet; Exh. 2-C, Elsass MTD, at 9:9-11.

- There is no evidence, however, that the Directors conducted any financial impact analysis or received something comparable from the UniTer Defendants.
  - There is also no evidence the Directors retained any independent advice regarding the financial impacts of such significant underwriting deviations.
- The UniTer Defendants internally evaluated Country Villa on two separate occasions, once in 2007 (which did not result in coverage) and again in 2009 (which did result in coverage).
  - As a result, there is no dispute that the Directors actually knew of Country Villa's materially higher risk profile. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet; Exh. 2-C, Elsass MTD, at 9:9-11.
  - There is also no dispute that the Directors and the UniTer Defendants actually knew that Country Villa never provided complete information to support an appropriate underwriting analysis. See Exh. 14, Country Villa Underwriting Files; Exh. 15, UniTer Country Villa History, LC-USRE-0010282.
  - There is further no dispute that the Directors knew that Country Villa would only bind with L&C subject to special treatment not provided for in any policy for any other insured. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 15, UniTer Country Villa History.

- There is also no dispute that covering Country Villa would significantly increase premium revenue to L&C. See Exh. 2-C, Elsass MTD, at 9:9-11; Exh. 16, UniTer-Stickels Emails, SWMLCEM008695-96 (Country Villa was L&C "swinging for the fences"); Exh. 15, UniTer Country Villa History.

- Based on the management fee structure, there is also no dispute that the Directors actually knew about the UniTer Defendants' vested interest in recommending Country Villa. See Exh. 2-B, Directors' Opposition, at 19:9-10; Exh. 4, UniTer Agreement.
- There is no evidence, however, that the Directors conducted an independent analysis of the potential impact of Country Villa.
- Instead, the Directors admit they merely rubberstamped the UniTer Defendants' recommendations. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet.

- L&C initially covered Country Villa for the July 1, 2009 to June 30, 2010 period.
- L&C renewed Country Villa for the July 1, 2010 to June 30, 2011 period.
  - There is no evidence, however, that the Directors quantitatively or qualitatively evaluated the July 2009–June 2010 financial impact of Country Villa.
    - The UniTer Agreement already required the UniTer Defendants to provide the Directors with monthly accounting reports. See Exh. 4, UniTer Agreement, at Art. III.H.
      - There is no evidence, however, that the Directors ever received such monthly reports.
      - Rather, the undisputed evidence is that the UniTer Defendants did not even prepare monthly reports until October 2011. See Exh. 17, UniTer Internal Claims Memo ("L&C **now** prepares and reviews financials on a monthly rather than quarterly basis." (Emphasis added.))
- In September 2010, based on second quarter 2010 financials, the Nevada DOI expressly admonished L&C about its "capital deterioration." See Exh. 11, DOI 9/2/2010 Deterioration Letter; Exh. 13, DOI 9/8/2010 Deterioration Letter.
  - There is no dispute the only two material changes to L&C between June 2009 and June 2010 were: (1) the Sophia merger; and (2) the Country Villa expansion. See

Exh. 2-A, Complaint, at ¶¶ 47-56; Exh. 2-C, Elsass MTD, at 9:9-11.

- During June 2011, the UniTer Defendants again recommended the renewal of Country Villa for policy year July 2011-June 2012. See Exh. 16, UniTer-Stickels Emails; Exh. 18, Country Villa Renewal Communications, BD002234-35, BD002912-13, BD002598-2601, BD003162-65, and BD002621-22.[9]
  - That renewal proposal recognized the negative financial impact of Country Villa. See id.
  - Nonetheless, the Directors never performed any detailed, independent evaluation of the financial impact of Country Villa and appropriateness of renewal.

- Shortly after this renewal proposal, in September 2011, the Directors again received unequivocal notice of L&C's worsening financial condition. See Exh. 25, DOI 9/23/2011 Deterioration Letter, LC0261493-94; Exh. 19, Reserve Emails, SWMLCEM008927-29, BD002556-58, BD002851-53, BD004318-21.

4. The Directors Deepen L&C's Insolvency

- On September 2, 2010, the Nevada DOI expressly admonished L&C about its "capital deterioration." See Exh. 11, DOI 9/2/2010 Deterioration Letter.
  - If the Directors truly believed L&C was in good financial health, this DOI letter should have been cause for immediate and significant concern and, more importantly, action.
  - There is no evidence, however, that the Directors cared at all about this DOI letter. Rather, the only evidence is that the Directors doubled down on their blind faith in the UniTer Defendants.
- Instead, in response to this DOI letter, the Directors quite literally did nothing.
  - The Directors did not convene special or more frequent meetings. Rather, the

[9] In subsequent litigation, however, the Directors and UniTer Defendants have both misrepresented that L&C non-renewed Country Villa. See e.g., Exh. 2-A, Complaint, at ¶ 52 ("[L&C], therefore, did not renew coverage for these two entities in July 2011"); Exh. 2-C, Elsass MTD, at 9:17-18 ("[L&C] did not renew the facilities' *[Country Villa et al.]* coverage after July 2011"); Exh. 18, Country Villa Renewal Communications; Exh. 15, UniTer Country Villa History.

Directors did not bother to convene again for more than a month. See Exh. 20, 11/10/10 Meeting Minutes.

- They did not bother to meet again after that for yet another six (6) months. See Exh. 21, 5/4/11 Meeting Minutes.

- There is no evidence the Directors conducted any historical analysis of L&C's financial condition in direct relation to the DOI 2010 Deterioration letters.
- There is no evidence the Directors caused or implemented any change to accounting procedures or policies.
  - There is no evidence the Directors retained independent financial advisors or consultants to evaluate the historical accounting methods of the UniTer Defendants.
    - Instead, they allowed the UniTer Defendants to select their own consultant (Praxis[10]) and control (meaning, limit) that consultant's inquiry.
  - There is also no evidence the Directors demanded monthly, quarterly, or other periodic assessments of the specific financial indicators referenced in the DOI letter. See Exh. 17, UniTer Internal Claims Memo.
- There is no evidence the Directors formed a special committee to investigate and/or respond to the issues raised in the DOI letter.
- There is no evidence the Directors considered replacing the UniTer Defendants as the management entity for L&C.

- Notwithstanding the undeniably bad news from the DOI, the only action by the Directors in the immediate aftermath of the extraordinary DOI letter was to renew the UniTer Defendants as L&C's management entity. See Exh. 23, Renewed UniTer Agreement, LC0261507-26.
- The Directors' actual knowledge regarding L&C's massive capital deficiencies and, therefore, potential impairment and/or insolvency, was reinforced over subsequent

[10] Praxis Consulting is the company of Brian Steifel. He was ultimately hired by the UniTer Defendants as a direct employee.

months. See Exh. 24, 2011 Additional Liabilities Documents, SWMLCEM008955-56, BD005836-38, BD003139-41, BD002158-61, BD004318-21.

- There is no evidence, however, that the Directors conducted any detailed analysis of the existing situation or received independent advice regarding potential, alternative solutions thereto.

- There is no dispute that, instead, on September 15, 2011, the UniTer Defendants told the Directors that all was well financially. See Exh. 2-B, Directors' Opposition, at p.12, 3rd bullet.
    - There is also no dispute that on September 21, 2011, the Directors received positive 2011 Year End projections from the UniTer Defendants. See Exh. 2-B, Directors' Opposition, at p.12, 2nd and 3rd bullets.
- Only two days later, however, on September 23, 2011, the Nevada DOI again expressly criticized L&C's worsening capital deterioration. See Exh. 25, DOI 9/23/2011 Deterioration Letter.
    - This second letter expressly cited to the same financial metrics as the prior, September 2010 letters. See Exhs. 11, and 13 ("A prior letter advised the Board of Directors of deteriorating financial condition.").
    - This letter directly contradicted the rosy picture presented to the Directors only days earlier. See id.; Exh. 2-B, Directors' Opposition, at p.12, 2nd and 3rd bullets.
    - This letter also expressly mandated immediate action by the Directors. See Exh. 25, DOI 9/23/2011 Deterioration Letter.
- The only "action" by the Directors in response, however, was to request an extension of time to prepare the mandated corrective action plan. See Exh. 26, Directors' DOI Extension Request; Exh. 25, DOI 9/23/2011 Deterioration Letter.
    - There is no evidence, however, that the Directors ever actually prepared such a corrective plan.
- There is also no evidence that the Directors ever conducted an independent analysis of the financial metrics cited by the DOI: (a) at any time prior to the DOI 2010 letters; (b) at any

time after the DOI 2010 letters but before the 2011 letter; or (c) at any time after the DOI 2011 letter.

- The Directors also did not terminate the UniTer Defendants.
- Instead, the Directors continued to blindly rely on the UniTer Defendants in saddling L&C with more debt. See Exh. 2-B, Directors' Opposition, at p.12, 5th – 7th bullets, and at 20:4-7, 22:12-13; Exh. 24, 2011 Additional Liabilities Documents.
    - The Directors again failed to retain any independent advisors to: (1) assess the potential insolvency; or (2) to provide advice regarding alternative solutions.
    - The Directors have since admitted L&C's financial condition at that time did not warrant incurring additional debt. See Exh. 2-A, Complaint, at ¶¶ 76-78; Exh. 2-A, Directors' Opposition, at p.12, 5th – 7th bullets, and at 20:4-7, 22:12-13.
- By December 2011, the Directors unequivocally admitted "no confidence in the information" from the UniTer Defendants. See Exh. 27, Director No Confidence Emails, BD000794A-97A.[11]
    - Nonetheless, the Directors did nothing vis-à-vis the UniTer Defendants.
- Mere days later, the UniTer Defendants confirmed for the Directors that the situation was, in fact, much worse than they previously reported. See Exh. 2-B, Directors' Opposition, at pp.12-13, last bullet on p.12.
    - The Directors still failed to do anything.
- Ultimately, L&C was placed in receivership.

The analysis regarding the Directors' liability is strictly binary as to whether or not the Directors obtained adequate information and independent advice given: (a) the obvious and known self-interest of the UniTer Defendants in their various significant business recommendations; and (b) the obvious and known unreliability and insufficiency of the information provided by the UniTer Defendants. Moreover, no deposition testimony that could be given so many years later is necessary or even useful to this straightforward, binary analysis.

[11] The "xxxxA" designation indicates the Directors initially improperly attempted to conceal this document from Plaintiff as supposedly privileged.

Rather, the undisputed facts are best gleaned from the contemporaneous documents – or more accurately, lack thereof.[12]

B. LAW AND ANALYSIS

1. Standard of Review

"[Summary] judgment … shall be rendered forthwith if [...] the moving party is entitled to a judgment as a matter of law." See NRCP 56. The nonmoving party can only withstand a motion for summary judgment by setting forth specific facts showing the existence of a "genuine" fact issue for trial. See Celotex Corp., 477 U.S. at 324, 106 S. Ct. at 2553; see also Wood v. Safeway, Inc., 121 Nev. 724, 731–32, 121 P.3d 1026, 1031 (2005) ("We now adopt the standard employed in Liberty Lobby, Celotex, and Matsushita."). "A dispute is 'genuine' only where a reasonable jury could find for the nonmoving party [and c]onclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute." See M'wanza v. Green, No. 315CV00301RCJVPC, 2017 WL 1363332, at *2 (D. Nev. Mar. 23, 2017), report and recommendation adopted sub nom. M'Wanza v. Corr. Officer Green, No. 315CV00301RCJVPC, 2017 WL 1383446 (D. Nev. Apr. 12, 2017). In other words, where no reasonable jury could find for the nonmovants based on the actual record, a court should grant the summary judgment motion. See id.; see also Price v. Blaine Kern Artista, Inc., 111 Nev. 515, 518, 893 P.2d 367, 369 (1995).

"This burden *[on the nonmovants]* is not a light one," and requires the nonmoving party to "show more than the mere existence of a scintilla of evidence.... In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." See M'wanza, 2017 WL 1363332, at *2 (quoting In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010)). If the factual contentions of the nonmovant are implausible or contrary to the record, which is the case here, "that party must come forward with more persuasive evidence than otherwise would be necessary to show that there is a genuine issue

[12] The Board was required to produce any and all documents or things in its possession relating to Lewis & Clark to the Receiver by order of the Honorable Judge Gonzalez in the receivership action (Case no.: A-12-672047-B) dated February 28, 2013. Accordingly, absent a violation of that order by the Directors, all evidence regarding the Directors' actions has been produced.

for trial'." See id. (citing LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1137 (9th Cir. 2009) (quoting Blue Ridge Ins. Co. v. Stanewich, 142 F.3d 1145, 1147 (9th Cir. 1998)).

Besides setting forth the obligations of the parties under NRCP 56, Celotex also provides guidance to courts regarding the proper place of summary judgment in the judicial process. Critically, courts are not to hesitate on summary judgment where a motion is properly made and supported and the nonmovant fails to set forth specific facts or legal authorities precluding it. "Summary judgment [is not to be] regarded ... as a disfavored procedural shortcut, but rather as an integral" tool in the court's administration of justice. See Celotex Corp., 477 U.S. at 327, 106 S. Ct. at 2555.

2. Application to this case

Many director liability cases revolve around a host of disputed facts and, thus, are not susceptible to summary disposition. This case, however, is different. This case, at least as to the liability of the Directors (with damages and the UniTer Defendants left for another day), turns on a set of undisputed and undisputable facts supported by documentary evidence. As such, summary judgment on the Directors' liability is both proper and warranted.

a. The Directors were grossly negligent

The undisputed facts confirm that the Directors were grossly negligent with respect to their duty of care to L&C. See e.g., Horwitz, 604 F.Supp. at 1134 (evaluating state law). There is no dispute that L&C was operating sufficiently well through June 2009. See Exh. 2-A, Complaint, at ¶ 47. There is also no dispute that L&C's financial condition materially and drastically worsened between June 2009 and June 2010. See Exh. 13, DOI 9/8/2010 Deterioration Letter. There is also no dispute that the Directors approved two (2) significant operational decisions during that exact timeframe. See Exh. 7, 4/8/09 Meeting Minutes, at ¶ 4; Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 1st and 3rd bullets; Exh. 2-C, Elsass MTD, at 9:9-11. There is also no disputing that these two decisions caused and/or materially contributed to L&C's collapse. See Exh. 13, DOI 9/8/2010 Deterioration Letter; see also, generally, Exhs. 2-A, 2-B, Oneida Case Pleadings.

The only pertinent inquiry, then, as to the gross negligence claim is whether the Directors

adequately informed themselves in making these decisions. See NRS 78.138; Wynn Resorts, 399 P.3d at 342-43; Shoen, 122 Nev. at 636-37, 137 P.3d at 1181; Horwitz, 604 F.Supp. at 1134; Sandberg v. Virginia Bankshares, Inc., 891 F.2d 1112 (4th Cir. 1989) (reversed on other grounds, 501 US 1083 (1991); WLR Foods cases, 869 F.Supp. 419 and 857 F.Supp. 492; Minnesota Invco. Of RSA # 7, Inc. v. Midwest Wireless Holdings LLC ("Minnesota Wireless" case), 903 A.2d 786 (Del. 2006); DISH Network, 401 P.3d at 1092.

i. The Sophia Palmer merger

In Sandberg, the 4th Circuit affirmed a trial verdict against the board because it "merely rubberstamped everything placed before them" by an entity with a vested interest in the recommended transaction or decision. 891 F.2d at 1123. Blind, unquestioning reliance on information from a source with a vested interest is a breach of the duty of care required of corporate officers. See id.; compare Horwitz, 604 F.Supp. 1130 (independent advice from both investment bankers and counsel obtained); WLR Foods cases, 869 F.Supp. 419 and 857 F.Supp. 492 (not one but two independent investment bankers retained and not one but two independent legal counsel retained to evaluate the specific proposed transaction); DISH Network, 401 P.3d 1081 (directors created "special litigation committee" to conduct year-long investigation and prepare formal report); Minnesota Wireless, 903 A.2d at 792 (retained investment bank conducted independent search for numerous potential merger candidates).[13] In this case, the Directors did nothing independent of the UniTer Defendants notwithstanding their actual knowledge of the UniTer Defendants' self-interest in both the Sophia merger and Country Villa recommendations. As such, the inescapable conclusion warranting summary judgment is that they were grossly negligent.

The Sandberg case evaluated the process by which the board "informed" themselves in the context of a merger and, therefore, it is particularly applicable here. The Sandberg case is additionally particularly applicable because the subject merger was proposed by an entity with a

[13] A different scenario might be where a board actually did retain nominally independent advisors, but then proceeded to handcuff those advisors by provide them incomplete and/or inaccurate information. See Wynn Resorts, 399 P.3d at 343 (adopting WLR Foods cases factors). That is **not** this case because there was simply never a single, actually independent advisor ever retained by the Directors for the specific purposes of advising regarding either of the two significant decisions.

vested interest in both the target and the acquirer. The merger was proposed by First American Bankshares ("FABI"), which controlled both entities to be merged: (1) Virginia Bankshares ("VBI"), a wholly owned subsidiary; and (2) First American Bank of Virginia ("BVA"), with 85% of its outstanding shares owned by VBI. There, FABI retained for itself an investment bank to support its recommendation of a "fair price" for the 15% minority shares in BVA. BVA did not retain its own independent advisor to calculate an appropriate share price. See id., 891 F.2d 1120. The BVA directors argued, as do the Directors here, that they were entitled to rely on the investment banker retained by the self-interested FABI. See id. The jury rejected that argument and returned a verdict against the BVA directors. See id. The 4th Circuit affirmed. See id.

In this case, the Directors were even less informed than the liable BVA board. At least in Sandberg there was an M&A valuation expert involved somewhere along the line (albeit not assisting the subject directors but only supporting the vested interest promoting entity). See id. In this instance, however, there is no evidence that the UniTer Defendants retained an independent investment banker for purposes of properly valuing and/or structuring the proposed merger. See Exhs. 7, 9, and 10, 4/8/09, 5/14/09, and 5/28/09 Meeting Minutes; Exh. 8, Sophia Merger Emails, BD002319-20, BD002492-2516, BD005437-39. Not only that, the entire recommendation to the Directors appears to have rested on a literal "back of the napkin" analysis by the UniTer Defendants (who have no specific expertise in the field of mergers and acquisitions). See Exh. 8, Sophia Merger Emails, BD002319-20.

Still worse, and thus easily overcoming the gross negligence threshold, the Directors in this case actually recognized the insufficiency of the information as presented to them by the UniTer Defendants. See id., BD002319-20, BD002492-2516, BD005437-39; Exhs. 7, 9, and 10, 4/8/09, 5/14/09, and 5/28/09 Meeting Minutes. Yet they proceeded anyway because their role was strictly to rubberstamp the UniTer Defendants' desires. In other words, this is not a simple negligence case of making a decision without understanding the incomplete state of the supporting information. This decision was made actually knowing of and totally disregarding the incomplete state of the information in favor of reflexive rubberstamping. See id.

Moreover, mergers are highly specialized and complex transactions requiring independent

advice from both investment bankers and specialized legal counsel. See Sandberg, Inc., 891 F.2d 1112; Horwitz, 604 F.Supp. 1130 (independent advice from both investment bankers and legal counsel); WLR Foods cases, 869 F.Supp. 419 and 857 F.Supp. 492 (not one but two independent investment bankers and not one but two independent legal counsel retained, and at 857 F.Supp. at 494 ("the *[Sandberg]* Court found **most salient** the directors' failure to retain independent experts and their blind allegiance to the advice they received") (emphasis added)). There is no evidence, however, that anybody involved with L&C ever consulted with either an investment bank or specialized counsel. See Exhs. 7, 9, and 10, 4/8/09, 5/14/09, and 5/28/09 Meeting Minutes; Exh. 8, Sophia Merger Emails.

In Wynn Resorts, the Supreme Court adopted factors set forth in the WLR Foods cases for determining whether a board acted in good faith. Those include: (1) the identity and qualifications of any sources of information or advice sought which bears on the decision reached; (2) the circumstances surrounding selection of those sources; (3) the general topics of the information sought or imparted; (4) whether advice was actually given; (5) whether that advice was followed, and if not, what sources of information and advice were consulted to reach the decision in issue. See id., 399 P.3d at 343. In this case, all of these factors are resolved, strictly in favor of Plaintiff and against the Directors because they failed to even seek information from any other source. As such, there is no identity and qualifications to even consider, which can only work against the Directors. The circumstances surrounding the failure to even seek other information can also only work against the Directors. There are obviously no general topics to consider based on the non-existence of information from other sources, which again works only against the Directors. There was obviously no advice actually given from these non-existent other sources, and that works strictly against the Directors. And finally, the Directors obviously did not rely on or follow non-existent advice, which works strictly against them. See id.

The documentary evidence (which is not susceptible to dispute via any later deposition testimony) is that the Directors: (a) never received complete information; (b) never retained any expert, independent advisors; and (c) spent mere minutes in deliberating on such an important decision. See id. The process was, therefore, nothing but a sham and summary judgment is

appropriate in favor of Plaintiff on the Directors' related gross negligence. See e.g., EXX, Inc., 2014 WL 10251999; Sandberg, 891 F.2d at 1123; Celotex Corp., 477 U.S. at 324, 106 S. Ct. at 2553; Wood, 121 Nev. at 731–32, 121 P.3d at 1031; M'wanza, 2017 WL 1363332, at *2; Price, 111 Nev. at 518, 893 P.2d at 369.

ii. The Country Villa fiasco

Similarly, the Directors were grossly negligent in their knowingly uninformed gamble on the UniTer Defendants' self-interested "get-rich-quick" scheme involving Country Villa. There is no dispute that Country Villa represented a material cardinal change in L&C's underwriting restrictions. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 1st and 3rd bullets; Exh. 2-C, Elsass MTD, at 9:9-11. There is also no dispute the Directors appreciated that magnitude of their "decision" at the time. See id.; Exh. 16, UniTer-Stickels Emails. There is also no dispute that L&C never had complete information from Country Villa to so as to adequately perform an initial underwriting analysis. See Exh. 14, Country Villa Underwriting Files. Nonetheless, and as further evidence of the recklessness of the decision, there is also no dispute that the Directors and the UniTer Defendants were aware of Country Villa's high risk history and demands for special treatment. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet; Exh. 2-C, Elsass MTD, at 9:9-11; Exh. 15, UniTer Country Villa History. There is also no dispute that the Directors actually knew of the UniTer Defendants' vested interest in Country Villa. See Exh. 2-B, Directors' Opposition, at 19:9-10; Exh. 4, UniTer Agreement.

Yet, despite all of these special circumstances – in particular, the UniTer Defendants' vested interest and the necessarily and materially increased risk to L&C – the Directors never obtained an independent and/or specially tailored analysis of such a unique decision beyond their prior experience. Instead, the Directors simply abdicated all responsibility for this decision to the UniTer Defendants and rubberstamped their recommendation with no analysis at all. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet.

Still further, there is no dispute that the negative impacts of the Country Villa decision were not an overnight sensation, but developed over long enough time for the Directors to do

something about them. First, based on the uniqueness of the original decision, the Directors should have been monitoring Country Villa from day one with respect to their impact on L&C. There is no dispute, however, that they did nothing in that regard.

Second, in September 2010, the Directors received an extraordinary letter from the DOI regarding L&C's significant capital deterioration since June 2009. See Exh. 11, DOI 9/2/2010 Deterioration Letter; Exh. 13, DOI 9/8/2010 Deterioration Letter. There is no dispute the only material changes to L&C in the preceding year were: (1) the Sophia merger; and (2) the Country Villa decision. See Exh. 2-A, Complaint, at ¶¶ 47-56. Therefore, there is no dispute that, as of September 2010, the Directors actually knew of material adverse impacts from the Country Villa decision. Nonetheless, the Directors failed to perform any detailed and/or independent evaluation of Country Villa's past impact on L&C. They also failed to perform any detailed and/or independent evaluation of the appropriateness of continuing coverage for Country Villa.

Third, in June 2011, the UniTer Defendants again recommended renewal of Country Villa. That renewal proposal identified adverse circumstances caused by Country Villa. Yet again, however, the Directors merely rubberstamped the UniTer Defendants' still self-interested recommendations without any independent or detailed analysis. See Exh. 18, Country Villa Renewal Communications; Exh. 15, UniTer Country Villa History. Perversely, rather than the Directors, Country Villa is to thank for capping the negative effects of the Directors' gross negligence in this regard. See n.10, supra (regarding the Directors' patently false claim to have affirmatively non-renewed Country Villa). But there is no dispute that Country Villa's election to non-renew did not undo the damage already caused. See e.g., Exh. 2-A, Complaint, at ¶ 51; Exh. 2-B, Directors' Opposition, at p.11, 4th bullet; Exh. 2-C, Elsass MTD, at 9:9-20.

As the Directors themselves articulated in their prior, 2016 Motion to Dismiss, facts supporting a conclusion that they acted on a "misinformed, misguided, and ***honestly*** mistaken" basis would not arise to gross negligence. See Directors' 2016 Motion to Dismiss, already on file, at 9:8-11 (emphasis added). And the Nevada Supreme Court described gross negligence as "the failure to exercise even a slight degree of care," "indifference to present legal duty," and "manifestly a smaller amount of watchfulness and circumspection than the circumstances require

of a prudent man." See id. at 9:21-28 (quoting Hart v. Kline, 61 Nev. 96, 116 P.2d 672, 674 (1941)). The facts as set forth above and supported by evidence, however, debunks the tall tale told by the Directors that they were simply misinformed. Rather, the facts and evidence demonstrate the Directors knew they were taking material risks and knew they were doing so without adequate information. That is not "honestly mistaken" action, but more than satisfies the Nevada Supreme Court's definition of gross negligence. See id.

The Directors knew they were making a material gamble on Country Villa. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 1st and 3rd bullets; Exh. 2-C, Elsass MTD, at 9:9-11; Exh. 16, UniTer-Stickels Emails ("swinging for the fences"). The Directors also knew this decision was outside L&C's experience. See id. The Directors also knew there were special circumstances relating to Country Villa. See Exh. 2-A, Complaint, at ¶¶ 48-50; Exh. 2-B, Directors' Opposition, at p.11, 3rd bullet; Exh. 2-C, Elsass MTD, at 9:9-11; Exh. 15, UniTer Country Villa History. They also knew at the time that they did not have complete information to make an intelligent decision regarding Country Villa. See Exh. 14, Country Villa Underwriting Files. The Directors further knew of UniTer's self-interest in promoting Country Villa. See Exh. 2-B, Directors' Opposition, at 19:9-10; Exh. 4, UniTer Agreement; Exh. 16, UniTer-Stickels Emails. They also definitively knew the disastrous impact of the Country Villa decision as early as September 2010 (although they could and should have known earlier had they demanded the UniTer Defendants comply with the UniTer Agreement's reporting requirements). See Exh. 11, DOI 9/2/2010 Deterioration Letter; Exh. 13, DOI 9/8/2010 Deterioration Letter; Exh. 17, UniTer Internal Claims Memo.

Had the Directors done anything to address these known issues, there might be a fact question to resolve regarding their liability. But they did **nothing**. See e.g., Wynn Resorts, 399 P.3d at 343 (citing WLR Foods factors); EXX, Inc., 2014 WL 10251999. Instead, they simply abdicated their responsibilities and rubberstamped the UniTer Defendants' speculative recommendation. The undisputed evidence is that the Directors exercised **no care at all**, so the distinction between "scant" and "reasonable" care is irrelevant. Summary judgment in favor of Plaintiff and against the Directors is warranted with respect to the Country Villa decision. See

Wynn Resorts, 399 P.3d at 343-44; Hart, 61 Nev. 96, 116 P.2d at 674; Shoen, 122 Nev. at 639, 137 P.3d at 1184; Aronson, 473 A.2d at 813; EXX, Inc., 2014 WL 10251999; Celotex Corp., 477 U.S. at 324, 106 S. Ct. at 2553; Wood, 121 Nev. at 731–32, 121 P.3d at 1031; M'wanza, 2017 WL 1363332, at *2; Price, 111 Nev. at 518, 893 P.2d at 369.

b. The Directors are liable for deepening L&C's insolvency

As explained above at n. 5, "deepening of the insolvency" is a valid and viable claim in this case. See also Smith v. Arthur Andersen LLP, 421 F.3d 989, 1006 (9th Cir.2005) (recognizing validity of deepening of the insolvency claim); In re Agribiotech, Inc., 319 B.R. 216, 224 (D.Nev. 2004) (same). While their patently false argument in their separate fight with the UniTer Defendants was that they were unaware of L&C's insolvency at the time, the true, undisputed facts as set forth herein belie that. See e.g., Exhs. 2-A and 2-B, Oneida Case Pleadings; Exhs. 11 and 13, DOI 2010 Deterioration Letter; Exh. 25, DOI 2011 Deterioration Letter; Exh. 15, UniTer Country Villa History; Exh. 24, 2011 Additional Liabilities Documents. Moreover, the Directors have elsewhere admitted that L&C's insolvency was unreasonably prolonged beginning in late 2011. See Exh. 2-A, Complaint, at ¶¶ 76-78; Exh. 2-B, Directors' Opposition, at p.12, 5th – 7th bullets, and at 20:4-7, 22:12-13. As such, summary judgment in Plaintiff's favor on that claim is also warranted.

A breach of the duty of care in incurring additional debt for a corporation, and thereby prolonging the life of that corporation, constitutes deepening of the corporation's insolvency. See Smith, 421 F.3d at 1003 ("[A]n insolvent corporation is deemed to suffer a 'distinct and compensable injury when it continues to operate and incur more debt'."); In re Agribiotech, Inc., 319 B.R. at 224 (recognizing deepening claim). This is because dissolving an entity doomed to eventual failure is a valid, even most appropriate action to minimize the harm to that corporation. See id. ("[A]dditional assets might not have been spent on a failing business. This allegedly wrongful expenditure of corporate assets qualifies as an injury to the firm[.]").

In this case, the Directors actually knew of the impairment and/or insolvency of L&C as of late 2010. See Exhs. 11 and 13, DOI 2010 Deterioration Letters. They then repeatedly received information that either confirmed L&C's worsening financial condition or, at the very

least, totally contradicted any representations by the UniTer Defendants in that regard. See e.g., Exh. 25, DOI 9/23/2011 Deterioration Letter; Exh. 24, 2011 Additional Liabilities Documents; Exh. 2-B, Directors' Opposition, at p.12, 2nd and 3rd bullets.

Yet the Directors did nothing while L&C was destroyed. The single affirmative decision taken by the Directors after the dire financial circumstances were revealed to them was to saddle L&C with still more debt. See Exh. 24, 2011 Additional Liabilities Documents. But their failures to act also unreasonably prolonged L&C's expenditures of its assets. First, the Directors should have actually considered dissolution or other alternatives (receivership, etc.) much earlier in the process. The DOI alerted the Directors to the dire financial condition in September 2010. See Exhs. 11 and 13, DOI 2010 Deterioration Letters. There is no dispute that in September 2011 the UniTer Defendants presented financial statements to the Directors indicating that all was well. See Exh. 2-B, Directors' Opposition, at p.12, 2nd and 3rd bullets. There is also no dispute that anybody and everybody examining L&C's June 2011 financial statements should and would have realized that the situation was "shocking and terrible." Exh. 17, UniTer Internal Claims Memo ("The *[June 2011 financial statement]* results were shocking and terrible **as everybody who has seen them knows**." (Emphasis added.)). The Directors apparently reviewed these very same financials at their September 21, 2011 Board Meeting. See Exh. 22, 9/21/2011 Meeting Minutes. Therefore, notwithstanding the UniTer Defendants' duplicitous breaches of their duties to L&C which are for another day, there is no reasonably disputing that the Directors, most of whom were seasoned finance executives (certainly Stickels), actually knew of the "shocking and terrible" situation facing L&C.

Then, only days later, the Directors received another DOI Deterioration Letter, which letter confirmed what the Directors should have already determined; that L&C was facing potential insolvency. See Exh. 25, DOI 9/23/11 Deterioration Letter; see also Exh. 17, UniTer Internal Claims Memo. Therefore, based only on the DOI letters confirming and consistent with the known "shocking and terrible" June 2011 results, the Directors should have: (1) started evaluating, with the assistance of advisors wholly independent of the UniTer Defendants, the continuing viability of L&C versus alternatives, such as dissolution; and/or (2) at the very least,

immediately terminated the UniTer Defendants for: (a) not doing anything to address the DOI 2010 letters; and (b) not immediately advising of the "shocking and terrible" results but instead waiting a full month to present a wholly false picture. See Exh. 17, UniTer Internal Claims Memo; Exh. 2-B, Directors' Opposition, at p.12, 2nd and 3rd bullets; Exh. 28, 9/21/2011 Meeting Minutes; Exh. 25, DOI 9/23/11 Deterioration Letter. The Directors, however, did nothing despite the obviously false, let alone merely unreliable, information from the UniTer Defendants.

Based on these undisputed facts, no reasonable jury could conclude that the Directors did anything other than improperly deepen L&C's insolvency. As such, and based on the appropriateness of judgment on the gross negligence claim, summary judgment in favor of Plaintiff on this deepening claim is also warranted.

V. CONCLUSION

For all these reasons Plaintiff respectfully requests that the Commissioner grant its request for exemption from the applicable arbitration program, and grant such other and further relief as is appropriate and necessary.

DATED this 19th day of September, 2018.

FENNEMORE CRAIG, P.C.

By: _____

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CERTIFICATE OF SERVICE

I certify that I am an employee of Fennemore Craig, P.C., and that on this date, I served the foregoing **PLAINTIFF'S: (1) OPPOSITION TO DIRECTOR DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; And (3) COUNTERMOTION FOR SUMMARY JUDGMENT AS TO LIABILITY ONLY** on the parties set forth below by legally serving via Odyssey electronic service as follows:

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DATED: Wed, Sep 19, 2018

/s/ Morganne Westover
An Employee of Fennemore Craig, P.C.

EXHIBIT 1

LIST OF EXHIBITS TO COUNTERMOTION

Exhibit No.	Description	Bates No.
1	List of Exhibits	- -
2	Filings in Case No. 5:13-CV-746 (MAD/ATB), Oneida Savings Bank, et al. v. Uni-Ter Underwriting Management Corp., et al.	- -
2-A	Directors' Complaint	- -
2-B	Plaintiffs' (Directors) Memorandum of Law in Opposition to Defendants' Motions to Dismiss and in Support of Plaintiffs' Motion for Leave to file an Amended Complaint	- -
2-C	Defendants Sanford Elsass and Donna Dalton's Memorandum of Law in Support of their Motion to Dismiss the Complaint for Failure to State a Claim	- -
3	US RE Broker of Record Letter Agreement ("US RE Agreement")	LC0130516-17
4	UniTer Management Agreement ("UniTer Agreement")	LC0130822-43
5	Meeting Minutes, March 1, 2005	LC0130931
6	Meeting Minutes, January 21, 2004 – November 8, 2004	LC0130982; LC0130977; LC0130939-40; LC0130937-38; LC0130936; LC0130935; LC0130933-34; LC0130932
7	Meeting Minutes, April 8, 2009	LC0130892-93
8	Sophia Merger Emails	BD002319-20; BD005437-39
9	Meeting Minutes, May 14, 2009	LC0130890-91
10	Meeting Minutes, May 28, 2009	LC0130888
11	Nevada Division of Insurance ("DOI") September 2, 2010 Letter	LC005608-09
12	UniTer-DOI 2010 Deterioration Emails	SWMLCEM006154-55; SWMLCEM006164-68
13	DOI September 8, 2010 Letter	LC0261491-92
14	Country Villa Underwriting Files	VARIOUS
15	UniTer Country Villa History	LC-USRE-0010282
16	UniTer-Stickels Emails	SWMLCEM008695-96
17	UniTer Internal Claims Memo	LC-USRE-0182922-23
18	Country Villa Renewal Communications	BD002234-35; BD002912-13; BD002598-2601; BD003162-65; BD002621-22
19	Reserve Emails	SWMLCEM008927-29; BD002556-58; BD002851-53
20	Meeting Minutes, November 10, 2010	LC0130878-79
21	Meeting Minutes, May 4, 2011	LC0130874-75
22	Meeting Minutes, September 21, 2011	LC0130872-73
23	Renewed UniTer Agreement	LC0261507-26
24	2011 Additional Liabilities Documents	SWMLCEM008955-56; BD005836-38; BD003139-41; BD002158-61; LC0261644-52
25	DOI September 23, 2011 Deterioration Letter	LC0261493-94
26	Directors' DOI Extension Request	BD0009921-23
27	Director No Confidence Emails	BD000794A-97A

EXHIBIT 2-A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA SAVINGS BANK; MARQUIS COMPANIES I, INC.; PINNACLE HEALTHCARE, INC.; ROHM SERVICES CORPORATION; HEATHWOOD HEALTH CARE CENTER, INC.; and EAGLE HEALTHCARE, INC.

Plaintiffs,

-vs-

UNI-TER UNDERWRITING MANAGEMENT CORPORATION; UNI-TER CLAIMS SERVICES CORPORATION; U.S. RE COMPANIES, INC.; SANFORD ELSASS; DONNA DALTON; JONNA MILLER; and RICHARD DAVIES

Defendants.

COMPLAINT

Civil Action No. 5:13-CV-0746 (MAD/ATB)

JURY TRIAL DEMANDED

Plaintiffs Oneida Savings Bank, Marquis Companies I, Inc., Pinnacle Healthcare, Inc., Rohm Services Corporation, Heathwood Healthcare Center, Inc., and Eagle Healthcare, Inc. (collectively, "Plaintiffs"), by their attorneys, Hiscock & Barclay, LLP, as and for their Complaint against Defendants, allege as follows:

NATURE OF ACTION

1. Plaintiffs bring this action to hold Uni-Ter Underwriting Management Corporation ("Uni-Ter") accountable for its wrongful and fraudulent conduct in connection with Lewis & Clark LTC Risk Retention Group, Inc. ("Lewis & Clark").

2. Uni-Ter, through fraudulent and unlawful means, induced Plaintiffs to invest $2,200,000 in convertible debentures in Lewis & Clark.

3. Uni-Ter, through its officers and employees, repeatedly and falsely represented to Plaintiffs that Lewis & Clark, although needing additional capital, was in a financially stable position and poised for future growth.

4. U.S. Re Companies, Inc. ("U.S. Re"), Uni-Ter's parent company, directed Uni-Ter to make these representations, and to refrain from disclosing known adverse material information.

5. After making their investments, Plaintiffs learned that, in fact, Lewis & Clark was insolvent, and that Uni-Ter knew that Lewis & Clark was insolvent at the time it induced Plaintiffs' investments.

6. As a direct result of Uni-Ter's intentional misrepresentations and material omissions made at U.S. Re's direction, which Uni-Ter and U.S. Re designed to induce Plaintiffs' investments in Lewis & Clark, Plaintiffs lost all of their investments in Lewis & Clark.

THE PARTIES

7. Plaintiff Oneida Savings Bank ("Oneida Savings Bank") is a savings bank chartered under the laws of the state of New York. Oneida Savings Bank maintains its principal office at 182 Main Street, Oneida, New York 13421.

8. Plaintiff Marquis Companies I, Inc. ("Marquis") is a corporation organized under the laws of the state of Oregon. Marquis maintains its principal office at 4560 SE International Way, Suite 100, Milwaukie, Oregon 97222.

9. Plaintiff Pinnacle Healthcare, Inc. ("Pinnacle") is a corporation organized under the laws of the state of Oregon. Pinnacle maintains its principal office at 1077 Gateway Loop, Suite A, Springfield, Oregon 97477.

10. Plaintiff Rohm Services Corporation ("Rohm") is a corporation organized under the laws of the state of New York. Rohm maintains its principal office at 240 East Avenue, Rochester, New York 14607.

11. Plaintiff Heathwood Health Care Center, Inc. ("Heathwood") is a corporation organized under the laws of the state of New York. Heathwood maintains its principal office at 7 Limestone Drive, Williamsville, New York 14221.

12. Plaintiff Eagle Healthcare, Inc. ("Eagle") is a corporation organized under the laws of the state of Washington. Eagle maintains its principal office at 6830 NE Bothell Way, Suite C-488, Kenmore, WA 98028.

13. Defendant Uni-Ter is a corporation organized under the laws of the state of Delaware. Uni-Ter maintains its principal office at 3655 Brookside Parkway, Suite 200, Alpharetta, Georgia 30022.

14. Defendant Uni-Ter Claims Services Corporation ("UCSC") is a corporation organized under the laws of the state of Delaware. UCSC maintains its principal office at 3655 Brookside Parkway, Suite 200, Alpharetta, Georgia 30022.

15. Defendant U.S. RE Companies, Inc. ("U.S. Re") is a corporation organized under the laws of the state of Delaware. U.S. Re maintains its principal office at 1 Blue Hill Plaza, 3rd Floor, Pearl River, New York 10965.

16. Defendant Sanford "Sandy" Elsass is an individual residing at, upon information and belief, 151 Tremont Street, Apartment 17F, Boston, Massachusetts 02111. During the time periods relevant to this Complaint, Mr. Elsass was the President and Chief Executive Officer of Uni-Ter.

17. Defendant Donna Dalton is an individual residing at , upon information and belief, 2301 Fripp Overlook NW, Acworth, Georgia 30101. During the time periods relevant to this Complaint, Ms. Dalton was the Chief Operating Officer and Chief Financial Officer of Uni-Ter.

18. Defendant Jonna Miller is an individual residing at, upon information and belief, 652 Bostic Hill Court SE, Marietta, Georgia 30067. During the time periods relevant to this Complaint, Ms. Miller was the Vice President – Claims of Uni-Ter.

19. Defendant Richard Davies is an individual residing at, upon information and belief, 319 Howard Avenue, Fair Lawn, New Jersey 07410. During the time periods relevant to this Complaint, Mr. Davies was the Chief Financial Officer of U.S. Re.

JURISDICTION AND VENUE

20. This Court has personal jurisdiction over Defendants Uni-Ter, UCSC, Elsass, Dalton, Miller, and Davies because they regularly engage in extensive business transactions and solicitations in New York (including the transactions giving rise to the claims in this action).

21. This Court has personal jurisdiction over Defendant U.S. Re because U.S. Re maintains its principal place of business in New York and because U.S. Re regularly engages in extensive business transactions and solicitations in New York (including the transactions giving rise to the claims in this action).

22. This Court has jurisdiction over this action under 28 U.S.C. § 1331 in that this is a civil action arising under the laws of the United States. This action arises under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 et seq. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

23. Venue in this Court is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events and/or omissions giving rise to the claim occurred in phone conferences with participants of the conferences situated in this District, and because securities in question are located in this District.

GENERAL ALLEGATIONS

Introduction

24. Lewis & Clark is a Nevada domiciled insurance company exclusively providing professional liability insurance to nursing homes, assisted living facilities, licensed nurses, and other long-term care facilities through a Risk Retention Group structure.

25. Risk Retention Group entities are similar to captive insurance companies in that they attempt to limit a policyholder's risk and encourage policyholders to manage better their claims experience.

26. The major differences between captive insurance companies and Risk Retention Groups are the following:

a. Risk Retention Groups include multiple policyholders rather than a single policyholder, as captive insurance companies do.

b. Policyholders must be equity owners of Risk Retention Groups.

c. Risk Retention Groups are limited to providing only liability coverage.

d. Risk Retention Groups retain liability for small claims risk and reinsure large losses.

27. The Risk Retention Group model involves creating a "shell" insurance company and then in turn contracting with third party organizations to provide management services, underwriting services, claims management services, risk management services, and reinsurance.

28. Lewis & Clark engaged Uni-Ter pursuant to a management agreement to provide all of the insurance company services necessary to run Lewis & Clark, including the placement of reinsurance with third parties. Pursuant to the terms of the management agreement, which Lewis & Clark and Uni-Ter renewed in January 2011 (the "Management Agreement"), Uni-Ter was to act as a fiduciary of Lewis & Clark and manage every aspect of Lewis & Clark's business.

29. Pursuant to the Management Agreement, Uni-Ter and UCSC were to receive management fees in the form of commissions, claims handling fees, and a profit sharing bonus.

30. Although the amounts of the management fees fluctuated and were changed by several amendments to the Management Agreement, the schedule of these management fees was initially as follows: a commission at the rate of 12% of the annual gross written premiums plus the amount of agency commissions for long-term care facilities, a commission at the rate of 37.5% of the annual gross written premiums for nurses and nurse practitioners, claims handling fees of a $250 file setup fee for each claim plus $155 per hour for claim adjusters and nurse professionals, and a profit sharing bonus that ranged from 1% to 6% of earned premium depending on loss ratio realized.

31. Lewis & Clark itself had no employees.

32. Uni-Ter's president, Mr. Elsass, is known as an industry expert in the insurance world and specifically the Risk Retention Group model.

33. Uni-Ter is the wholly owned subsidiary of U.S. Re, a closely held reinsurance company.

34. Uni-Ter also manages four other Risk Retention Groups and runs a Florida-based full line insurance company.

Oneida Savings and Bailey & Haskell Associates, Inc. Involvement

35. Oneida Savings Bank has an affiliate, Bailey & Haskell Associates, Inc. ("B&H"). B&H is an insurance agency with a significant presence in the health care sector. B&H also had a long-standing business relationship with Mr. Elsass.

36. In 2004, after a series of discussions with B&H and Mr. Elsass, Oneida Savings Bank agreed to provide capital for the creation of a long-term care Risk Retention Group.

37. As a result, Uni-Ter formed an entity known as Henry Hudson Risk Retention Group, Inc. ("Henry Hudson") to serve as a Risk Retention Group.

38. Henry Hudson had a market in New York State north of Westchester County for the sale of general and professional liability insurance to long-term care facilities and B&H was the sole wholesale broker for the Henry Hudson.

39. At the beginning of 2004, Uni-Ter also formed Lewis & Clark to operate in the states of Washington, Oregon, and Idaho, selling liability insurance to the long-term care industry.

40. Henry Hudson and Lewis & Clark operated separately, but identically, and Uni-Ter managed both Henry Hudson and Lewis & Clark.

41. In early 2005, Henry Hudson and Lewis & Clark merged their operations under Lewis & Clark.

42. At that time, Oneida Savings Bank provided capital to Lewis & Clark in the amount of $1.75 million in the form of a subordinated debenture (the "Oneida Debenture").

43. Ultimately, Lewis & Clark became an approved insurance company in over 30 states in the United States.

44. Each of the Plaintiffs appointed an individual to represent the Plaintiffs on Lewis & Clark's Board of Directors.

45. The Plaintiffs were, however, dependent upon defendant Uni-Ter for complete and accurate information regarding the operations of Lewis & Clark. Knowing this, Uni-Ter and UCSC agreed, in a written Management Agreement, to provide this information, as well as other services, to Lewis & Clark.

46. Plaintiffs reasonably relied on Uni-Ter's superior expertise in the insurance business at all relevant times.

Financial Summary

47. Lewis & Clark operated successfully and profitably in each of the four calendar years from 2007-2010.

48. In July 2009, Lewis & Clark, at Uni-Ter's direction, accepted two California-based multi-site long-term care operators, Country Villa and Braswell (the "California Insureds"). This was a divergence from the established business model of Lewis & Clark because it was the first time it chose to insure a large multi-facility operator, with Country Villa operating approximately fifty facilities.

49. In addition, the California Insureds had historical loss records that were outside of Lewis & Clark's typical underwriting range.

50. Finally, the contract with Country Villa contained provisions that Lewis & Clark had never accepted previously, including a provision that limited the claims exposure of Lewis & Clark on an aggregate level, instead of on a claim specific level as had been typical.

51. During the two policy years from July 2009 to July 2011, the California Insureds passed on significant losses to Lewis & Clark – a principal reason, along with increases in claims

reserves for other insureds, that Lewis & Clark experienced a net loss during the three quarters ending September 30, 2011, of $3.1 million.

52. Lewis & Clark, therefore, did not renew coverage for these two entities in July 2011.

53. At the Lewis & Clark Board of Directors meeting on September 21, 2011, Uni-Ter presented the amount of the expected claims and the amount of the significantly increased claims reserves to the Board. Uni-Ter informed the Board that the revised claims reserves were adequate to cover existing and anticipated claims.

54. In fact, the claims of the California Insureds represented the first time in eight years that Lewis & Clark's claims exceeded their self-insured limits and pierced the reinsurance layer of coverage, thereby, requiring BeazleyRe to pay out under the reinsurance treaty between Lewis & Clark and BeazleyRe.

55. At that time, Uni-Ter represented to the Plaintiffs that the one-time operating loss would not result in a financial disruption of Lewis and Clark and that Lewis & Clark retained sufficient capital to support its operations and payment of the Oneida Debenture.

56. Uni-Ter, however, requested that the Plaintiffs, all entities with representatives on the Lewis & Clark Board of Directors, make additional investments in Lewis & Clark to preserve Lewis & Clark's good standing with the Nevada Department of Insurance, an acceptable premium-to-equity ratio, and its Demotech A rating.

57. Also, on or about September 1, 2011, Mr. Elsass and Ms. Dalton sent a memorandum to the Lewis & Clark Board of Directors to outline the recent events causing financial difficulties and to outline "Uni-ter's proposed action plan." Included in that action plan, was that Uni-Ter would hire "[a]consultant...to do a complete analysis of the claims

process of Uni-ter Claims Services Corp" and that "[w]e should have his report to share with the board at the September 21st meeting.

58. On or about September 21, 2011, before the Plaintiff's additional investments, the Lewis & Clark Board of Directors held a Board of Directors meeting in Las Vegas, Nevada.

59. The Directors representing the Plaintiffs, including Jeff Marshall on behalf of Eagle Healthcare, Inc., Mark Garber on behalf of Pinnacle Healthcare, Inc., Robert Hurlbut on behalf of Rohm Services, Inc., Eric Stickels on behalf of Oneida Savings Bank, and Robert Chur on behalf of Heathwood attended the meeting in person. Steven Fogg attended the meeting on behalf of Marquis Companies by telephone.

60. Mr. Elsass and Ms. Miller of Uni-Ter, and Mr. Davies of U.S. Re attended the meeting in person.

61. The packages Uni-Ter prepared for each Lewis & Clark Board Member for the September 21, 2011 meeting, included a report from the consultant, the Praxis Claims Consulting ("Praxis"), dated September 15, 2011. At the September 21, 2011 meeting, Brian Stiefel, CPCU of Praxis presented the September 15, 2011 report to the Lewis & Clark Board of Directors.

62. During his presentation, Mr. Stiefel discussed his audit purpose, which was to review and comment on current administrative practices and procedures and to comment on the reserving methodology used by Uni-Ter's claim staff. Mr. Stiefel did not raise any concerns with Lewis & Clark's claims reserves. The Praxis report commented on the reserve methodology in a sample of nine claim files. The Praxis report did not find fault with any of the sampled claims or recommend any addition to the loss reserve for any of the claims. However, in December 2011, a subsequent Praxis audit of all claims found that Uni-Ter had understated the sampled claims by a net $1,200,000.

63. Also during the September 21, 2011 meeting, Ms. Dalton presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011" that Uni-Ter had prepared for Lewis & Clark. This Financial Statement did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure, including only the existing claims reserves.

64. During the September 21, 2011 meeting, the directors representing the Plaintiffs asked Uni-Ter's representatives, Mr. Elsass and Ms. Miller, whether there were any claims developments not previously reported. Ms. Miller replied that there were none, and Mr. Elsass agreed. Mr. Davies of U.S. Re said nothing. Ms. Dalton also remained silent.

65. Subsequently, on November 7, 2011, the Board of Directors held a telephonic board meeting to discuss the November 2011 Debentures, and again Uni-Ter, with U.S. Re's acquiescence, reassured the Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate.

66. With the assurances from Uni-Ter and U.S. Re at the Board of Directors meetings on September 21, 2011, and November 7, 2011, on or about November 7, 2011, Oneida Savings Bank, Eagle, Marquis, Pinnacle, Rohm, and Heathwood invested an aggregate of $2,200,000 in Lewis & Clark through additional debentures (the "November 2011 Debentures").

67. Oneida Savings Bank invested $750,000 at that time, and the five other entities invested $290,000 each.

68. The November 2011 Debentures were each convertible to equity interests in Lewis & Clark.

69. Oneida Savings Bank maintains the signed original of its November 2011 Debenture in its offices in Oneida, New York. Uni-Ter maintains the signed originals for all other outstanding November 2011 Debentures in its offices.

70. Significantly, despite Uni-Ter's earlier representation that Praxis had been retained to do a complete claims analysis, the Lewis & Clark Board of Directors later learned that Uni-Ter limited the scope of Praxis' engagement that resulted in the September 15, 2011 report to a review of claims-related processes and of that small sample size of nine specific claims reserves.

71. Notwithstanding the reduced scope of the September 15, 2011 Praxis report and its report to the Board of Directors that the reserves were adequate, Uni-Ter, at U.S. Re's direction, conducted in late November 2011 an internal full-scale review of all claims reserves and subsequently engaged Praxis to also conduct a full-scale review. The internal review was initiated based on Uni-Ter's and U.S. Re's concerns about the adequacy of claims reserves raised in the September 15, 2011 Praxis report.

72. U.S. Re, Uni-Ter, Mr. Elsass, Ms. Miller, and Mr. Davies before the September 21, 2011 meeting knew that Praxis was going to be evaluating the amount of Lewis & Clark's loss reserves because it was likely that the reserves needed to be materially larger. They intentionally misrepresented this material claims development information to the representatives of the Plaintiffs at the September 21, 2011 meeting.

73. U.S. Re required Uni-Ter to retain Praxis in December 2011 to complete its full claims review, because U.S. Re had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review. Neither Uni-Ter nor U.S. Re disclosed these doubts to the Plaintiffs despite U.S. Re's knowledge at the time that Uni-Ter's

internal review was very negative. In fact, on December 17, 2011 (one day after the conclusion of the Praxis audit confirming the need for drastically increased claims reserves), Donna Dalton submitted a draft of the November 2011 financial statements to the Board reflecting that claims reserves had actually decreased since September 2011, the Company was profitable, and the capital had reached a healthy level.

74. Uni-Ter and U.S. Re informed the Board on a conference call that, in fact, an increase of $5 million to the claims reserves was necessary based on the Praxis full-scale review.

75. This charge to earnings significantly increased the net loss of Lewis & Clark on a full 2011 year basis and further decreased Lewis & Clark's capital to an unacceptable level for operational, regulatory, and rating purposes.

76. At the time of their additional investments on November 7, 2011, however, the Plaintiffs were not aware of the significant reserve concerns raised in September 2011 to Uni-Ter and U.S. Re by Praxis but not expressed to the Board. Further, the Board was led to believe by Uni-Ter that the September Praxis report represented a complete review of the claims process (not just the sample size review reported upon by Praxis), giving the Board comfort in Uni-Ter's and U.S. Re's representations at the September Board Meeting that claims reserves were adequate.

77. If the Plaintiffs had known of Praxis' doubts regarding Lewis & Clark's claims reserves, that Praxis was not conducting a full review of the amounts reserved for each claim as was represented to the Board, or that Uni-Ter and U.S. Re had doubts about the claims reserves, Plaintiffs would not have invested in Lewis & Clark through the November 2011 Debentures.

78. Furthermore, if Uni-Ter and U.S. Re had disclosed the true financial condition of Lewis & Clark, Oneida Savings Bank would not have consented to the November 2011

Debentures, and would have taken immediate action to collect on its outstanding $1,000,000 surplus debenture.

79. Uni-Ter and U.S. Re's motive for making these misrepresentations and omitting these material facts was to delay Lewis & Clark's insolvency and increase its capital available to pay claims before Lewis & Clark's reinsurance policy was triggered.

80. U.S. Re is a broker of reinsurance, and had brokered Lewis & Clark's reinsurance through policy issuer BeazelyRe. Increasing Lewis & Clark's capital by $2,200,000 lowered the exposure of the reinsurance policy U.S. Re had brokered by a similar amount. It mitigated any claims of self-dealing BeazelyRe may have against U.S. Re for self-dealing in a policy U.S. Re knew would be triggered, and protected U.S. Re's reputation in the reinsurance business.

81. The delay of insolvency also allowed Uni-Ter to continue receiving management fees for its services to Lewis & Clark and to expand its market share to new policyholders.

82. In fact, immediately after the Plaintiffs executed the November 2011 Debentures, Uni-Ter prepared and issued an Offering Memorandum dated November 2011 (the "Offering Memorandum") seeking equity investments in Lewis & Clark. Uni-Ter issued this offering memorandum to long-term care facilities, home health care businesses, and individuals engaged in nursing or allied health care practice in an attempt to sell securities to additional insured parties.

83. At the time when Uni-Ter prepared and issued the offering memorandum for Lewis & Clark, Uni-Ter knew that the offering memorandum failed to disclose material adverse information, specifically the existence of the review by the Praxis Group.

84. In the Memorandum, Uni-Ter concealed what Uni-Ter considered at the time to be the true financial position of Lewis & Clark. The following artful and misleading language

was presented on page 3 of the Memorandum, under the caption "The Company and Its Operations":

> The Company has experienced signification underwriting losses in 2011 and has increased its capital by $2,220,000 as a result of surplus note contributions and, as a result, had a capital and surplus of approximately $3.7 million as of September 30, 2011 (See "Additional Financing") A summary of the Company's most recent financial statement is attached hereto as Exhibit E.

This language was not balanced by any caution, here or elsewhere in the Memorandum, that US Re had instructed Uni-Ter to recalculate Lewis & Clark's reserves; that Uni-Ter was in the process of doing so through its internal full-scale review; and that there existed, at the time the Memorandum was drafted and delivered, a serious question whether the existing reserves – which were reflected in the Company's most recent financial statements attached to the Memorandum as Exhibit E – were materially deficient. Instead, Uni-Ter presented the Company as solvent.

85. The Memorandum, immediately following the language from page 3 quoted above, further stated that:

> It is expected that the net proceeds generated from this Offering of the Company's Shares will provide additional funds for the Company to continue operations and to comply with all applicable capitalization requirements under the laws of Nevada.

In this sentence, Uni-Ter was careful not to state that it considered Lewis & Clark's capital to be sufficient. Instead, Uni-Ter said that, after receiving proceeds from the offering, Lewis & Clark's capital was expected to be sufficient. The total offering amount under the Offering Memorandum was $50,000,000.

86. Uni-Ter had told the Plaintiffs that, once the Plaintiffs paid for the November 2011 Debentures, the capital of Lewis & Clark would be sufficient. But Uni-Ter had such

serious doubts that it was unwilling to say the same thing in the Offering Memorandum to potential investors.

87. The half-truths and deceit in the Offering Memorandum show that Uni-Ter was acting with *scienter* when it induced the Plaintiffs to invest in Lewis & Clark by means of the November 2011 Debentures.

88. Furthermore, Uni-Ter, as a manager of other Risk Retention Groups servicing the same market, was in a position to capture additional business for its other Risk Retention Groups from the new insured parties obtained through the November 2011 offering, which was made possible only by the Plaintiffs' investments. The November 2011 Debentures delayed the inevitable dissolution of Lewis & Clark long enough for Uni-Ter to expand its market share and gain additional insured parties that it could simply service through other Risk Retention Groups Uni-Ter controlled after Lewis & Clark dissolved.

89. In fact, this was not the first time that Uni-Ter had taken steps to deflate claims reserves below appropriate levels. In April 2010, Christine McCarthy assumed the role of Vice President-Claims for Uni-Ter. She immediately overhauled Uni-Ter's claims handling, reserve setting, and litigation management policies, resulting in increases in claims reserves from $6.3 million at the end of 2009, to $8.0 million at June 30, 2010, to $9.2 million at the end of 2010.

90. In May 2011, Uni-Ter terminated Ms. McCarthy for, among other reasons, her "tendency to over-reserve for claims without justification." Claims reserves ceased to rise following Ms. McCarthy's termination until late August 2011, when claims reserves were increased as referenced in paragraph 51 above.

91. Notwithstanding Ms. McCarthy's termination, and the fact that her policies were put in place during 2010, Uni-Ter represented to Praxis that Ms. McCarthy's policies were newly

instituted corrective measures in August of 2011, which is a representation recounted in the September 15, 2011 Praxis report.

92. It was not until a telephonic Lewis & Clark Board of Directors meeting on or about December 20, 2011, that Uni-Ter and U.S. Re informed the Plaintiffs of Praxis' full claims review, its findings, and the resulting adverse financial developments of Lewis & Clark.

93. Citing to the Praxis Group audit findings, Uni-Ter and U.S. Re informed the Lewis & Clark Board of Directors that Lewis & Clark's reserves were inadequate and that urgent action was required to preserve Lewis & Clark's capital structure.

94. Prior to December 31, 2011, at the direction of U.S. Re's Chief Executive Officer, Tal Piccione, Uni-Ter initiated three parallel approaches to address the negative developments and preserve Lewis & Clark's capital structure. The approaches were:

a. Retaining another third-party expert (not Praxis Group) to evaluate all open claims and reserves.

b. Contacting Lewis & Clark's reinsurer (Beazley Re) for capital contribution and/or a structured transaction.

c. Participating in discussions with the Nevada Department of Insurance regarding whether to dissolve or recapitalize Lewis & Clark.

95. The new third-party reviewer conducted its claims review on January 12-14, 2012. The result was no change in the reserves booked.

96. None of Uni-Ter's or U.S. Re's efforts in preserving Lewis & Clark's capital structure succeeded, and Lewis & Clark ultimately entered a dissolution proceeding pursuant to Nevada law on or about November 11, 2012.

97. All of Plaintiffs' investments in Lewis & Clark, including the aggregate $2,200,000 investment in November 2011, have been lost.

Punitive Damages Are Appropriate

98. Defendants engaged in the conduct described above willfully, fraudulently, maliciously and oppressively, in direct and intentional breach of their fiduciary, contractual and other obligations to Plaintiffs. Defendants' conduct thus gives rise to punitive damages in an amount to be determined at trial.

FIRST CLAIM FOR RELIEF

(Violation of Section 10(b) of the Securities Exchange Act of 1934)

(AGAINST DEFENDANTS UNI-TER, ELSASS, DALTON MILLER, AND DAVIES)

99. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

100. By investing in Lewis & Clark through the November 2011 Debentures, the Plaintiffs acquired interests that qualify as a security under the Securities Exchange Act of 1934, 15 U.S.C. § 78, and Securities and Exchange Commission Rule 10b-5.

101. Uni-Ter, at U.S. Re's direction, and utilizing instrumentalities of interstate commerce, made material representations and omissions in connection with the solicitation of Plaintiffs' purchases of the November 2011 Debentures including, without limitation, the following: (a) the statement that there were not any claims developments not previously reported during the November 7, 2011 board meeting; and (b) the failure to disclose the existence of the Praxis Audit.

102. Defendants intended for Plaintiffs to rely on the false misrepresentations in making their decisions to invest in Lewis & Clark during November 2011.

103. Defendants' deception occurred in connection with the purchase of a security and for the purpose of inducing Plaintiffs to invest $2,200,000 in Lewis & Clark.

104. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

105. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

106. As a result of the foregoing fraudulent conduct, Defendants damaged Plaintiffs in an amount to be determined at trial.

107. Plaintiffs also seek punitive damages because the acts of Uni-Ter were fraudulent, malicious and oppressive.

SECOND CLAIM FOR RELIEF

(Violation of Section 20(a) of the Securities Exchange Act of 1934)

(AGAINST DEFENDANT U.S. RE)

108. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

109. By investing in Lewis & Clark through the November 2011 Debentures, the Plaintiffs acquired interests that qualify as a security under the Securities Exchange Act of 1934, 15 U.S.C. § 78, and Securities Exchange Rule 10b-5.

110. U.S. Re directed Uni-Ter to make material representations and omissions utilizing instrumentalities of interstate commerce in connection with the solicitation of Plaintiffs' purchases of the November 2011 Debentures including, without limitation, the following: (a) the statement that there were not any claims developments not previously reported during the

November 7, 2011 board meeting; and (b) the failure to disclose the existence of the Praxis Audit.

111. In fact, U.S. Re's representative Mr. Davies even attended the November 7, 2011 Board of Directors meeting during which the material misstatements and omissions occurred, and Mr. Davies remained silent despite knowing that Uni-Ter's statements during the meeting were false and that there were material facts not disclosed.

112. U.S. Re intended for Plaintiffs to rely on the false misrepresentations in making their decisions to invest in Lewis & Clark during November 2011.

113. Defendants' deception occurred in connection with the purchase of a security and for the purpose of inducing Plaintiffs to invest $2,200,000 in Lewis & Clark.

114. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

115. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

116. As a result of the foregoing fraudulent conduct, U.S. Re damaged Plaintiffs in an amount to be determined at trial.

117. Plaintiffs also seek punitive damages because the acts of the U.S. Re were fraudulent, malicious and oppressive.

THIRD CLAIM FOR RELIEF

COMMON LAW FRAUD

(AGAINST ALL DEFENDANTS)

118. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

119. At the time Plaintiffs invested in Lewis & Clark through the November 2011 Debentures, Defendant Uni-Ter represented that that there were not any claims developments not previously reported. This was a false statement of material fact because Uni-Ter knew, but did not disclose, that it had retained the Praxis Group to audit the claims and that it had received the audit findings before the November 7, 2011 meeting. Uni-Ter knew that this representation was a false and misleading statement of material fact.

120. Uni-Ter and U.S. Re also made a material omission in their solicitation of Plaintiffs' investments, including, without limitation, by failing to disclose the Praxis Group audit until after Plaintiffs entered into the November 2011 Debentures.

121. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

122. Defendants' desire to continue Lewis & Clark's operations, all of which Uni-Ter was paid under a management agreement to handle, motivated their deceptions.

123. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

124. The foregoing fraudulent conduct damaged Plaintiffs in an amount to be determined at trial.

125. Plaintiffs also seek punitive damages because the acts of the Defendants were fraudulent, malicious and oppressive.

FOURTH CLAIM FOR RELIEF

CONSTRUCTIVE/EQUITABLE FRAUD

(AGAINST ALL DEFENDANTS)

126. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

127. At the time Plaintiffs invested in Lewis & Clark through the November 2011 Debentures, Defendant Uni-Ter represented that that there were not any claims developments not previously reported. This was a false statement of material fact because Uni-Ter knew, but did not disclose, that it had retained the Praxis Group to audit the claims. Uni-Ter knew that this representation was a false and misleading statement of material fact.

128. Uni-Ter and U.S. Re also made a material omission in their solicitation of Plaintiffs' investments, including, without limitation, by failing to disclose the Praxis Group audit until after Plaintiffs entered into the November 2011 Debentures.

129. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

130. Defendants' desire to continue Lewis & Clark's operations, all of which Uni-Ter was paid under a management agreement to handle, motivated their deceptions.

131. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of

Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

132. The foregoing fraudulent conduct damaged Plaintiffs in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

NEGLIGENT MISREPRESENTATION

(AGAINST ALL DEFENDANTS)

133. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

134. At the time Plaintiffs invested in Lewis & Clark through the November 2011 Debentures, Defendant Uni-Ter represented that that there were not any claims developments not previously reported. This was a false statement of material fact because Uni-Ter knew, but did not disclose, that it had retained the Praxis Group to audit the claims. Uni-Ter knew that this representation was a false and misleading statement of material fact.

135. Defendants knew, or should reasonably have known, that this was a false statement of material fact.

136. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

137. Defendants' desire to continue Lewis & Clark's operations, all of which Uni-Ter was paid under a management agreement to handle motivated their deceptions.

138. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of

Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

139. As a result of the foregoing negligent conduct, Plaintiffs suffered damaged in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF

FRAUDULENT INDUCEMENT

(AGAINST ALL DEFENDANTS)

140. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

141. At the time Plaintiffs invested in Lewis & Clark through the November 2011 Debentures, Defendant Uni-Ter represented that that there were not any claims developments not previously reported. This was a false statement of material fact because Uni-Ter knew, but did not disclose, that it had retained the Praxis Group to audit the claims. Uni-Ter knew that this representation was a false and misleading statement of material fact.

142. Uni-Ter and U.S. Re also made a material omission in their solicitation of Plaintiffs' investments, including, without limitation, by failing to disclose the Praxis Group audit until after Plaintiffs entered into the November 2011 Debentures.

143. Defendants intended for Plaintiffs to rely on the false misrepresentations and material omissions in making their decisions to invest in Lewis & Clark.

144. Defendants' desire to continue Lewis & Clark's operations, all of which Uni-Ter was paid under a management agreement to handle motivated their deceptions.

145. Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by investing $2,200,000 in Lewis & Clark, and, in the case of

Oneida Savings Bank, by not taking action to collect its outstanding $1,000,000 surplus debenture.

146. The foregoing fraudulent conduct damaged Plaintiffs in an amount to be determined at trial.

147. Plaintiffs also seek punitive damages because the acts of the Defendants were fraudulent, malicious and oppressive.

SEVENTH CLAIM FOR RELIEF

UNJUST ENRICHMENT RESULTING IN CONSTRUCTIVE TRUST

(AGAINST DEFENDANTS UNI-TER AND UCSC)

148. Plaintiffs repeat and re-allege each of the allegations set forth above as if set forth in full.

149. By engaging in the conduct alleged above, Uni-Ter and UCSC have been unjustly enriched by receiving and retaining management fees from Lewis & Clark by prolonging Lewis & Clark's operations funded by the fraudulently induced November 2011 Debentures.

150. Plaintiffs are entitled to a constructive trust for their benefit over these ill-gotten proceeds.

151. It is necessary and appropriate for the Court to impose a constructive trust over the funds that Uni-Ter and UCSC received for management fees after November 7, 2011, as well as any other improper financial benefit enjoyed by the Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

1. That judgment be entered in favor of Plaintiffs and against Defendants on all claims for relief;
2. That Plaintiffs recover damages according to proof, including interest thereon;
3. For a constructive trust over all monies received by Defendant Uni-Ter under its management agreement with Lewis & Clark after November 7, 2011;
4. That Plaintiffs recover punitive damages according to proof;
5. For costs of suit herein, including reasonable attorneys' fees; and
6. For such other and further relief that is just and proper.

JURY DEMAND

Plaintiffs demand a jury on all issues so triable.

DATED: June 25, 2013

HISCOCK & BARCLAY, LLP

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EXHIBIT 2-B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA SAVINGS BANK; MARQUIS COMPANIES I, INC.; PINNACLE HEALTHCARE, INC.; ROHM SERVICES CORPORATION; HEATHWOOD HEALTH CARE CENTER, INC.; and EAGLE HEALTHCARE, INC.,

Plaintiffs,

-vs-

UNI-TER UNDERWRITING MANAGEMENT CORPORATION; UNI-TER CLAIMS SERVICES CORPORATION; U.S. RE COMPANIES, INC.; SANFORD ELSASS; DONNA DALTON; JONNA MILLER; and RICHARD DAVIES,

Defendants.

Civil Action No.
5:13-CV-0476 (MAD/ATB)

Oral Argument Requested

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

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Plaintiffs Oneida Savings Bank; Marquis Companies I, Inc.; Pinnacle Healthcare, Inc.; Rohm Services Corporation; Heathwood Health Care Center, Inc.; and Eagle Healthcare, Inc. ("Plaintiffs"), by and through their attorneys, Hiscock & Barclay, LLP, submit this Memorandum of Law in opposition to the motions of Defendants to dismiss Plaintiffs' Complaint, and in support of Plaintiffs' cross-motion for leave to file an amended complaint. For the reasons set forth below, Defendants' motions should be denied. Alternatively, Plaintiffs should be granted leave to file an amended complaint.

PRELIMINARY STATEMENT

This case is about a systematic fraud scheme carried out by defendants to induce Plaintiffs to invest $2.2 million in a captive insurance company known as Lewis & Clark LTC Risk Retention Group, Inc. ("Lewis & Clark"), despite their knowledge that Lewis & Clark was destined to fail. The Defendants are Uni-Ter Underwriting Management Corporation ("Uni-Ter"); Uni-Ter Claims Services Corporation ("UCSC"); their parent company U.S. Re Companies, Inc. ("U.S. Re"); and individual defendants Sanford Elsass, then CEO of Uni-Ter; Donna Dalton, then CFO of Uni-Ter; Jonna Miller, Vice President—Claims of Uni-Ter; and Richard Davies, CFO of U.S. Re. (collectively, "Defendants"). All Defendants played an integral role in defrauding Plaintiffs through a series of misrepresentations and omissions.

Defendants, as detailed in the Complaint, perpetrated this fraud to keep Lewis & Clark—which was managed by Uni-Ter and UCSC as fiduciaries—a going concern so that Uni-Ter and USCS could continue to earn management fees, and so U.S. Re could mitigate exposure to certain reinsurance policies U.S. Re had brokered.

The individual defendants actively participated in the scheme by knowingly making materially false statements about the adequacy of Lewis & Clark's capitalization and reserves to

cover contingent claims from its insureds. Ms. Dalton issued a financial statement shortly before asking Plaintiffs to make their investments purporting to show Lewis & Clark had no capitalization problems and adequate claims reserves. Ms. Miller and Mr. Elsass followed by affirming, ***twice***, that there were no unreported claims developments, even after the Plaintiffs specifically asked for this confirmation before committing to their investments. Mr. Davies, as CFO of U.S. Re, actively monitored the meetings in which Uni-Ter's officers made false statements, but made no effort to correct the misrepresentations although he knew they were false. Moreover, U.S. Re controlled all these actions as Uni-Ter's parent, beginning with Mr. Davies' monitoring and guidance, continuing on to active participation in the fraud, and concluding with unfettered assumption of control over the management of Lewis & Clark.

Defendants have asked this Court to dismiss the Complaint, primarily because they assert their misrepresentations have been pleaded without sufficient particularity, and because they argue they lacked scienter. However, as set forth below, Plaintiffs have more than adequately pleaded their claims.

Although securities fraud claims must meet heightened pleading standards, the Second Circuit has routinely cautioned district courts not to "impos[e] . . . exceedingly onerous burden[s] on the plaintiffs with respect to their obligation to plead facts with particularity." *See e.g., Novak v. Kasaks*, 216 F.3d 300, 303 (2d Cir. 2000). Plaintiffs have met the particularity standard with their allegations, providing a significant amount of factual detail regarding oral misrepresentations made by the people Plaintiffs trusted to run the business they invested in, during meetings and on telephone calls at a time when Plaintiffs did not realize they were being defrauded.

Plaintiffs also have established scienter in their Complaint. The allegations demonstrate

Defendants undertook this scheme for a number of specific reasons, each of which alone is sufficient to satisfy the scienter pleading standards: (a) Uni-Ter stood to earn $1 million from additional management fees if it could keep Lewis & Clark alive for just a short period of time; (b) U.S. Re stood to protect itself from claims of self-dealing from the reinsurer with whom it placed the Lewis & Clark reinsurance coverage—if that policy was triggered, the reinsurer could have uncovered the plot in which Uni-Ter and U.S. Re had engaged to string Lewis & Clark slowly along to its inevitable dissolution in an effort to collect additional management fees; and (c) the individual defendants, each an officer of a corporate defendant, had strong motives to carry out the scheme supported by their misrepresentations. As a result, Defendants' challenges to Plaintiffs' securities fraud claims must fail. Defendants' challenges to the state law claims pleaded by Plaintiffs must fail for similar reasons.

Ms. Miller has also moved to dismiss for lack of personal jurisdiction. But, the allegations of her conduct, including many phone calls, e-mails, other correspondence, and, of course, the fraudulent statements directed to New York, readily defeat any claim that her contacts to New York are too attenuated or that her being haled into New York to account for her conduct was unforeseeable.

For these reasons and those more fully set forth below, Defendants' arguments must fail, and their motions should be denied. Alternatively, to the extent the Court were to determine a pleading deficiency exists, Plaintiffs request leave to file an amended complaint, a copy of which is attached to the accompanying Declaration of Gabriel M. Nugent, dated November 27, 2013.

STATEMENT OF FACTS

The following timeline, which is based on facts taken from the Complaint, and, as noted, Plaintiffs' proposed amended complaint, establishes Defendants fraud:

- 2004 – Uni-Ter formed Lewis & Clark to operate as a Risk Retention Group, which subsequently merged with another Risk Retention Group in which Plaintiffs had invested. (Complaint, ¶¶ 39, 41, 42.) Lewis & Clark sought to offer insurance to small health care providers. (Complaint, ¶ 24-26.) Five of the six plaintiffs are themselves small long-term care providers. (Complaint, ¶ 8-12.) None of the plaintiffs had any prior experience managing an insurance company. (Complaint, ¶ 45-46.)

- 2004-2012 – Uni-Ter managed all aspects of Lewis & Clark's business from its inception to the time it entered into dissolution proceedings, and Plaintiffs relied completely on Uni-Ter for complete and accurate information regarding the operations of Lewis & Clark. (Complaint, ¶¶ 45-46.) The management agreement between Lewis & Clark, Uni-Ter and UCSC, required Uni-Ter and UCSC to act as fiduciaries to "manage every aspect of Lewis & Clark's business." (Complaint, ¶ 28.)

- July 2009 – Lewis & Clark, at Uni-Ter's direction, accepted two California-based multi-site long-term care providers, a move that diverged from the established business model of Lewis & Clark because it had not previously insured a large multi-facility operator, which had loss records that were worse than Lewis & Clark's typical underwriting range. (Complaint, ¶ 48.)

- July 2009-July 2011 – The California insureds passed on significant losses to Lewis & Clark, resulting in a net loss to Lewis & Clark of $3.1 million during the three quarters ending September 20, 2011. (Complaint, ¶ 51.) The claims of the California insureds triggered coverage under the reinsurance treaty between Lewis & Clark and BeazleyRe, which U.S. Re had brokered. This was the first time ever that a Lewis & Clark reinsurance contract was triggered. (Complaint, ¶ 54.) As of December 31, 2011, the total shareholders' equity in Lewis & Clark was only $3,545,437. (Proposed Amended Complaint, ¶ 53.)

- September 1, 2011 – Uni-Ter represented to Plaintiffs it was obtaining a full claims review of Lewis & Clark. (Complaint, ¶ 57.) Uni-Ter represented that the one-time operating loss would not result in a financial disruption of Lewis & Clark and that Lewis & Clark retained sufficient capital to support its operations and payment of the Plaintiffs' outstanding debentures. (Complaint, ¶ 55.)

- September 8-9 – U.S. Re Reinsurance Claims Manager William Donnelly arranged for Praxis Claims Consulting ("Praxis") to conduct an audit of Lewis & Clark's claims reserves. Mr. Donnelly scheduled the audit and coordinated travel. Mr. Donnelly was on-site and took part in the meetings during the first day of Praxis' site visit to Uni-Ter on or about September 8, 2011, and Mr. Donnelly supplied all the documents Praxis reviewed before the site visit to Praxis by e-mail. (Declaration of Brian Rosner dated September 30, 2013 ("Rosner Declaration"), Ex. 1 (Docket No. 35); Proposed Amended Complaint, ¶ 76.)

- September 15, 2011 – Uni-Ter provided Plaintiffs with a copy of a claims review report Praxis prepared. (Complaint, ¶ 61.)

- September 21, 2011 – At the Lewis & Clark board meeting in Las Vegas, Nevada, Uni-Ter, through Ms. Miller and Mr. Elsass, told Plaintiffs there were no claims developments not previously reported. This representation was consistent with the findings in the Praxis report that Uni-Ter provided to Plaintiffs prior to the board meeting. (Complaint, ¶¶ 62, 64.) Mr. Davies (of U.S. Re) and Ms. Dalton were both present at the meeting at the time of these statements and said nothing to correct them. (Complaint, ¶ 64.)

- September 21, 2011 – Also at the Board meeting, Ms. Dalton presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011," prepared for Lewis & Clark by Uni-Ter. This Financial Statement did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure, including only the existing claims reserves. (Complaint, ¶ 63.)

- November 7, 2011 – During a telephonic Lewis & Clark board meeting, Uni-Ter, with U.S. Re's acquiescence, reassured Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. (Complaint, ¶ 65.)

- November 2011 – Plaintiffs irrevocably committed to investing $2.2 million in Lewis & Clark through November 2011 Debentures. (Complaint, ¶¶ 66-67.) The Plaintiffs subsequently transfer the funds to Lewis & Clark. (Rosner Declaration, Ex. 3 (Docket 35); Proposed Amended Complaint, ¶ 70-71.)

- November 2011 – Uni-Ter issued an Offering Memorandum to the general public that was silent regarding whether existing capital commitments were adequate, but referenced the Plaintiffs' $2.2 million investments as though they already had been made. (Complaint, ¶¶ 82-87.)

- Late November 2011 – U.S. Re required Uni-Ter to conduct an internal full-scale review of all claims reserves. Uni-Ter performs the review without obtaining approval of or notifying Lewis & Clark's board. (Complaint, ¶¶ 71-76.)

- December 2011 – U.S. Re required Uni-Ter to retain Praxis to complete Lewis & Clark's claims review, providing more evidence of control. (Complaint, ¶¶ 71-76.)

- December 17, 2011 – One day after receiving Praxis's audit findings detailing the inadequacies of Lewis & Clark's claims reserves, Ms. Dalton submits a draft of the November 2011 Lewis & Clark financial statements to the Board reflecting that (a) claims reserves had actually decreased since September 2011; (b) the company was profitable; and (c) the company's capital had reached a healthy level. (Complaint, ¶ 73.)

- December 20, 2011 – During a telephonic Lewis & Clark board meeting, Uni-Ter and

U.S. Re, for the first time, informed the Board on a conference call that $5 million must be added to the claims reserves to meet all of Lewis & Clark's obligations and avoid liquidation. (Complaint, ¶¶ 92-93.)

- January 12-14, 2012 – A new third party conducted a claims review at U.S. Re's direction. The result was no change in the reserves booked. (Complaint, ¶¶ 94-95.)

- January – November 2012 – Uni-Ter, led by Tal Piccione CEO of U.S. Re, institutes a number of actions it claims are required to turn Lewis & Clark around. None were successful. (Complaint, ¶¶ 94-96.)

- January 2010-November 2012 – Uni-Ter earned $1.5 million in management fees in 2010, and $1.0 million in management fees during 2011. (Proposed Amended Complaint, ¶ 88.)

- November 2012 – Plaintiffs lose all of their investments in Lewis & Clark and determine that Defendants lied on September 21 and November 7, 2011 about the adequacy of Lewis & Clark's claims reserves and capitalization. (Complaint, ¶¶ 96.)

ARGUMENT

Plaintiffs submit this Memorandum in opposition to the Motions to Dismiss made by all Defendants, who filed two separate motions (Docket Nos. 33 and 35). The Memorandum addresses the Defendants' arguments regarding Defendants' allegations that the Complaint does not meet the pleading standards of the Private Securities Litigation Reform Act of 1995 ("PSLRA") in Point I; U.S. Re's argument that Plaintiffs failed to state a claim for control person liability in Point II; the arguments regarding Plaintiffs' state law claims in Point III; the arguments regarding Plaintiffs' claim for punitive damages in Point IV; and Ms. Miller's argument regarding the Court's personal jurisdiction over her in Point V. Point VI addresses Plaintiffs' alternative request for leave to file an amended complaint.

I. PLAINTIFFS STATED A CLAIM UNDER THE EXCHANGE ACT

A complaint sounding in securities fraud must allege the defendant (1) made a misstatement or omission; (2) of a material fact; (3) with scienter; (4) upon which plaintiff justifiably relied; and (5) which proximately caused plaintiff's damages. *Lattanzio v. Deloitte &*

Touche, 476 F.3d 147, 153 (2d Cir. 2007).

Plaintiffs have alleged facts that, if true, would establish each of these elements as against each Defendant. Defendants make various arguments regarding the quality of Plaintiffs' allegations, contending the Complaint is not particular enough on some topics. However, as set forth below, the Complaint meets the requirements set forth in the PSLRA.

A. Plaintiffs have stated the Defendants' misrepresentations with the particularity the PSLRA requires.

Although the PSLRA imposes a heightened pleading standard for securities fraud claims, it is well settled that a misrepresentation allegation is proper if the complaint contains sufficient detail regarding the statement, when it was made, and why it was misleading. *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 94 F. Supp. 2d 491, 504 (S.D.N.Y. 2000) (motion to dismiss denied where plaintiffs could not quote defendants' oral representations, but identified the relevant dates, the individuals present, and the specifics of the statements); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 463 (S.D.N.Y. 2008) (motion to dismiss denied where plaintiffs' allegations of fraud were based on unrecorded statements of defendants, stated to the best of the plaintiffs' recollection); *Vento & Co., LLC v. Metromedia Fiber Network*, No. 97-CV-7751 (JGK), 1999 U.S. Dist. LEXIS 3020, at *17-18, 21 (S.D.N.Y. March 18, 1999) (motion to dismiss denied where the plaintiff's allegations of fraud were based on information and belief of defendants' statements because the plaintiff specified the dates and facts about the involvement of each defendant); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 485 (S.D.N.Y. 2011) (motion to dismiss denied where defendants were officers, giving rise to a presumption that statements in published information, such as annual reports, were the collective work of those individuals with direct involvement in the everyday business of the company); *In re WorldCom, Inc. Sec. Litig.,* 294 F. Supp. 2d 392, 427 (S.D.N.Y. 2003); *Goldstein v. Solucorp*

Indus., No. 11-CV-6227 (VB), 2013 U.S. Dist. LEXIS 64231, at *15-16 (S.D.N.Y. March 19, 2013) (holding that plaintiffs sufficiently pleaded a Rule 10b-5 claim where plaintiffs specified the dates, times, and places where each defendant made false material statements); *Patriot Exploration, LLC v. Sandridge Energy, Inc.*, No. 11-CV-01234 (AWT), 2013 U.S. Dist. LEXIS 92249, at *68-69 (D. Conn. June 29, 2013) (motion to dismiss denied despite the fact the complaint did not attribute any false or misleading statements directly to one defendant, because moving defendant was an upper level officer). Furthermore, omissions by corporate officers are actionable. *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 170 (S.D.N.Y. 2008) (denying motion to dismiss where corporate officer failed to correct misstatement made by the company in describing a settlement of a patent infringement lawsuit he had negotiated).

The cases cited above demonstrate that photographic recitation and attribution of the misrepresentation is not required when pleading a violation of Rule 10b-5. For example, in *Gabriel Capital, L.P*, the Southern District of New York allowed a claim to proceed where the plaintiff alleged only the date of an oral misrepresentation, did not quote the words spoken or specify the particular person who spoke them, and named only one person present when the misrepresentation was uttered. 94 F. Supp. 2d at 504.

Similarly, in *Patriot Exploration*, the court held a complaint pleaded a 10b-5 claim with sufficient particularity against an officer of a company even though it did not identify the speaker. 2013 U.S. Dist. LEXIS 92249, at *68-69. The court found that the moving defendant officer was involved in a series of investor presentations and negotiation discussions with the plaintiffs regarding investing, and drawing inferences in the light most favorable to plaintiffs, the allegations in the complaint could support a conclusion that he knew of the alleged misstatements and omissions and failed to disclose or correct the fraud. *Id*.

Under these standards, Plaintiffs stated the Defendants' misrepresentations and omissions with the particularity the PSLRA requires. As alleged in the Complaint:

- "[D]uring the September 21, 2011 meeting [between the Plaintiffs and Defendants], Ms. Dalton presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011" that Uni-Ter had prepared for Lewis & Clark. This Financial Statement did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure, including only the existing claims reserves." (Complaint, ¶ 63.)

- "During the September 21, 2011 meeting, the directors representing the Plaintiffs asked Uni-Ter's representatives, Mr. Elsass and Ms. Miller, whether there were any claims developments not previously reported. Ms. Miller replied that there were none, and Mr. Elsass agreed. Mr. Davies of U.S. Re said nothing. Ms. Dalton also remained silent." (Complaint, ¶ 64.)

- "Subsequently, on November 7, 2011, the Board of Directors held a telephonic board meeting to discuss the November 2011 Debentures, and again Uni-Ter, with U.S. Re's acquiescence, reassured the Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate." (Complaint, ¶ 65.)

- "[D]espite Uni-Ter's earlier representation that Praxis had been retained to do a complete claims analysis, the Lewis & Clark Board of Directors later learned that Uni-Ter limited the scope of Praxis' engagement that resulted in the September15, 2011 report to a review of claims-related processes and of that small sample size of nine specific claims reserves." (Complaint, ¶ 70.)

- "U.S. Re, Uni-Ter, Mr. Elsass, Ms. Miller, and Mr. Davies before the September 21, 2011 meeting knew that Praxis was going to be evaluating the amount of Lewis & Clark's loss reserves because it was likely that the reserves needed to be materially larger. They intentionally misrepresented this material claims development information to the representatives of the Plaintiffs at the September 21, 2011 meeting." (Complaint, ¶ 72.)

- "U.S. Re required Uni-Ter to retain Praxis in December 2011 to complete its full claims review, because U.S. Re had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review. Neither Uni-Ter nor U.S. Re disclosed these doubts to the Plaintiffs despite U.S. Re's knowledge at the time that Uni-Ter's internal review was very negative." (Complaint, ¶ 73.)

Defendants ignore these facts, and focus only on the allegations regarding the adequacy of the claims reserves made during the November 7, 2011 meeting, which is only one part of the

series of misrepresentations they made to Plaintiffs. (Uni-Ter Memorandum, pp. 4-5; Elsass & Dalton Memorandum, pp. 11-13.)

In fact, the all of the misrepresentations and omissions set forth in the Complaint are actionable, including (a) the representation that a full claims review was forthcoming, and Defendants only provided Plaintiffs with a review based on a sample of existing claims; (b) the statement that the claims reserves were adequate in the financial statement Ms. Dalton prepared and circulated; (c) the statement that there were no undisclosed claims developments, which was made by Ms. Miller, agreed to by Mr. Elsass, and acquiesced to by Ms. Dalton and Mr. Davies; and (d) the confirmation from all the Defendants that Lewis & Clark remained financially stable on November 7, 2011.

For each of these statements and omissions, Plaintiffs have alleged who made the statement or omission, the date and occasion of the statement or omission, and why the statements or omissions were false. As a result, Plaintiffs' allegations satisfy the particularity standards of the PSLRA.

B. Plaintiffs have adequately alleged each Defendants' scienter.

Defendants next take issue with the allegations of Defendants' scienter. The PSLRA requires that the complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." 15 U.S.C. § 78u-4(b)(2). In the Second Circuit, a plaintiff need only allege facts that give rise to a "strong inference" of scienter to meet this standard. *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1128 (2d Cir. 1994). A plaintiff may establish the strong inference either "(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id*. As the Second Circuit

has instructed, "securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements." *Novak,* 216 F.3d at 311. The Second Circuit also has stated that "great specificity" is not required with regard to scienter allegations so long as a plaintiff alleges "enough facts to support a strong inference of fraudulent intent." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 169 (2d Cir. 2000).

The "strong inference" standard is met when the complaint sufficiently alleges that defendants benefited in a concrete and personal way from the purported fraud; engaged in deliberately illegal behavior; knew facts or had access to information suggesting their statements were inaccurate; or failed to check information they had a duty to monitor. *Novak*, 216 F.3d at 311; *see also In re J.P. Morgan Chase Securities Litigation*, 363 F. Supp. 2d 595, 623-624 (S.D.N.Y. 2005); *In re CIT Group, Inc. Securities Litigation*, No. 08-CV-6613 (BSJ), 2010 U.S. Dist. LEXIS 57467, at *11-12 (S.D.N.Y. June 10, 2010) (plaintiffs adequately alleged scienter by alleging that defendants knew about CIT's lowered lending standards and in some cases affirmatively approved them – while publicly touting the company's conservative and disciplined approaches); *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 246-248 (S.D.N.Y. 2012) (plaintiffs adequately pleaded scienter of CFO's alleged misstatements regarding company internal controls based on the personal participation of the CFO in the design and evaluation of the controls). For example, in *Novak*, the Second Circuit held that plaintiffs satisfied the pleading requirements by alleging the defendants refused to mark down inventory they knew to be worthless, obsolete and unsaleable, and acted intentionally and deliberately to artificially inflate the company's reported financial results. 216 F.3d at 311.

The Complaint meets these pleading standards, as it lays out Defendants' motives and

opportunities in detail, and, in the alternative, alleges facts providing strong circumstantial evidence of conscious misbehavior, or at least recklessness. As evidence of motive, the Complaint details the financial incentives Uni-Ter and U.S. Re, and the individual defendants as officers and employees of those entities, had for misleading the Plaintiffs and inducing their $2.2 million investment.

Defendants contend that the Complaint's allegations of scienter are undermined by Uni-Ter's investment of $500,000 in Lewis & Clark at approximately the same time as the Plaintiffs' investments. However, Defendants' overlook the fact that the management fees Uni-Ter stood to receive by keeping Lewis & Clark operating after the Plaintiffs' $2.2 million investment would far exceed Uni-Ter's $500,000 investment. In fact, Uni-Ter received compensation at 12% of Gross Written premium plus Claims Management fees. (Complaint, ¶ 30.) In 2010, Uni-Ter earned at least $1.5 million in management fees, and earned at least $1.0 million in fees during 2011. Defendants knew that these fees would be automatic for as long as Lewis & Clark continued in operation. Thus, at the time Uni-Ter made its investment along with Plaintiffs, Uni-Ter was guaranteed a 100% return on its $500,000 investment so long as the Plaintiffs' investments could delay Lewis & Clark's inevitable demise.

Despite Defendants' attempt to spin Uni-Ter's investment as one made by an innocent party, it actually provides strong evidence of Defendants' motives for misrepresenting the condition of Lewis & Clark to secure Plaintiffs' investments. By making an investment Defendants further reassured Plaintiffs that Lewis & Clark remained able to continue its operations, even though they knew it was not and that the investments would be lost. Uni-Ter, on the other hand, would double its money as it watched Plaintiffs lose everything.

There are other motives for Uni-Ter's fraud. As alleged in the Complaint, "Uni-Ter, as a

manager of other Risk Retention Groups servicing the same market, was in a position to capture additional business for its other Risk Retention Groups from the new insured parties obtained through the November 2011 offering, which was made possible only by the Plaintiffs' investments." (Complaint, ¶ 88.) Accordingly, "The November 2011 Debentures delayed the inevitable dissolution of Lewis & Clark long enough for Uni-Ter to expand its market share and gain additional insured parties that it could simply service through other Risk Retention Groups Uni-Ter controlled after Lewis & Clark dissolved." (*Id*.)

The Complaint pleads a similar motive for U.S. Re's participation in the fraud. U.S. Re earned commissions for reinsurance placed through it as the reinsurance broker. The longer Lewis & Clark survived its inevitable fate, the more reinsurance policies Lewis & Clark would need, the more commissions U.S. Re would receive. At the same time, injecting $2.2 million of new capital into Lewis & Clark "lowered the exposure of the reinsurance policy U.S. Re had brokered by a similar amount [and] mitigated any claims of self-dealing BeazelyRe may have against U.S. Re for self dealing in a policy U.S. Re knew would be triggered, and protected U.S. Re's reputation in the reinsurance business." (Complaint, ¶ 80.)

The Complaint also details the strong circumstantial evidence of the Defendants' conscious misbehavior, or at least recklessness, by Uni-Ter, U.S. Re, and the individual defendants. The definition of conscious misbehavior is "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Honeyman v. Hoyt*, 220 F. 3d 36, 39 (2d Cir. 2000). Defendants clearly engaged in such behavior.

For example, Uni-Ter had engaged in a pattern of falsifying claims reserves for years,

which Plaintiffs realized only in hindsight after their investments were lost. Plaintiffs now know, and have alleged in their Complaint, that Christine McCarthy, Vice President-Claims for Uni-Ter, began raising reserves by more than 30% in mid-2010, only to be terminated shortly thereafter for, among other reasons, her "tendency to over-reserve for claims without justification." (Complaint, ¶¶ 89-90.) Then, 18 months later, and only after Praxis found the claims reserves to be inadequate, Uni-Ter represented that Ms. McCarthy's policies were newly instituted corrective measures and undertook to raise the reserves. (Complaint, ¶ 91.) This convenient reversal strongly suggests Defendants' long-term plan was to deceive investors with misstated claims reserves as long as possible to attract new investments, while at the same time Uni-Ter earned management fees as long as Lewis & Clark kept operating and U.S. Re earned commissions on reinsurance policies it brokered.

Uni-Ter also falsified the Offering Memorandum it issued days after securing Plaintiffs' investment commitments. (Complaint, ¶¶ 83-87.) When Uni-Ter prepared and issued the Offering Memorandum, Uni-Ter knew the Offering Memorandum failed to disclose material adverse information—specifically, the existence of the Praxis's review. (Complaint, ¶ 83.) Moreover, despite telling Plaintiffs just days earlier that Lewis & Clark's capital would be sufficient after the Plaintiffs' investment of $2.2 million was made, Uni-Ter stated in the Offering Memorandum to the general public that Lewis & Clark required an investment of $50 million to be adequately capitalized. (Complaint, ¶¶ 85-86.) Given its representations to the general public, it is simply unbelievable that Uni-Ter was innocent when it lied to the Plaintiffs. These contrasting representations, made by the same small group of actors, all with a common interest in seeing that Plaintiffs' $2.2 million in new money was invested in Lewis & Clark, are yet more circumstantial evidence demonstrating that the Defendants acted intentionally

improper.

And, perhaps most indicative of Defendants' ongoing misconduct, Defendant Donna Dalton, Uni-Ter's Chief Financial Officer, prepared a financial statement for Lewis & Clark in late-December – ***after receiving the final Praxis report*** establishing conclusively the inadequacies of Lewis & Clark's capitalization – purporting to show that claims reserves and capitalization were adequate. (Complaint, ¶ 73.) This fact alone is enough to defeat Defendants' claims of innocent intent. Defendants claim the Complaint does not adequately plead scienter, in part, because it does not include enough facts to demonstrate Defendants knew their representations were false. However, Ms. Dalton's preparation and distribution of a financial statement, after receiving the final Praxis report, demonstrates Defendants were acting in a continuing scheme to defraud Plaintiffs through misstated financial statements and other false representations.

Meanwhile, as Uni-Ter was convincing Plaintiffs to pour more money into a losing venture based on misrepresentations of the financial health of the company, U.S. Re continued to monitor developments with Lewis & Clark's claims load, but never brought any of the adverse developments to Plaintiffs' attention. Moreover, U.S. Re continued to exert an ever-growing authority over Uni-Ter's management of Lewis & Clark, peaking with U.S. Re's direction to obtain the Praxis review. (Complaint, ¶¶ 60, 64, 71,73, 84, 94.)

These actions all provide a strong circumstantial evidence that the Defendants were consciously, or at the very least recklessly, misleading Plaintiffs.

C. Plaintiffs adequately pleaded their reliance on the Defendants' misrepresentations.

Contrary to Defendants' arguments, the Complaint's allegations regarding Plaintiffs' reliance are both factually accurate and sufficiently particular. To make out a fraud claim, a

plaintiff must show that it reasonably relied on the misrepresentations of the defendant. *Securities and Exchange Commission v. DiBella,* 587 F.3d 553, 563 (2d Cir. 2009). The Second Circuit has stated that "our evaluation of the reasonable-reliance element has involved many factors to 'consider[] and balance[],' no single of which is 'dispositive.'" *Id.* (*citing Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993)). These factors include but are not limited to (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of longstanding business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) the concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction; and (8) the generality or specificity of the misrepresentations. *Id.*; *CredSights, Inc. v. Ciasullo,* 05-CV-9345 (DAB), 2007 U.S. Dist. LEXIS 25850 at *36-37 (S.D.N.Y. March 26, 2007).

The Second Circuit has cautioned that the word "reasonable" is inherently imprecise and, thus, is often a question of fact for a jury rather than a question of law for the court. *STMircoelectronics, N.V. v. Credit Suisse Sec. (USA) LLC* , 648 F.3d 68, 81 (2d Cir. 2011); *Aiena v. Olsen*, 69 F. Supp. 2d 521, 538 (S.D.N.Y. 1999); *Miller v. Genesco, Inc.*, 93-CV-0096 (LMM), 1996 U.S. Dist. LEXIS 13069 at *25-26 (S.D.N.Y. Sept. 9, 1996). For example, in *Aiena*, the court denied a motion for judgment on the pleadings finding that the reasonableness of reliance was not determinable as a matter of law. 69 F. Supp. 2d at 538. There, plaintiffs alleged a longstanding business and personal relationship with the defendants and that the defendants owed plaintiffs a fiduciary duty. *Id.* Similarly, in *Miller*, the court denied a motion for summary judgment based on a lack of reliance because there was a triable issue of fact because the parties had a longstanding business relationship, only the

defendants had access to certain relevant information, and defendants owed a fiduciary duty to the plaintiffs as shareholders. 1996 U.S. Dist. LEXIS at *25-26.

The standards for reliance on an omission are even more favorable to plaintiffs. As held by the Supreme Court, where a fiduciary in a face-to-face transaction elected to "stand mute" and failed to disclose material facts, "positive proof of reliance is not necessary to recovery . . . [a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this [investment] decision." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972), *reh'g denied*, 407 U.S. 916, and 408 U.S. 931 (1972). In fact, there is a rebuttable presumption that plaintiffs relied on defendants' omissions. *In re Beacon Assocs. Litig.,* 745 F. Supp. 2d 386, 409 (S.D.N.Y. 2010); *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,* 522 U.S. 148, 159 (2008) ("[I]f there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance.") (*citing Affiliated Ute Citizens of Utah*, 406 U.S. at 154; *see also Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) ("[I]f the plaintiff proves that the facts withheld are material in the sense that a reasonable investor might have considered them important, reliance will be presumed." (internal citation omitted)).

Finally, allegations of reliance are not subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b) and the PSLRA—all that is necessary to properly plead reliance is for the complaint to connect the defendants' fraud with the plaintiffs' purported loss in a manner consistent with the "short and plain statement" standard of Fed. R. Civ. P. 8(a). *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d at 163.

Plaintiffs' pleading meets these standards. As alleged in the Complaint, "Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by

investing $2.2 million in Lewis & Clark, and, in the case of Oneida Savings Bank, by not taking action to collect its outstanding $1 million surplus debenture. (Complaint, ¶ 105.) This allegation follows the detailed pleading of why the Plaintiffs were reasonable in their reliance:

- "Lewis & Clark engaged Uni-Ter pursuant to a management agreement to provide all of the insurance company services necessary to run Lewis & Clark, including the placement of reinsurance with third parties." (Complaint, ¶ 28.)

- "Pursuant to the terms of the management agreement, which Lewis & Clark and Uni-Ter renewed in January 2011 …, ***Uni-Ter was to act as a fiduciary*** of Lewis & Clark and ***manage every aspect of Lewis & Clark's business***." (*Id*.) (Emphasis added.)

- "The Plaintiffs were…dependent upon defendant Uni-Ter for complete and accurate information regarding the operations of Lewis & Clark. Knowing this, Uni-Ter and UCSC agreed, in a written Management Agreement, to provide this, as well as other services, to Lewis & Clark." (Complaint, ¶ 45.)

- "Plaintiffs reasonably relied on Uni-Ter's superior expertise in the insurance business at all relevant times." (Complaint, ¶ 46.)

- "[O]n or about September 1, 2011, Mr. Elsass and Ms. Dalton sent a memorandum to the Lewis & Clark Board of Directors to outline the recent events causing financial difficulties and to outline 'Uni-Ter's proposed action plan.' (Complaint, ¶ 57.) Included in that action plan, was that Uni-Ter would hire '[a] consultant…to do a complete analysis of the claims process of Uni-Ter Claims Services Corp' and that '[w]e should have his report to share with the board at the September 21st meeting.'" (*Id*.)

- The packages Uni-Ter prepared for each Lewis & Clark Board Member for the September 21, 2011 meeting included a report from the consultant, the Praxis Claims Consulting [Group], dated September 15, 2011"—the same report Uni-Ter committed to commissioning in its "action plan" to address Lewis & Clark's financial struggles. (Complaint, ¶ 61.)

- After the report was presented, Uni-Ter requested the Plaintiffs commit to invest $2.2 million, collectively, and confirmed that the investment would return Lewis & Clark to an adequate level of capitalization through the presentation of a "GAAP Proforma Financial Statement for Period Ending December 31, 2011" prepared by Ms. Dalton of Uni-Ter. (Compliant, ¶¶ 61-63.)

- Uni-Ter made the same requests and representations again at a subsequent meeting on November 7, 2011. (Complaint, ¶ 65.)

- Thereafter, the Plaintiffs committed, irrevocably, to make the investments that are the

subject of this action. (Complaint, ¶ 66.)

Defendants argue that the allegation of reliance is "factually inaccurate" because Marquis, Pinnacle, Rohm, and Heathwood funded a portion of their investments after they were informed that the second Praxis audit had found that claims reserves were inadequate. Although it is true that the actual transfer of a portion of the cash occurred for these Plaintiffs in February 2012, each had fully committed to the investments in November 2011, and these Plaintiffs, each board members of a closely-held entity, could not break their commitments. To fail to honor their commitments would have, at a minimum, opened these plaintiffs to liability to their fellow directors and investors who already had acted in reliance on the fact that all the plaintiffs were making investments, and that the aggregate of their investments was $2.2 million—an amount Defendants told the Plaintiffs was a threshold that needed to be crossed to keep Lewis & Clark adequately capitalized.

Moreover, Uni-Ter already had issued the Offering Memorandum to the general public in November 2011, which stated as follows:

> The Company has experienced significant underwriting losses in 2011 and has increased its capital by $2,220,000 as a result of surplus not contributions and, as a result, had a capital and surplus of approximately $3.7 million as of September 30, 2011.

(Complaint, ¶ 84.)

Accordingly, the Defendants put those four Plaintiffs in the position of causing the Offering Memorandum to be false if they failed to honor their commitments, which would potentially have opened them, Lewis & Clark (and Defendants) to liability to those who made additional investments in reliance on the Offering Memorandum. And, this liability could have been much greater to each of the Plaintiffs than the loss of their doomed investments.

Through deliberate misrepresentations designed to enrich themselves, Defendants forced

Plaintiffs to face the Hobson's choice of abandoning their promise to their partners and potentially incurring significant damages, or completing the funding on their investment commitment. Defendants should not now be permitted to benefit from their own misconduct simply because Plaintiffs made what seemed to be the least worse of these choices.

Indeed, Defendants continued to make it seem like the latter choice in fact was the least worse of Plaintiffs' sorry options. In December 2011 and January 2012, Mr. Piccione, CEO of U.S. Re had assumed control of Uni-Ter and UCSC's management of Lewis & Clark and had instituted a number of actions he said were designed to return Lewis & Clark to stability. (Complaint, ¶ 94.) Defendants were only beginning to implement those turn-around plans in February 2012 at the time the last of the Plaintiffs had transferred the funds for their investments. Defendants, including Uni-Ter and UCSC as fiduciaries under the Management Agreement, represented they had a plan to fix Lewis & Clark's claims reserve problems, effectively stating, "just trust us." Of course, Plaintiffs now know with the benefit of hindsight what Defendants concealed from them: that the turn-around plans were doomed to fail. Accordingly, Defendants arguments regarding the timing of Plaintiffs' investments do not defeat Plaintiffs' reliance on Defendants' misrepresentations.

Finally, Defendants argue that Plaintiffs could not rely on the September 15, 2011 Praxis Report as an indication that the claims reserves were adequate because it contained language regarding the fact that it was only based on a sample. This argument is unavailing to Defendants. "[W]arnings of specific risks . . . do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.,* 763 F. Supp. 2d 423, 495 (S.D.N.Y. 2011) (*citing In re Am. Int'l Group, Inc.,* 741 F. Supp. 2d 511, 531 (S.D.N.Y. 2010)). "True

cautionary language must 'warn investors of exactly the risk that plaintiffs claim was not disclosed.'" *Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 230 (S.D.N.Y. 1999) (*quoting Olkey v. Hyperion*, 98 F.3d 2, 5 (2d Cir. 1996)). The fact that the Praxis report stated it was based on a sample and was not a full claims review does not rise to the level of a cautionary statement, and does not undermine Plaintiffs reliance on the report or the Defendants' subsequent misrepresentations about Lewis & Clark's financial stability.

D. Plaintiffs adequately pleaded that the Defendants' misrepresentations caused Plaintiffs' losses.

To state a claim under the PSLRA, a plaintiff must plead that the defendant's misrepresentations proximately caused the plaintiff's loss. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 242-244 (2005). There is no requirement that the loss occur immediately after the misrepresentation—indeed, such a rule would defy logic. *Id*. (holding that "as a matter of pure logic" the plaintiff does not suffer loss at the moment the plaintiff purchases shares at an artificially inflated price). "The loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement." *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 96 (2d Cir. 2001). Thus, "a misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by the disappointed investor"). *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005); *see also Teamsters Local 445 Freight Division Pension Fund v. Bombardier*, No. 05-CV-1898 (SAS), 2005 U.S. Dist. LEXIS 19506 (S.D.N.Y. Sept. 6, 2005) , *aff'd*, 546 F.3d 196 (2d Cir. 2008) (loss causation sufficiency pleaded where prospectus concealed a condition which then occurred, and the materialization of that condition allegedly caused the loss); *In re Parmalat Securities Litigation*,

375 F. Supp. 2d 278 (S.D.N.Y. 2005) (loss causation sufficiently pleaded where company's inability to pay off maturing bonds was the materialization of the risk concealed by allegedly false financial statements).

Plaintiffs have met the standard for pleading that the Defendants' misrepresentations and omissions "proximately caused" Plaintiffs' losses. The Complaint pleads that Defendants' fraudulent representations induced Plaintiffs to commit to a purchase of securities, and in the case of Oneida Savings Bank, defer collecting a prior debt Lewis & Clark owed to it. (Complaint, ¶ 66, 77, 78.)

Defendants argue that the passage of time—the investments were formally lost approximately one year when Lewis & Clark entered receivership—and intervening events caused Plaintiffs' losses. This argument fails to recognize that Defendants put the chain of events leading to Plaintiffs' losses into motion in the fall of 2011 when they made misrepresentations to Plaintiffs and induced their investments. At that time, Defendants knew that it was inevitable that Lewis & Clark would dissolve and was hopelessly undercapitalized. That one year passed between the time Plaintiffs committed to the investments does not sever causation, and a review of what occurred during that year confirms this. As alleged in the Complaint:

- Plaintiffs committed to the investments in November 2011. (Complaint, ¶ 66.)
- "It was not until a telephonic Lewis & Clark Board of Directors meeting on or about December 20, 2011, that Uni-Ter and U.S. Re informed the Plaintiffs of Praxis' full claims review, its findings, and the resulting adverse financial developments of Lewis & Clark." (Complaint, ¶ 92.)
- "Citing to the Praxis Group audit findings, Uni-Ter and U.S. Re informed the Lewis & Clark Board of Directors that Lewis & Clark's reserves were inadequate and that urgent action was required to preserve Lewis & Clark's capital structure." (Complaint, ¶ 93.)
- "Prior to December 31, 2011, at the direction of U.S. Re's Chief Executive Officer, Tal

Piccione, Uni-Ter initiated three parallel approaches to address the negative developments and preserve Lewis & Clark's capital structure. The approaches were:

a. Retaining another third-party expert (not Praxis Group) to evaluate all open claims and reserves.

b. Contacting Lewis & Clark's reinsurer (Beazely Re) for capital contribution and/or a structured transaction.

c. Participating in discussions with the Nevada Department of Insurance regarding whether to dissolve or recapitalize Lewis & Clark." (Complaint, ¶ 94.)

- "None of Uni-Ter's or U.S. Re's efforts in preserving Lewis & Clark's capital structure succeeded, and Lewis & Clark ultimately entered a dissolution proceeding pursuant to Nevada law on or about November 11, 2012." (Complaint, ¶ 96.)

- "All of Plaintiffs' investments in Lewis & Clark, including the aggregate $2,200,000 investment in November 2011, [were] lost." (Complaint, ¶ 97.)

The passage of time alone from the misrepresentation to ultimate loss does not absolve Defendants of liability. This is not a case where a down market, separate from a defendant's misrepresentations, led to or increased a plaintiff's loss. Plaintiffs' losses were immediate, as Plaintiffs would not have committed to invest and followed through with funding the investments but for Defendants' misrepresentations.

II. PLAINTIFFS STATED A CLAIM FOR CONTROL PERSON VIOLATION

Defendants challenge Plaintiffs' claim for control person liability against U.S. Re based on their arguments that there is no primary Rule 10b-5 claim against Defendants and because Plaintiffs have purportedly not alleged adequate control by U.S. Re over the primary defendants. Both arguments are incorrect. First, as set forth above, Plaintiffs have stated a claim against Defendants Uni-Ter, UCSC and the individual Defendants for violation of Rule 10b-5. (*See* Point I, *supra*.)

Second, Plaintiffs have stated a claim against U.S. Re under Section 20(a) of the Exchange Act. Section 20(a) of the Exchange Act provides that "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter . . . shall also be

liable jointly and severally with and to the same extent as such controlled person" unless the purported control person can demonstrate he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t.

Courts in the Second Circuit generally apply the following standard when evaluating whether a plaintiff has stated a claim under Section 20(a) : "a plaintiff must allege (1) a primary violation by the controlled [entity], (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *In re Scottish Re Group Sec. Litig.*, 524 F. Supp. 2d 370, 386 (S.D.N.Y. 2007) (quotations and citations omitted). Control person liability need not be pleaded with particularity and is generally analyzed under the "short and plain" statement standard of Rule 8(a). *See Sedona Corp. v. Ladenburg Thalmann & Co., Inc.*, No. 03 Civ. 3120 (LTS) (THK), 2005 U.S. Dist. LEXIS 16382, at *16 (S.D.N.Y. Aug. 9, 2005) ("neither the PSLRA (because scienter is not an essential element), nor Rule 9(b) (because fraud is not an essential element), apply to a Section 20(a) claim").

To plead control, Plaintiffs are required to allege actual control over the controlled person and the transactions at issue. *In re Satyam Computer Services Ltd. Sec. Litig.*, 915 F.Supp.2d 450, 482 (S.D.N.Y. 2013); *Cromer Fin. Ltd. v. Berger*, 137 F.Supp. 2d 452, 484 (S.D.N.Y. 2001). Plaintiffs detailed U.S. Re's extensive involvement and control over the other defendants starting in early fall 2011 with direction to obtain the Praxis Group audit, followed by Mr. Davies, U.S. Re's CFO, participating in update calls to Plaintiffs as they were induced to invest, and continuing through 2012 with Tal Piccione, U.S. Re's CEO, assuming complete and unfettered control over Uni-Ter's management of Lewis & Clark. As set forth in the Complaint:

- "***[U.S. Re], Uni-Ter's parent company, directed Uni-***Ter to make these representations, and to refrain from disclosing known adverse material information."

(Complaint, ¶ 4.) (Emphasis added.)

- "As a direct result of Uni-Ter's intentional misrepresentations and material omissions made at ***U.S. Re's direction***, which Uni-Ter and U.S. Re designed to induce Plaintiffs' investments in Lewis & Clark, Plaintiffs lost all of their investments in Lewis & Clark." (Complaint, ¶ 6.) (Emphasis added.)

- U.S. Re Reinsurance Claims Manager Mr. Donnelly arranged for Praxis to conduct an audit of Lewis & Clark's claims reserves. Mr. Donnelly scheduled the audit and coordinated travel. Mr. Donnelly was on-site and took part in the meetings during the first day of Praxis' site visit to Uni-Ter on or about September 8, 2011, and Mr. Donnelly supplied all the documents Praxis reviewed before the site visit to Praxis by e-mail. (Rosner Declaration, Ex. 1 (Docket No. 35); Proposed Amended Complaint, ¶ 76.)

- Mr. Davies, ***U.S. Re's CFO, attended the Board meetings*** at which the relevant misrepresentations were made. (Complaint, ¶¶ 60, 111.) Mr. Davies did not correct a misrepresentation he knew was false during the September 21, 2011 Board Meeting. (Complaint, ¶ 64.)

- "Notwithstanding the reduced scope of the September 15, 2011 Praxis report and its report to the Board of Directors that the reserves were adequate, Uni-Ter, ***at U.S. Re's direction***, conducted in late November 2011 an internal full-scale review of all claims reserves and subsequently engaged Praxis to also conduct a full-scale review. The internal review was initiated based on Uni-Ter's and U.S. Re's concerns about the adequacy of claims reserves raised in the September 15, 2011 Praxis report." (Complaint, ¶ 71.) (Emphasis added.)

- "U.S. Re, Uni-Ter, Mr. Elsass, Ms. Miller, and Mr. Davies before the September 21, 2011 meeting knew that Praxis was going to be evaluating the amount of Lewis & Clark's loss reserves because it was likely that the reserves needed to be materially larger. They intentionally misrepresented this material claims development information to the representatives of the Plaintiffs at the September 21, 2011 meeting." (Complaint, ¶ 72.)

- "***U.S. Re required Uni-Ter*** to retain Praxis in December 2011 to complete its full claims review, because U.S. Re had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review. Neither Uni-Ter nor U.S. Re disclosed these doubts to the Plaintiffs despite U.S. Re's knowledge at the time that Uni-Ter's internal review was very negative." (Complaint, ¶ 73.) (Emphasis added.)

- ***U.S. Re directed Uni-Ter*** to make material representations and omissions utilizing instrumentalities of interstate commerce in connection with the solicitation of Plaintiffs' purchases of the November 2011 Debentures…" (Complaint, ¶ 110.) (Emphasis added.)

- "In fact, U.S. Re's representative Mr. Davies even attended the November 7, 2011 Board of Directors meeting during which the material misstatements and omissions occurred, and Mr. Davies remained silent despite knowing that Uni-Ter's statements during the meeting were false and that there were material facts not disclosed." (Complaint, ¶ 110-111.)

Accordingly, U.S. Re, as alleged in the Complaint, exercised dominion and control over Uni-Ter, UCSC, and the individual defendants throughout the relevant time period.

Also, Uni-Ter answered to U.S. Re regarding the financial condition of Lewis & Clark and the need to raise capital, notwithstanding that it should have been reporting and responding to the Plaintiffs, as directors of Lewis & Clark (to whom Uni-Ter owed a fiduciary duty), regarding these issues and the reasons the issues arose. Instead, Uni-Ter, at U.S. Re's direction, fraudulently induced Plaintiffs to invest $2.2 million, which investments solely benefited Uni-Ter and U.S. Re by extending the life of Lewis & Clark so Uni-Ter could receive management fees and U.S. Re could proportionately reduce the exposure of the reinsurance it had brokered.

III. PLAINTIFF'S STATE LAW CLAIMS SHOULD NOT BE DISMISSED

The crux of Defendants' arguments regarding Plaintiffs' state law causes of action is that Plaintiffs alleged no misrepresentation. (Uni-Ter Memorandum of Law, pp. 17-18; Elsass & Dalton Memorandum of Law, pp. 9-13.) Defendants argue that the Complaint's inclusion of facts that contradict the alleged misrepresentations undermines Plaintiffs state law claims. (Uni-Ter Memorandum of Law, pp. 17-19; Elsass & Dalton Memorandum of Law, pp. 13.) This is incorrect, as the Complaint is clear that Plaintiffs did not know those facts at the time they committed to their investments. Plaintiffs pleaded that they only knew the following at the time that the Defendants made their misrepresentations:

- Defendants presented a memorandum dated September 1, 2011 to outline "Uni-ter's proposed action plan" following an unanticipated operating loss. "Included in that

action plan, was that Uni-Ter would hire '[a] consultant…to do a complete analysis of the claims process of Uni-ter Claims Services Corp." (Complaint, ¶ 57.)

- Praxis completed that report, and Defendants provided it to the Plaintiffs in September 2011. The report found that there was no fault with any of the sampled claims and found the claims reserves methodology appropriate. (Complaint, ¶¶ 61-62.)

- Defendants…confirmed to Plaintiffs that there were no claims developments not previously reported on September 21, 2011. (Complaint, ¶ 64.) Uni-ter, through Ms. Dalton, also presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011," which reported only existing claims reserves and did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure. (Complaint, ¶ 63.)

- Also, "on December 17, 2011 . . . Donna Dalton submitted a draft of the November 2011 financial statements to the Board reflecting that claims reserves had actually decreased since September 2011, the Company was profitable, and the capital had reached a healthy level." (Complaint, ¶ 73.)

That Plaintiffs also pleaded what Defendants actually knew at the time they made the above detailed misrepresentations (*e.g.*, that Praxis was not formally retained to complete the full review, that the initial Praxis review was only a sample review and a review of process, or that Defendants knew all along that the claims reserves were inadequate), does not contradict the factual allegations underlying the misrepresentation as Defendants argue.

A. Common Law Fraud

A plaintiff states a claim for common law fraud if the Complaint alleges facts establishing the following elements: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995); *Peach Parking Corp. v. 346 West 40th Street, LLC*, 42 A.D.3d 82, 86 (1st Dep't 2007).

As detailed extensively above, Plaintiffs pleaded facts meeting each of these elements, including that (1) Defendants knowingly stated to Defendants that Lewis & Clark was adequately capitalized and did not have any adverse claims developments not reported, or failed to correct the misrepresentation in the case of U.S. Re, Mr. Davies, and Ms. Dalton; (2) that Defendants made these false statements to induce Defendants to purchase $2.2 million in convertible debentures; (3) Plaintiffs justifiably relied on the misrepresentation as it relied on Defendants for all analysis of Lewis & Clark's financial condition; and (4) Plaintiffs were injured when they lost their $2.2 million investments. (*See* Point I, *supra*); *see also Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311, 322 (N.D.N.Y. 1997) *aff'd* 162 F.3d 1148 (2d Cir. 1998) (stating that "[t]he elements of fraud under New York law and Section 10b are essentially the same").

B. Constructive Fraud

To plead a claim for constructive fraud, a plaintiff must state facts establishing the same elements as those for fraud, except there is no requirement of scienter. *Brown v. Lockwood*, 76 A.D.2d 721, 730-731 (2d Dep't 1980); *see also Schneiderman v. Barandes*, 105 A.D.3d 602 (1st Dep't 2013) (holding that lower court improper dismissed constructive fraud claim because there existed issues of fact regarding both elements of claim: misrepresentation, and reliance). Again, as discussed above, Plaintiffs have stated detailed facts establishing the requisite elements. (*See* Point I, *supra*.)

C. Negligent Misrepresentation

A plaintiff alleging negligent misrepresentation must allege that "the defendant made a false representation that he or she should have known was incorrect . . . [,and that] the plaintiff reasonably relied on it to his or her detriment." *Anschutz Corp. v. Merrill Lynch & Co.*, 690

F.3d 98, 114 (2d Cir. 2012). The Complaint details facts, extensively discussed above, that if true, establish that Defendants knew or should have known Lewis & Clark was inadequately capitalized and had insufficient claims reserves, but stated that its capitalization was sufficient in a financial statement and orally confirmed claims reserves were sufficient. Based on these statements, Plaintiffs invested in Lewis & Clark, and subsequently lost their entire investments because the truth was that Lewis & Clark was hopelessly insolvent because its claims reserves were underfunded. These allegations state a claim for negligent misrepresentation.

D. Fraudulent Inducement

To state a claim for fraudulent inducement, a plaintiff must allege "(1) the defendant made a material, false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance. *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013). These elements are identical to those for common law fraud, and, as discussed above, the Complaint alleges facts establishing each of them.

E. Unjust Enrichment

An unjust enrichment claim is stated on allegations that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004).

The Complaint pleads facts establishing these elements, as follows: "By engaging in the conduct alleged above, Uni-Ter and UCSC have been unjustly enriched by receiving and retaining management fees from Lewis & Clark by prolonging Lewis & Clark's operations funded by the fraudulently induced November 2011 Debentures." (Complaint, ¶ 149.) This

allegation, combined with the other detailed allegations regarding Defendants' deceit and resulting profit are sufficient to support Plaintiffs' claim for unjust enrichment.

Defendants also argue that the unjust enrichment claim is not viable because contracts—the Management Agreement and the debentures—governed their obligations. (Uni-Ter Memorandum of Law, p. 22.) This assertion is incorrect, as Plaintiffs had no contract with Uni-Ter. Lewis & Clark was the party that contracted with Uni-Ter. Further, Plaintiffs claim does not arise under any contract. *See In re First Cent. Fin. Corp*., 377 F.3d 209, 213 (2d Cir. 2004). Neither the Management Agreement nor the debentures gave Defendants the right to the misrepresentations that induced the investments, and those misrepresentations that form the basis for Plaintiffs' claims, including their unjust enrichment claim.

IV. PLAINTIFFS ADEQUATELY STATED A CLAIM FOR PUNITIVE DAMAGES

A claim for punitive damages is proper if a plaintiff alleges the defendant committed an "egregious tort directed at the public at large." *New York Univ.*, 87 N.Y.2d at 316. Thus, a complaint states a claim for punitive damages if (1) defendant's conduct is actionable as an independent tort; (2) the tortious conduct is of an egregious nature; (3) that egregious conduct is directed at plaintiff; and (4) is part of a pattern directed at the public generally. *Rocanova v. Equitable Life Assurance Society*, 83 NY2d 603, 613 (1994).

The Complaint easily meets this standard. Plaintiffs allege throughout the Complaint that Defendants engaged in willful, fraudulent, and malicious conduct in a scheme to defraud Plaintiffs of their investments. Moreover, the Complaint details how Defendants broadened the scope of their fraud on Plaintiffs to the public at large by citing Plaintiffs' investments as providing Lewis & Clark adequate capitalization in the Offering Memorandum seeking investments from the general public. (*See* Complaint, ¶¶ 82-87.) This allegation is sufficient to

support Plaintiffs' claim for punitive damages.

V. JONNA MILLER IS SUBJECT TO THIS COURT'S PERSONAL JURISDICTION

When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a *prima facie* showing that the court possesses personal jurisdiction. *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001); *Litton v. Avomex Inc.*, 08-CV-1340 (NAM/DRH), 2010 U.S. Dist. LEXIS 2881 at *7 (N.D.N.Y. Jan. 14, 2010); *Park West Galleries, Inc. v. Franks*, No. 12-CV-3007 (CM), 2012 U.S. Dist. LEXIS 86629, at *7 (S.D.N.Y. June 20, 2012).

A. Securities Exchange Act Personal Jurisdiction Standard

The first of Plaintiffs' claims against Ms. Miller is based on the Securities Exchange Act of 1934, which provides for worldwide service of process and permits the exercise of personal jurisdiction to the limits of the Fifth Amendment's Due Process Clause. *See* 15 U.S.C. § 77v(a); 15 U.S.C. § 78aa; *Securities and Exchange Commission v. Unifund Sal*, 910 F.2d 1028, 1033 (2d Cir. 1990). Defendant does not argue that Plaintiffs improperly served her. Accordingly, Ms. Miller is subject to this Court's jurisdiction unless its exercise would violate her Fifth Amendment due process rights. *See Securities and Exchange Commission v. Syndicated Food Servs. Int'l*, No. 04-CV-1301 (NGG), 2010 U.S. Dist. LEXIS 91916, at *5 (E.D.N.Y. Sept. 3, 2010).

The due process test for personal jurisdiction has two related components: (1) a minimum contacts inquiry, and (2) a reasonableness inquiry. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). In federal question cases brought under a statute where Congress has provided for worldwide service of process, a defendant's aggregate contacts with the United States govern the minimum contacts inquiry. *See Chew v.*

Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1988); *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *6; *see also Securities and Exchange Commission v. Softpoint Inc.*, No. 95-CV-2951 (GEL), 2001 U.S. Dist. LEXIS 286, at *15 (S.D.N.Y. Jan. 17, 2001); *Securities and Exchange Commission v. Boock*, No. 09-CV-8261 (DLC), 2010 U.S. Dist. LEXIS 59498, at *4 (S.D.N.Y. June 15, 2010). The minimum contacts requirement is satisfied where a defendant's conduct and connection with the United States are such that she should reasonably anticipate being haled into court there. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980); *see also Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *7.

The Complaint alleges sufficient contacts by Ms. Miller. She is a citizen and resident of the United States, and all of her alleged unlawful conduct took place in the United States. *See Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *7. Indeed, Ms. Miller does not assert she lacks sufficient contacts with the United States; rather, she focuses on her more limited connections to New York. *Id.*

The reasonableness inquiry asks whether the assertion of personal jurisdiction in a particular case comports with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). These factors include "[1] the burden on the defendant, [2] the forum state's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several states in furthering fundamental substantive social policies . . . ." *Burger King v. Rudzewicz*, 471 U.S. 462, 476-477 (1985); *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

Where a plaintiff demonstrates sufficient minimum contacts, a defendant must present "a compelling case that the presence of some other considerations would render jurisdiction

unreasonable." *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *8 (*citing Burger King*, 471 U.S. at 477, and *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 116 (1987)). The reasonableness inquiry is "largely academic in non-diversity cases brought under a federal law which provides for nationwide service of process" because of the strong federal interests involved. *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *8 (*citing Softpoint, Inc.*, 2001 U.S. Dist. LEXIS 286, at *20). Most courts continue to apply this test as a constitutional floor to protect litigants from truly undue burdens, but few (and none in the Second Circuit) have ever declined jurisdiction on fairness grounds in similar cases. *Id.* at *89 (*citing Softpoint, Inc.*, 2001 U.S. Dist. LEXIS 286, at *20).

In *Syndicated Food*, the defendants resided in Florida and were subjected to the jurisdiction of federal district court for the Eastern District of New York. *Id.* at 9. The court recognized that this imposed some burden on the defendants, at least relative to other possible forums, but that this burden was relatively minor given the realities of modern transportation and communication as well as the nature of civil litigation. *Id.* Moreover, the court stated that claims brought under the federal securities laws are an area of strong federal concern that fall at the center of Congress' commerce power. *Id.*

This Court has jurisdiction over Ms. Miller under these standards. First, Ms. Miller would be minimally burdened if subjected to federal jurisdiction in the Northern District of New York, given the realities of modern transportation and communications. Additionally, many of the pre-trial conferences may be completed telephonically, almost exclusively by Ms. Miller's New York based counsel, and Ms. Miller herself may never need to visit New York except ofr depositions or trial testimony. Second, New York has a strong interest in litigating this dispute since several of the Plaintiffs suffered the harm caused by Ms. Miller's unlawful conduct in New

York. Third, there is a strong incentive to obtain convenient and effective relief.

Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of controversies urges a New York forum. Ms. Miller states, "there is no reason why Plaintiffs could not pursue their claims against Ms. Miller in Georgia." (Uni-Ter Memorandum of Law, p. 30.) The interstate judicial system has a strong interest in litigating the claims against Ms. Miller with the claims against the other Defendants because they have the same nucleus of operative facts, and litigation against Ms. Miller in Georgia could result in an inconsistent decision with the litigation in New York.

Fifth, the states have a unified interest in encouraging citizens to interact in good faith and legally, and neither Georgia nor New York permits fraud. By dismissing the suit against Ms. Miller, the Court would be disregarding the unified interest of the states in discouraging fraud.

Accordingly, the Court should assert personal jurisdiction over Ms. Miller because the due process requirements are more than satisfied.

B. Claims Based on New York Common Law

Plaintiffs' remaining four claims against Ms. Miller are based on New York State common law. Personal jurisdiction exists with regard to the state law claims based on pendent personal jurisdiction and under the laws of New York.

1. Pendent Personal Jurisdiction

Under the doctrine of pendent personal jurisdiction, where a federal statute authorizes nationwide service of process, and the federal and state claims "derive from a common nucleus of operative fact," a district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available. *Comprehensive Inv.*

Servs. v. Mudd (In re Fannie Mae 2008 Sec. Litig.), 891 F. Supp. 2d 458, 480 (S.D.N.Y. 2012) (*quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), and *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993)). In other words, once a district court has personal jurisdiction over a defendant for one claim, it may piggyback onto that claim other claims that lacks independent personal jurisdiction, if all the claims arise from the same facts as the claim over which it has proper personal jurisdiction. *Id.* (*citing Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 783 (N.D. Tex. 2008)). The reasoning for this rule is that a defendant who is already before a court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim where the issues are nearly identical or substantially overlap the federal claim. *Id.* (*citing Rolls-Royce*, 576 F. Supp. 2d at 783).

Here, as discussed above, there is a federal claim against Ms. Miller. The basis of the federal claim is identical to the bases for the state claims. Accordingly, the Court should assert pendant personal jurisdiction over Ms. Miller for the state law claims.

2. New York CPLR Bases for Jurisdiction

In the alternative, the Court may also assert jurisdiction over Ms. Miller under New York Civil Practice Law and Rules ("CPLR") 302(a)(3) and 302(a)(1)).

CPLR 302(a)(3) provides for personal jurisdiction over a non-domiciliary when that person commits a tortious act outside of New York causing injury to person or property within New York if that person (i) regularly solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in New York; or (ii) expects or should reasonably expect the act to have consequences in New York and derives substantial revenue from interstate or international commerce.

In *Park West Galleries*, the court determined that the plaintiff adequately alleged

CPLR 302(a)(3)(ii) by asserting that the defendants called, e-mailed, or chatted online with the plaintiff's New York customers and knowingly caused those customers to breach their contracts with the plaintiff by telling them defamatory lies. 2012 U.S. Dist LEXIS 86629, at *21) ".

At the September 21, 2011 meeting with Plaintiffs, including several from New York, Ms. Miller fraudulently stated that there were no claims developments not previously reported in the Praxis report. In addition, Ms. Miller was a party to the November 7, 2011, telephonic board meeting to discuss the November Debentures and, again, reassure Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. Accordingly, Ms. Miller's fraudulent acts outside of New York caused injury in New York to Plaintiffs.

Ms. Miller had reason to know that her fraud would cause injury in New York. Plaintiffs and Defendants agreed in writing that Defendants would provide its superior expertise in the insurance business and provide complete and accurate information regarding the operations of Lewis & Clark. Plaintiffs depended on Defendants for this information. Thus, Ms. Miller knew or reasonably should have known that Plaintiffs would rely on her inaccurate information and, hence, have effects in New York. Moreover, Ms. Miller is the Vice President of Uni-Ter—a provider of nationwide claims management services, and, therefore, derives substantial revenue from interstate commerce.

Contrary to Ms. Miller's contention, Plaintiffs do not impute the actions of her employer, Uni-Ter, to her. During the September 21, 2011, meeting, Ms. Miller stated that there were no claim developments not previously reported in the Praxis report. Hence, this is not a situation where the Complaint names Ms. Miller as a defendant simply because her name appears at the top of the corporation's masthead. *See King County, Wash. v. IKB Deutsch Industriebank, AG*,

769 F. Supp. 2d 309, 321 (S.D.N.Y. 2011).

Accordingly, the Court should assert personal jurisdiction over Ms. Miller based on CPLR 302(a)(3).

CPLR 302(a)(1) provides for personal jurisdiction over a non-domiciliary when that person transacts any business within the state or contracts anywhere to supply goods or services in the state.

Courts must look to the totality of the circumstances when determining the existence of a purposeful activity. *Eaton & Van Winkle LLP v. Midway Oil Holding Ltd.*, No. 102759/09, 2010 N.Y. Misc. LEXIS 2594, at *19 (Sup. Ct., N.Y. Cnty., March 15, 2010) (*citing SAS Group, Inc. v. Worldwide Inventions, Inc.*, 245 F. Supp. 2d 543, 548 (S.D.N.Y. 2003)). Such purposeful acts may include contract negotiations between the parties, meetings at which the defendant was present, or letters sent and telephone calls made by the defendant to the plaintiff. *Id.* at 20 (*citing Scholastic, Inc. v. Stouffer*, No. 99-CV-11480 (AGS), 2000 U.S. Dist. LEXIS 11516 (S.D.N.Y. 2000)).

Proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities in New York were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Deutsch Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006) (*citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988)). Moreover, commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions are subject to long-arm jurisdiction. *Deutsch Bank*, 7 N.Y.3d at 71.

In *Deutsch Bank*, the Court of Appeals found personal jurisdiction over a defendant where the defendant was a sophisticated institutional trader that knowingly initiated and pursued

negotiations with the plaintiff's employee, communicating by instant messages. *Id.* at 69-71.

Similarly, here, Ms. Miller is the Vice President of Uni-Ter. She is a sophisticated individual, particularly with regard to the insurance business and the setting of claims reserves. Ms. Miller projected herself into New York throughout the various e-mails she sent to Plaintiffs and during the November 7, 2011, teleconference where she and others purposefully reassured Plaintiffs that the capital infusion would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. When a sophisticated individual knowingly enters New York, whether by phone, through electronic communications or otherwise, to negotiate and conclude a substantial transaction, it is within the embrace of the New York long-arm statute. *Id.* at 72.

Ms. Miller's contacts with Plaintiffs have been anything but temporary, random, or tenuous. Rather her contacts with Plaintiffs and New York have been continual, repetitive, and essential to Uni-Ter's business. *See Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996).

Accordingly, the Court should assert personal jurisdiction over Ms. Miller based on CPLR 302(a)(1).

3. Due Process

In addition to the requirements of the CPLR, to assert personal jurisdiction over a plaintiff based on the CPLR, the court must also find that the assertion comports with due process. *See King County, Wash.*, 769 F. Supp. 2d 309. As discussed above, subjecting Ms. Miller to the jurisdiction of this Court satisfies due process.

V. PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT SHOULD BE GRANTED

Plaintiffs submit that Defendants' Motions to Dismiss should be denied in all respects. In the alternative, and if the Court determines the Complaint is deficient in any way, Plaintiff

respectfully requests leave to file an amended complaint.

Under Fed. R. Civ. P. 15, leave to amend a pleading should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). In line with this liberal standard, "[t]he rule in [this] circuit is to allow a party to amend its [pleadings] unless the nonmovant demonstrates prejudice or bad faith." *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 157 (2d Cir. 2011).

Underpinning this rule is the longstanding principle that claims and defenses should be *fully* adjudicated on the merits whenever fair and possible. *See S.S. Silberblatt, Inc. v. E. Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 43 (2d Cir. 1979) (recognizing "the policy of Rule 15(a) in favor of permitting the parties to obtain an adjudication of the merits"). In determining whether prejudice would result from amendment, courts consider whether the newly asserted claim or defense would: (1) "require the opponent to expend significant additional resources to conduct discovery and prepare for trial"; (2) "significantly delay the resolution of the dispute"; or (3) "prevent the plaintiff from bringing a timely action in another jurisdiction." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993).

Plaintiffs' proposed amended complaint, attached as Exhibit A to the Declaration of Gabriel M. Nugent, simply adds additional detail to respond to Defendants' criticisms of the Complaint's particularity about certain elements of the claims. It does not seek to assert any new or different claims. At this early stage of the litigation, allowing Plaintiffs to amend the Complaint to cure any perceived deficiencies will neither require Defendants to expend resources to conduct additional discovery, nor delay the resolution of the dispute. Accordingly, in the event the Court determines the Complaint fails to state one or more claims, Plaintiffs respectfully request leave to file an amended complaint.

CONCLUSION

For the reasons set forth above, and in the accompanying affidavit, Defendants' Motions to Dismiss should be denied. In the alternative, Plaintiffs respectfully request leave to serve the proposed amended complaint, together with any such other and further relief as the court deems just and proper.

DATED: November 27, 2013 **HISCOCK & BARCLAY, LLP**

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EXHIBIT 2-C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA SAVINGS BANK; MARQUIS COMPANIES I, INC.; PINNACLE HEALTHCARE, INC.; ROHM SERVICES CORPORATION; HEATHWOOD HEALTH CARE CENTER, INC.; and EAGLE HEALTHCARE, INC., Plaintiffs, -against- UNI-TER UNDERWRITING MANAGEMENT CORPORATION; UNI-TER CLAIMS SERVICES CORPORATION; U.S. RE COMPANIES, INC.; SANFORD ELSASS; DONNA DALTON; JONNA MILLER; and RICHARD DAVIES, Defendants.	ECF Case No. 5:13-CV-746 (MAD/ATB) Oral Argument Requested

DEFENDANTS SANFORD ELSASS AND DONNA DALTON'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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Defendants Sanford Elsass and Donna Dalton respectfully submit this memorandum of law in support of their motion to dismiss the complaint in this action for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6) and the Private Securities Litigation Reform Act.[1]

INTRODUCTION

After years of running a successful insurance company together, the plaintiffs and the defendants, including Mr. Elsass and Ms. Dalton, expanded their business into a new market. In hindsight, that good faith decision proved to be a mistake. The business failed; the plaintiffs and Uni-Ter lost their investments; and the defendants lost a valuable management contract. Now the plaintiffs seek to recover the losses from their knowing decision to invest additional capital in a struggling business by claiming they were defrauded. But the facts alleged in the complaint do not support plaintiffs' claims.

Beginning in 2004, the plaintiffs and Uni-Ter—of which Mr. Elsass and Ms. Dalton were officers—operated Lewis & Clark, a successful insurer of small healthcare facility operators. Uni-Ter (and Mr. Elsass and Ms. Dalton) ran Lewis & Clark's day-to-day operations while the plaintiffs provided capital and governed the business through their representatives on its board of directors. In July 2009, Lewis & Clark began insuring larger healthcare facility operators than it had previously. By 2011, these facilities were passing substantial losses on to Lewis & Clark. Plaintiffs' complaint focuses on the two-month period from September 2011 through November 2011, during which these unexpected losses came to light, the defendants disclosed them to the plaintiffs, hired outside consultants to review the business, shared the

[1] Mr. Elsass and Ms. Dalton also join in the memorandum being filed today by defendants Uni-Ter Underwriting Management Corporation, Uni-Ter Claims Services Corporation, U.S. Re Companies, Inc., Jonna Miller, and Richard Davies.

results of that review with the plaintiffs, sought and received additional investments from the plaintiffs to shore up the company's capital position, invested significant sums of their own in the struggling business, and continued to review and investigate the losses. The plaintiffs theorize that because Lewis & Clark's business continued to deteriorate after they made their investments and because the defendants' subsequent reviews and investigations revealed additional problems at the company, the defendants *must have* defrauded them into making their investments. This theory fails to state a claim for several independent reasons.

First, the complaint does not meet Rule 9(b)'s requirement to identify any misstatement with particularity. The plaintiffs' vague allegations that "Uni-Ter" or the "defendants" "led them to believe" certain things about Lewis & Clark's financial state will not suffice. The plaintiffs fail to allege the "who, what, where, and when" of the alleged fraud, as they must to state their claims. *See infra* pp. 9-11.

Second, the complaint likewise fails to meet Rule 9(b)'s requirement to explain with specificity why any alleged misstatement was false when made. In attempting to plead falsity, the plaintiffs simply allege that statements made in September 2011 *must have* been false, because they were ultimately contradicted by information that emerged months later in late November and December. Such allegations of fraud by hindsight do not state a fraud claim. *See infra* pp. 11-13.

Third, the complaint does not allege facts supporting the required cogent and compelling inference of scienter. The plaintiffs do not plead scienter based on motive and opportunity because they fail to identify any concrete benefits that Mr. Elsass or Ms. Dalton received from any supposed fraud. And they do not plead scienter based on recklessness, because they do not allege that Mr. Elsass or Ms. Dalton had access to specific information

contradicting their statements at the time they were made. Moreover, Uni-Ter's own investments in Lewis & Clark at the same time as the plaintiffs' investments rebuts any inference of scienter. As a result, any inference of fraud arising from plaintiffs' allegations is not nearly as cogent and compelling as the opposing non-fraudulent inference—that the defendants' good faith efforts to save Lewis & Clark's business were derailed by unexpected events. *See infra* pp. 13-19.

Finally, the plaintiffs' claim for punitive damages against Mr. Elsass and Ms. Dalton must be dismissed because the complaint fails to allege any tort directed at the public-at-large, as it must to recover punitive damages under New York law. *See infra* p. 20.

For these reasons, Sanford Elsass and Donna Dalton respectfully request that the plaintiffs' claims against them be dismissed with prejudice.

BACKGROUND

This case arises from the plaintiffs' investment in Lewis & Clark LTC Risk Retention Group, Inc. ("Lewis & Clark"), an insurer of long-term-care facilities operating as a "risk retention group."[2] Defendant Uni-Ter Underwriting Management Corporation ("Uni-Ter")[3] managed Lewis and Clark's operations under a management agreement, including managing claims and placing larger risks with reinsurers. (*Id.* ¶¶ 27-28.) Mr. Elsass was Uni-Ter's president and chief executive officer. (*Id.* ¶ 16.) Ms. Dalton was its chief financial officer and chief operating officer. (*Id.* ¶ 17.) Defendant Jonna Miller was Uni-Ter's vice president for claims. (*Id.* ¶ 18.) Plaintiff Oneida Savings Bank is a sophisticated and experienced participant in the health care insurance business, including through its affiliate Bailey & Haskell Associates,

[2] In a risk retention group, policyholders form a group to provide liability coverage. (Compl. ¶ 26.) The group then retains liability for small claims and reinsures large losses. (*Id.*) The policyholders own the group's equity. (*Id.*)
[3] Uni-Ter was a wholly-owned subsidiary of defendant U.S. Re Companies, Inc. ("U.S. Re."), a closely-held reinsurance company. (*Id.* ¶ 33.) Defendant Richard Davies was U.S. Re's chief financial officer. (*Id.* ¶ 19.)

Inc., an insurance agency "with a significant presence in the health care sector." (*Id.* ¶ 35.) The remaining plaintiffs are healthcare companies that invested in Lewis & Clark. (*Id.* ¶¶ 8-12.)

Lewis & Clark's Operations. In 2004, Oneida Savings Bank and Uni-Ter formed Lewis & Clark's predecessor firm. (Compl. ¶¶ 36-37.) Oneida and the other plaintiffs each contributed capital to Lewis & Clark and appointed a representative to Lewis & Clark's board of directors. (*Id.* ¶¶ 36, 44.) Oneida then invested additional capital in Lewis & Clark in 2005. (*Id.* ¶¶ 41-42.) Under the parties' joint control, Lewis & Clark operated "successfully and profitably" until 2010. (*Id.* ¶ 47.)

Beginning in July 2009, Lewis & Clark, with the plaintiffs' knowledge, "diverg[ed] from its established business model," attempting to grow its profitable business by taking on larger policyholders than it had previously. (Compl. ¶ 48.) In particular, Lewis & Clark accepted as new policyholders two large, multi-site long-term-care operators, including one operating approximately fifty long-term care facilities. (*Id.*) These were the first large, multi-facility operators Lewis & Clark had insured. (*Id.*) While plaintiffs allege that Lewis & Clark accepted these policyholders "at Uni-Ter's direction," they do not allege (because they cannot) that Uni-Ter concealed this decision from them. (*Id.*) During the policy years from July 2009 to July 2011, these facilities submitted significant claims to Lewis & Clark. (*Id.* ¶ 51.) As a result, Lewis & Clark did not renew the facilities' coverage after July 2011. (*Id.* ¶ 52.) But the damage was done—after operating profitably from 2007 through 2010, Lewis & Clark had a losing year in 2011. (*Id.* ¶ 51.)

The September 1, 2011 Memo and the September Praxis Review. After learning of these unexpected losses, Mr. Elsass and Ms. Dalton sent a memorandum to Lewis & Clark's

board (including plaintiffs) on September 1, 2011 disclosing the losses and explaining Uni-Ter's proposed responses. (*Id.* ¶ 57.)

Among other things, Mr. Elsass and Ms. Dalton explained that Uni-Ter planned to hire a consultant to review its claims process and that the consultant's report should be available in time for an upcoming board meeting on September 21, 2011. (*Id.*) Uni-Ter hired Brian Stiefel of Praxis Claims Consulting to conduct the review. (*Id.* ¶ 61.) Mr. Stiefel reported his findings in a memo dated September 15, 2011 to Tal Piccione, U.S. Re's chief executive officer, Mr. Elsass, and Mr. Davies (the "September 15 Praxis Report"). (*Id.* ¶ 61; *see also* Ex. A.)[4]

The September 15 Praxis Report explained in detail how Praxis conducted its review. It explained that Praxis began by reviewing excerpts from a limited number of "specific claim file documents [Uni-Ter] supplied." (Ex. A at 1). Praxis then visited Uni-Ter's offices for two days to meet with Ms. Miller and other members of Uni-Ter's claims staff. (*Id.*) During its visit, Praxis only reviewed open claims that had either been discussed in its meetings with the claims staff or "identified as cases that would illustrate the current reserving methodology." (*Id.*)

As the Report clearly explained, Praxis based its review on "the pre-visit review [of the excerpts from claims files Uni-Ter supplied], as well as the on-site meetings, discussions, observations, and *limited file reviews* conducted in this two-day period." (*Id.* at 2 (emphasis

[4] References to "Ex. __" refer to exhibits to the accompanying Declaration of James J. Beha II dated September 30, 2013 (the "Beha Declaration"). The documents attached as exhibits to the Beha Declaration are all incorporated by reference in, and integral to, the complaint. For purposes of this motion to dismiss, "the Court may consider: '(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents integral to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.'" *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351, 358 (N.D.N.Y. 2013) (D'Agostino, J.) (quoting *Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt*, No. 08 Civ. 4207, 2012 WL 1038804 at *4 (E.D.N.Y. Mar. 28, 2012)).

added).) Specifically, the Praxis report based its review of Uni-Ter's claims methodology on a sample of nine claims files. (Compl. ¶ 62.)

Praxis also stated that "[a]lthough [it] felt that the observations and recommendations contained in th[e] report accurately reflect the claims handling by Uni-Ter, *a larger statistical sampling of claim files to be reviewed may be done to confirm Praxis' findings*." (Ex. A at 2 (emphasis added).)

Uni-Ter shared the September 15 Praxis Report with its directors—including plaintiffs' representatives—before the upcoming Lewis & Clark board meeting on September 21, 2011. (Compl. ¶ 61.)

The Board Meetings and Plaintiffs' Investments. As alleged in the complaint, the plaintiffs' representatives, Mr. Elsass, Ms. Dalton, Ms. Miller, and Mr. Davies all attended Lewis & Clark's board meeting on September 21, 2011. (Compl. ¶¶ 53, 58-60, 63.) At the meeting, Mr. Stiefel presented Praxis's report to the board. (*Id.* ¶ 61.) And Uni-Ter reported "the significantly increased claims reserves." (*Id.* ¶ 53.) According to the complaint, a board member asked Ms. Miller if there were any other claims developments that had not been previously reported. (*Id.* ¶ 64.) She said there were not; Mr. Elsass "agreed;" and Ms. Dalton "remained silent." (*Id.*)

At the meeting, Uni-Ter "requested . . . that the Plaintiffs . . . make additional investments in Lewis & Clark." (Compl. ¶ 56.) Uni-Ter explained that Lewis & Clark needed this additional investment "to preserve [its] good standing with the Nevada Department of Insurance, an acceptable premium-to-equity ratio, and its [financial stability] rating." (*Id.*)

On November 7, 2011, Uni-Ter's board met again by telephone to discuss the plaintiffs' potential additional investment. (Compl. ¶¶ 65-66.) According to the complaint, at

the meeting, Uni-Ter "reassured the Plaintiffs that the capital infusion . . . would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate." (*Id.* ¶ 65.) And, according to the complaint, after that meeting, the plaintiffs made their investments by purchasing $2.2 million of debentures convertible into equity interests in Lewis & Clark. (*Id.* ¶ 66-68.) When the plaintiffs purchased these debentures, Uni-Ter joined them, investing $300,000 of its own in Lewis & Clark. (*See* Ex. B.)

The Defendants' Continued Efforts to Save Lewis & Clark. Later in November, after the plaintiffs made their investments, Uni-Ter sought additional investments from its policyholders in an equity offering subject to an offering memorandum. (Compl. ¶ 82.) The offering memorandum disclosed that Lewis & Clark had suffered "significant underwriting losses in 2011." (*Id.* ¶ 84.) It also disclosed that Lewis & Clark had recently solicited and received additional capital from the plaintiffs. (*Id.*) And it stated that Lewis & Clark "expected that the net proceeds generated from [the offering] will provide additional funds for the Company to continue operations and to comply with all applicable capitalization requirements under Nevada law." (*Id.* ¶ 85.)

In late November 2011, Uni-Ter conducted an additional internal review of all of Lewis & Clark's claims reserves. (Compl. ¶ 71.) In December, following that internal review, U.S. Re directed Uni-Ter to retain Praxis to conduct a full claims review. (*Id.* ¶ 73.) In this later review, Praxis determined that claims reserves should be increased by $5 million, significantly increasing Lewis & Clark's net loss for fiscal year 2011 and decreasing Lewis & Clark's capital position to "an unacceptable level for operational, regulatory, and rating purposes." (*Id.* ¶¶ 74-75.) Praxis completed the review on Friday, December 16, 2011 and Uni-Ter shared the results with the board on the following Tuesday, December 20. (*Id.* ¶¶ 73, 92.)

Over the next several months, Uni-Ter and U.S. Re attempted to address these negative developments by, among other things, hiring additional outside experts, seeking a capital contribution from Lewis & Clark's reinsurer, and discussing a possible recapitalization with Lewis & Clark's regulators. (Compl. ¶ 94.) Uni-Ter also invested an additional $200,000 in Lewis & Clark in February 2012. (Ex. C.) Ultimately, all of these efforts failed and Lewis & Clark entered dissolution on November 11, 2012. (Compl. ¶ 96.)

* * *

On June 25, 2013, the plaintiffs filed their complaint in this action, asserting, among others, claims against Mr. Elsass and Ms. Dalton for violating Securities Exchange Act Section 10(b) and S.E.C. Rule 10b-5, common law fraud, fraudulent inducement, and negligent misrepresentation.

ARGUMENT

To sustain their fraud-based claims, the plaintiffs "must allege that the defendant[s] (1) made misstatements or omissions of material fact, (2) with scienter, (3) in connection with the purchase or sale of securities, (4) upon which plaintiff[s] relied, and (5) that the plaintiff[s'] reliance was the proximate cause of [their] injury."[5] *Local No. 38 Int'l Bd. of Elec. Workers Pension Fund v. Am. Exp. Co.*, 724 F. Supp. 2d 447, 458 (S.D.N.Y. 2010) (quoting *ATSI Commc'ns v. The SHAAR Fund, Ltd.*, 493 F.3d 87, 105 (2d Cir. 2007)). And to sustain their negligent misrepresentation claim, the plaintiffs must allege that: "(1) the defendant[s] had a duty, as a result of a special relationship, to give correct information; (2) the defendant[s] made a false representation that [they] should have known was incorrect; (3) the information supplied in the representation was known by the defendant[s] to be desired by the

[5] "The elements of fraud under New York law and Section 10(b) are essentially the same." *Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311, 322 (N.D.N.Y. 1997) *aff'd*, 162 F.3d 1148 (2d Cir. 1998) (*citing Fruchtman v. First Edition Composite Holdings Inc.*, No. 89 Civ. 7058, 1991 WL 238273, at *4 (S.D.N.Y. Nov. 6, 1991)).

plaintiff[s] for a serious purpose; (4) the plaintiff[s] intended to rely and act upon it; and (5) the plaintiff[s] reasonably relied on it to [their] detriment." *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). Finally, to recover punitive damages from Mr. Elsass and Ms. Dalton, the plaintiffs must allege that Mr. Elsass and Ms. Dalton committed an "egregious tort directed at the public at large." *Cross v. Toyota Motor Corp.*, No. 10 Civ. 1179, 2011 WL 2222350, at *2 (N.D.N.Y. June 7, 2011) (quoting *Steinhardt*, 272 A.D.2d at 257).

The plaintiffs' claims against Mr. Elsass and Ms. Dalton fail to identify any misstatement with adequate particularity or to properly explain why any such statements were false when made. The plaintiffs' fraud claims also fail to allege facts giving rise to a cogent and compelling inference that Mr. Elsass or Ms. Dalton intentionally deceived them. Finally, the plaintiffs fail to allege any conduct directed to the public-at-large. As a result, the complaint fails to state a claim against either Mr. Elsass or Ms. Dalton and must be dismissed.

I. THE PLAINTIFFS FAIL TO ALLEGE A MISSTATEMENT.

A. The Plaintiffs Fail to Identify Any Alleged Misstatements with Particularity

To satisfy Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (quotation marks omitted). In short, Rule 9(b) requires the plaintiffs to allege the "who, what, where, [and] when" of the alleged misstatements.[6] *In re Refco, Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 527 (S.D.N.Y. 2011).

[6] Because the complaint sounds in fraud, Rule 9(b) governs plaintiffs' negligent misrepresentation claim as well as their fraud claims. *See CAC Group, Inc. v. Maxim Group, LLC*, No. 12 Civ. 5901, 2012 WL 4857518, at *5 (S.D.N.Y. Oct. 10, 2012), *aff'd,* No. 12-4381-cv, 2013 WL 1831672 (2d Cir. May 2, 2013) ("[f]ederal courts considering claims for negligent misrepresentation under . . . New York . . . law[ ] require such claims be pled with particularity under Rule 9(b)" (citing *Aetna Cas. & Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 583 (2d Cir. 2005)).

Rather than identify *who* made the alleged misstatement, however, the complaint repeatedly and generally refers to alleged misstatements made by "Uni-Ter" or the "defendants." (*See, e.g.,* Compl. ¶¶ 101-07, 112-17, 119-25, 127-32, 134-38, 141-47, 149.) But "the individual defendants . . . must have *actually "made" the statements* . . . to be held liable under Section 10(b)." *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012) (emphasis added) (dismissing securities fraud claims against individual defendants for failure to plead that they actually made any misstatement). Accordingly, "circumstances amounting to fraud [must] be pleaded *as to each individual defendant*, and not premised on guilt by association." *Sheppard v. Manhattan Club Timeshare Ass'n*, No. 11 Civ. 4362, 2012 WL 1890388, at *5 (S.D.N.Y. May 23, 2012) (emphasis added). Plaintiffs' generic references to statements made by "Uni-Ter" or the "defendants" do not meet this burden and cannot support plaintiffs' claim against Mr. Elsass or Ms. Dalton.

And rather than identify *what* was actually said, the plaintiffs make vague allegations that the defendants "represented" certain facts to them and "informed," "assur[ed]," "reassured," "g[a]ve [them] comfort" about, or "led them to believe" others. (*See, e.g.,* Compl. ¶¶ 53, 55, 65, 66, 76.) But Rule 9(b) requires the plaintiffs to allege "*what was said* . . . as opposed to the mere gist." *Watson v. Consol. Edison of N.Y.*, 594 F. Supp. 2d 399, 409 (S.D.N.Y. 2009) (*quoting Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275–76 (2d Cir. 1998)).

Similarly, the plaintiffs allege that at the board meeting on September 21, Mr. Elsass "agreed" and Ms. Dalton "remained silent" when Ms. Miller allegedly said there were no claims developments not previously reported. (Compl. ¶ 64.) Plaintiffs do not allege that Ms. Miller's statement was false or that Mr. Elsass or Ms. Dalton knew it was false. But even if they

had alleged a misstatement *by Ms. Miller*, the plaintiffs fail to allege what, if anything, Mr. Elsass actually *said* to express this supposed agreement. Vague allegations about Mr. Elsass's supposed agreement are not sufficient to state a fraud claim. And the allegation of Ms. Dalton's silence fails, as well, because—again even if plaintiffs had properly alleged a misstatement by Ms. Miller—Ms. Dalton had no duty to correct Ms. Miller's supposed misstatement. The law is clear that "[a] party has no duty to correct statements not attributable to it." *In re Bristol-Myers Squibb Sec. Lit.*, 312 F. Supp. 2d 549, 560 (S.D.N.Y. 2004); *see also Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012) (no duty to correct another's misstatement because "each party is only liable for their own omissions as well"); *Fulton Cnty. Employees Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051-52 (7th Cir. 2012) (dismissing securities fraud claim based on alleged failure to correct and noting that "no statute or rule creates such a duty [to correct another's misstatement]").

B. The Plaintiffs Fail to Explain Why Any Alleged Misstatement Was False

Rule 9(b) also requires the plaintiffs to "state with particularity 'in what respects the statements at issue were false.'" *Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 570 (S.D.N.Y. 2009) (quoting *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 812 (2d Cir. 1996)). To meet this burden, plaintiffs "must do more than say that the statements . . . were false and misleading; they must demonstrate with specificity why and how that is so." *Rombach*, 355 F.3d at 174. They fail to do so.

First, according to the plaintiffs, Uni-Ter "led [the board] to believe" that Praxis's September 15 Report "represented a complete review of the claims process" and "a full review of the amounts reserved for each claim." (Compl. ¶¶ 76-77.) But no defendant ever said that. And the plaintiffs do not allege that they did. In fact, the plaintiffs acknowledge that they received the same September 15 report the defendants received. (*Id.* ¶ 61.) That report