IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO SILVA, AN INDIVIDUAL,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARIA A. GALL, DISTRICT JUDGE,
Respondents,

and

ED CLAY, AN INDIVIDUAL; SCOTT NELSON, AN INDIVIDUAL; DEDDRICK PERRY, AN INDIVIDUAL; AND CPI MANAGEMENT GROUP, LLC
Real Parties in Interest.

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Case No. 91228

Original Writ Proceeding from the Eighth Judicial District Court, Case No. A-25-909767-B

REAL PARTIES IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that none of the Real Parties in Interest named herein are persons or entities described in NRAP 26.1(a) and no disclosure statement is required.

CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,704 words.

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

Dated this 5th day of November 2025.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Exercising its sound discretion, the District Court correctly determined that the Business Judgment Rule is the applicable standard of review to assess whether a member of a limited liability company has breached fiduciary duties imposed by the company's governing documents. The Business Judgment Rule's application to limited liability companies is firmly grounded in longstanding, fundamental principles of business law existing in the common law and consistent with Nevada's position as a leader in the development of business law. In light of these considerations, the District Court's decision was not made in error, and Silva's Petition must be denied.

Contrary to Silva's mischaracterization, the District Court did not substitute its policy preferences for the Legislature's. The Business Judgment Rule is a well-established judicial doctrine that creates a judicially created presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Shoen v. SAC Holding Corp*., 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006) (citations omitted), *abrogated on other grounds by Guzman v. Johnson,* 137 Nev. 126, 483 P.3d 531, (2021). For centuries, the common law has recognized the Business Judgment Rule to limit judicial involvement in the internal management of business affairs. Its application to limited liability companies is

entirely consistent with the same principles justifying its application to corporations and other business entities. Furthermore, as reflected by this Court's prior decisions and the legislative history of Nevada's business statutes, application of the Business Judgment Rule to limited liability companies is entirely consistent with Nevada law and legislative policy.

Moreover, examining the application of the alter ego in *Gardner,* this Court previously rejected Silva's contention that codification of a judicial doctrine within corporate statutes precludes application of that doctrine to limited liability companies under the common law. *Gardner v. Eighth Judicial Dist. Court,* 133 Nev. 730, 736, 405 P.3d 651, 656 (2017). Based on its analysis of Nevada's legislative history and law in other jurisdictions, this Court conclusively determined that the judicially created alter ego doctrine is applicable to limited liability companies despite its codification in the corporate statutes. *Id.* The same reasoning applies here. Consideration of precedent interpreting the Business Judgment Rule, in conjunction with the same legislative history analyzed by this Court in *Gardner*, makes clear that codification of the Business Judgment Rule in Nevada's corporate statutes does not preclude its application to limited liability companies.

The District Court conducted a comprehensive review of CPI's Operating Agreement (the "Operating Agreement") and correctly applied the Business Judgment Rule to Silva's claims arising from the fiduciary duties of loyalty, care,

and good faith and fair dealing set forth therein. Drawing upon scholarly sources and decisions from other jurisdictions applying the Business Judgment Rule to limited liability companies, the District Court correctly concluded that the imposition of fiduciary duties on members of a limited liability company also incorporates the Business Judgment Rule. Otherwise, courts would be compelled to "substitute their own notions of what is or is not sound business judgment." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 133 Nev. 369, 378, 399 P.3d 334, 344 (2017). Silva's semantic distinctions between a corporate "duty of care" and "standard of care," as well as his superficial comparisons to other fiduciary relationships, are immaterial to the Business Judgment Rule's applicability to limited liability companies.

The District Court's application of the Business Judgment Rule is supported by both the common law and Nevada's business statutes, not precluded by statutory codification, and consistent with the corporate fiduciary duties imposed by CPI's Operating Agreement. Accordingly, the District Court did not err, and Silva's Petition should be denied.

II. STATEMENT OF RELEVANT FACTS

Prior to filing the instant Writ, Silva filed his Second Amended Verified Complaint ("SAVC") in the District Court, reducing the sixteen (16) causes of action originally asserted in his First Amended Verified Complaint ("FAVC"), several of

which survived the Motion to Dismiss, to just four (4). *Pet'r App'x Vol. I (hereinafter, "App'x I"),* PA052-078. For reasons unknown, Silva did not include the SAVC in his Appendix. Nevertheless, Silva's SAVC superseded the FAVC and became the operative pleading in the case. *See Randono v. Ballow*, 100 Nev. 142, 143, 676 P.2d 807, 808 (1984). Therefore, the irrelevant, baseless, and insufficiently pled allegations contained in the FAVC, and reiterated by Silva in the instant Petition, are no longer operative.

As Silva acknowledges, the present Petition raises a purely legal issue: whether the Business Judgment Rule applies to claims for breach of fiduciary duty imposed on members by the governing documents of a limited liability company. *Pet. for Writ of Mandamus ("Pet."),* at 11. As such, only a handful of the superseded allegations contained in Silva's FAVC and identified herein are relevant to the legal question before this Court.

In 2021, Real Parties in Interest Ed Clay, Scott Nelson, and Deddrick Perry formed CPI Management Group, LLC, a Nevada limited liability company ("CPI"), and granted Silva a 25% membership interest. *App'x I,* PA064-65. Articles 6.1, 6.2, and 6.3 of CPI's Operating Agreement expressly impose fiduciary duties of loyalty, care, and good faith and fair dealing on each Member. *Id.*, PA093-94.

In his FAVC, Silva asserted claims for breach of the fiduciary duty of loyalty, breach of the fiduciary duty of care, as well as breach of an unspecified fiduciary

duty purportedly arising under the Operating Agreement. *Id.*, PA067-70. Real Parties in Interest, Clay, Nelson, and Perry, moved to dismiss these fiduciary duty claims on the grounds that Silva failed to allege particularized facts sufficient to overcome the presumption afforded by the Business Judgment Rule. *Id.*, PA126-31.

The District Court agreed in part, finding that, by adopting fiduciary duties in CPI's Operating Agreement, the Members also incorporated the Business Judgment Rule as the governing standard of review to assess alleged breaches of those duties. *Pet'r App'x Vol. III (hereinafter, "App'x III")*, PA333. However, the District Court declined to extend the exculpatory provision applicable to corporations under NRS 78.138(7) and held that Silva was not required to allege particularized facts demonstrating intentional misconduct, fraud, or a knowing violation of the law by the members. *Id.*, PA336.

The District Court applied the Business Judgment Rule in assessing each of Silva's fiduciary breach claims, finding that Silva alleged sufficient particularized facts to rebut the Business Judgment Rule as to his breach of loyalty claim, but not as to his claim for breach of the duty of care.[1] *Id.*, PA337-41. The Notice of Entry of

[1] Based on the allegations in the FAVC and Silva's arguments in opposition to Real Parties in Interest's Motion to Dismiss, the District Court found that Silva's claim for breach of fiduciary duty was in reality a breach of the implied covenant of good faith and fair dealing. *App'x III*, PA340-41. Thus, the District Court dismissed Silva's claim as duplicative without reaching the Business Judgment Rule. *Id.*

the District Court's decision was filed on August 1, 2025, prompting Silva to file the instant Petition for Writ of Mandamus. *Id.*, PA384.

III. LEGAL ARGUMENT

A. SILVA HAS AN ADEQUATE AND SPEEDY LEGAL REMEDY AND EXTRAORDINARY WRIT RELIEF IS NOT WARRANTED.

Mandamus is an extraordinary remedy and generally, a writ may issue only when the petitioner has no other plain, adequate, and speedy legal remedy. *State ex rel. Masto v. Second Judicial Dist. Ct.,* 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009). While writ relief may also be available when a petition "presents an opportunity to clarify an important issue of law" if doing so "serves judicial economy," neither basis for writ relief is present here as Silva's ability to challenge the District Court's decision on appeal from final judgment generally precludes the availability of writ relief. *Pan v. Dist. Ct.,* 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

Moreover, while the application of the Business Judgment Rule to fiduciary duties imposed on limited liability company members has not yet been addressed by this Court, as described in more detail herein, the question of its applicability rarely arises given the lack of statutorily imposed fiduciary duties under Nevada law. Silva has failed to establish that extraordinary relief is appropriate, warranting denial of his Petition.

B. THE DISTRICT COURT'S DECISION TO APPLY THE BUSINESS JUDGMENT RULE TO CLAIMS FOR BREACH OF FIDUCIARY DUTIES AGAINST MEMBERS OF A LIMITED LIABILITY COMPANY IS SUPPORTED BY COMMON LAW AND NEVADA STATUTES.

Contrary to Silva's assertion, the Business Judgment Rule is not "a term of art referring to a trio of statutory presumptions," but a long-standing, judicially created doctrine establishing a presumption that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Shoen,* 122 Nev. at 632. The Business Judgment Rule has served as a cornerstone of corporate governance in the common law for centuries, and Nevada recognized the presumption as early as 1958. *See Foster v. Arata,* 74 Nev. 143, 154, 325 P.2d 759, 764 (1958) ("The directors of a company still are the agents and trustees of a corporation, and...until it is shown otherwise there is a presumption that their acts were honest and in the best interests of the company"); *see also Gries Sports Enters. v. Cleveland Browns Football Co*., 26 Ohio St. 3d 15, 19-20, 496 N.E.2d 959, 963-64 (1986).[2]

Silva's assertion that the District Court's decision "trampled" Nevada's constitutional separation of powers rests on a distorted reading of the District Court's

[2] The Real Parties in Interest, like the District Court below, cite to *Gries* merely to highlight the long history of the Business Judgment Rule in the common law. Thus, Silva's argument that *Gries* applies only to the Business Judgment Rule in the context of corporations is not relevant. *Pet.* at 21-22.

order. Specifically, Silva asserts the District Court stated "there is 'no reason why [Nevada] should or would not [codify the Business Judgment Rule] for LLCs.'" *Pet.,* at 13. This mischaracterization is both misleading and inaccurate. *App'x III,* PA335. In reality, the District Court found there was no reason Nevada would not recognize the application of the Business Judgment Rule to limited liability companies **under the common law**. *Id.*

Appreciating the Business Judgment Rule's purpose and historical foundation in common law, the District Court properly applied the Business Judgment Rule to Silva's claims for breach of the fiduciary duties imposed by CPI's Operating Agreement. *Id.* The District Court's decision is consistent with established principles of corporate governance in the common law and harmonizes with Nevada's statutory framework governing business entities.

1. The District Court's Decision Correctly Relied on Foundational Principles of Corporate Governance Found in the Common Law.

Pursuant to NRS 1.030, the common law serves as the "rule of decision in all the courts of [Nevada]" in so far as it does not conflict with federal or state law. The Business Judgment Rule, a fundamental principle of corporate governance long recognized under Nevada law, presumes that fiduciary decision-makers act "honest[ly] and in the best interests of the company." *Foster,* 74 Nev. at 154. Accordingly, the District Court's application of the Business Judgment Rule to

limited liability companies under the common law is grounded in Nevada precedent and consistent with established legal principles.

The Business Judgment Rule is "designed to limit judicial involvement in business decision-making" and "prevents courts from substituting their own notions of what is or is not sound business judgment." *Wynn,* 133 Nev. at 376-378. This Court has not yet addressed whether the Business Judgment Rule applies to legal claims for breach of fiduciary duties asserted against members of a limited liability company, likely because "one of the most compelling reasons" to choose a limited liability company over a corporate structure is the minimization or elimination of corporate fiduciary duties. Lawrence J. Feller, *LLCs Provide Tax, Liability, and Other Benefits for Developers,* 25 J. TAX'N INV. 65, 72 (2008). However, as the District Court correctly observed, where a limited liability company's operating agreement expressly imposes fiduciary duties akin to those recognized in corporate law on its members, the Business Judgment Rule provides the appropriate standard for evaluating alleged breaches of those corporate duties. *App'x III,* PA334.

Applying the Business Judgment Rule in this context is entirely consistent with the Rule's common-law rationale. The Business Judgment Rule reflects the recognition that "judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information." *Brehm v. Eisner,* 746 A.2d 244,

263 (Del. 2000). As the District Court explained, the absence of the Business Judgment Rule would leave factfinders to determine in hindsight[3] and without particularized expertise whether the complained of transaction "could have gone better.". *App'x III,* PA334-35. In turn, this would discourage reasonable risk-taking and impede business, inviting courts to "step in the place of business fiduciaries and second-guess decisions made by those who are better positioned to act on behalf of the company" at any member's request. *Id.*, PA335 (citing *Wynn Resorts,* 133 Nev. at 378); *see also Resolution TrustCorp. v. Blasdell,* 930 F. Supp. 2d 417, 423 (D. Ariz. 1994); *Air Line Pilots Ass'n. Int'l v. UAL Corp*., 717 F. Supp. 575, 582 (N.D. Ill. 1989).

Nevada courts have likewise recognized that these same purposes and rationale underlying application of the Business Judgment Rule to corporations likewise extend to limited liability companies. For instance, in *Schreck v. Babcock,* the Nevada district court dismissed a limited liability member's claim for breach of fiduciary duties, finding that generalized allegations of mismanagement were insufficient to overcome the Business Judgment Rule's presumptions. *Schreck v.*

[3] Notably, empirical studies have found that legal professionals more negatively judge a director's actions and perceive a corporate disaster such as a bankruptcy as significantly more foreseeable when evaluated in hindsight. Niek Strohmaier, et. al, *Hindsight bias and outcome bias in judging directors' liability and the role of free will beliefs,* 51 J. APPLIED SOC. PSYCH. 141 (2020). An examination of judges likewise found that knowing the outcome of a case significantly affected judges' assessments of which outcome was most likely. Chris Guthrie, et al, *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 802 (2001).

Babcock, No. A-593059-B, 2013 Nev. Dist. LEXIS 412, at *7-8 (Nev. Dist. Ct. Aug. 19, 2013). In reaching its decision, the court found that "application of [the Business Judgment Rule] to limited liability companies is not unusual." *Id.* Similarly, in *Montgomery v. eTreppid Techs., LLC,* a Nevada federal district court recognized that "federal and state courts have consistently applied the law of corporations to LLCs, including for the purposes of piercing the corporate veil, the alter ego doctrine, determining standing, *the business judgment rule,* and derivative actions." *Montgomery v. eTreppid Techs., LLC,* 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008) (emphasis added).

In addition, courts in numerous other jurisdictions have recognized that the common law Business Judgment Rule applies equally to limited liability companies, including the following eight states:

- California; *See Tuli v. Specialty Surgical Center of Thousand Oaks, LLC*, 105 Cal. App. 5th 997, 998 (2024) ("The Business Judgment Rule applies to limited liability companies as well as corporations");
- Colorado; *See, e.g., Gagne v. Gagne*, 459 P.3d 686, 693 (Colo. App. 2019) (applying the Business Judgment Rule to claims against a limited liability company member); *Alarcon v. Latimer*, No. 2020CV31074, 2023 Colo. Dist. LEXIS 905, *21 (Colo. Dist. Ct. Dec. 28, 2023);

- Delaware; *See, e.g., Bakerman v. Sidney Frank Importing Co.,* 2006 Del. Ch. LEXIS 180, at *28 (Del. Ch. Oct. 10, 2006) (“Absent particularized allegations to the contrary, the managers of an LLC are presumed to have acted on an informed basis and in the honest belief that the decisions were in furtherance of the best interests of the LLC and its members”); *Minn. Invco of RSA # 7, Inc. v. Midwest Wireless Holdings, LLC*, 903 A.2d 786, 797 (Del. Ch. 2006) (applying the Business Judgment Rule to a limited liability company);
- New York; *See, e.g., Bai Wen v. N.Y.C. Reg'l Ctr., LLC*, 695 F. Supp. 3d 517, 546 (S.D.N.Y. 2023) (“Although the [Business Judgment Rule] originated in suits against corporate directors, it also protects the managers of LLCs");
- North Carolina; *See, e.g., Mooring Capital Fund, LLC v. Comstock N.C., LLC*, 2009 NCBC 26, 30 (2009) (holding the Business Judgment Rule applies to limited liability companies as a matter of common law in North Carolina);
- Wisconsin; *Pinnacle Labs, LLC v. Goldberg*, No. 07-C-196-S, 2007 U.S. Dist. LEXIS 65620, *11 (W.D. Wis. Sept. 5, 2007) (applying the Business Judgment Rule to a limited liability company);
- Oregon; *HLHZ Invs., LLC v. Plaid Pantries, Inc*., No. 06-797-KI, 2007 U.S. Dist. LEXIS 78817, *50 (D. Or. Oct. 23, 2007) (holding the Business

Judgment Rule applies to limited liability companies)[4]; *Bernards v. Summit Real Estate Mgmt.*, 213 P.3d 1, 7 (Or. Ct. App. 2009) (dismissing complaint against members of Oregon limited liability company for failure to rebut the Business Judgment Rule);

- and South Dakota; *See Expansion Capital Group v. Patterson*, 514 F. Supp. 3d 1095, 1113 (S.D. 2021) (holding the Business Judgment Rule applies to limited liability companies under South Dakota common law).

Notably, the North Carolina Court of Appeals emphasized the importance of the Business Judgment Rule's long tradition in the common law, holding that codification of the Business Judgment Rule "does not abrogate the common law of the business judgment rule" for any business entity, including corporations. *State ex rel. Long v. ILA Corp.*, 513 S.E. 2d 812, 821 (N.C. App. 1999).

This broad and consistent body of authority throughout the country confirms that the District Court's application of the Business Judgment Rule to limited liability companies under Nevada law is firmly supported by common-law tradition, persuasive precedent, and sound policy. Therefore, the District Court's decision to

[4] On reconsideration, the Oregon District Court reversed summary judgment on the plaintiff's breach of fiduciary duty claim, finding that questions of fact remained in the record as to whether evidence in the record of that case rebutted the Business Judgment Rule. *HLHZ Invs., LLC v. Plaid Pantries, Inc*., No. 06-797-KI, 2007 U.S. Dist. LEXIS 86863, *2-3 (D. Or. Nov. 21, 2007). Contrary to Silva's assertions, the Oregon District Court did not revisit its finding that the Business Judgment Rule is generally applicable to limited liability companies under Oregon law.

apply the Business Judgment Rule to Silva's claims for breach of fiduciary duties was sound.

2. Application of the Business Judgment Rule to Claims for Breach of Fiduciary Duties Against Members of a Limited Liability Company Is Consistent with Nevada's Statutory Framework Governing Business Entities.

Although the District Court merely applied the common law Business Judgment Rule to limited liability companies, Silva's contention that the District Court "substitute[d] its own policy preferences for the Legislature's" is unfounded when viewed in light of Nevada's comprehensive statutory framework governing business entities. *Pet.*, at 13. The legislative history of Nevada's business statutes confirms that application of the Business Judgment Rule to limited liability companies is entirely consistent with legislative intent. Accordingly, Silva's assertion that the District Court violated Nevada's constitutional separation of powers is erroneous.

The legislative history of NRS 78.138(3) demonstrates that the Business Judgment Rule was codified to preserve its established common law protections. During hearings on Senate Bill 61, the Legislature made clear that the statute was enacted in response to a federal district court decision, *Hilton Hotel Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997), which had imposed a higher duty on directors exclusively in corporate takeover situations. Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Feb. 3, 1999). In *Hilton*, the federal district court held that the Business Judgment Rule applied only in takeover situations where

a corporation could first prove certain facts concerning a genuine threat to corporate policy and effectiveness. *Hilton,* 978 F.Supp. 1342, 1347 (D. Nev. 1997). The Nevada Legislature rejected this heightened standard and codified the Business Judgment Rule through enactment NRS 78.138(3) to ensure its full protection would extend to all business decisions, including those made in takeover situations. Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Feb. 3, 1999).

In the years following the enactment of NRS 78.138(3), the Nevada Legislature has consistently expanded the Business Judgment Rule's protections to encourage business formation within the State. *See* Hearing on S.B. 577 Before the S. Judiciary Comm., 71st Leg. (Nev., May 22, 2001) (discussing the purpose of the exculpatory provision found in NRS 78.138(7)). The sponsor of S.B. 577 explained that NRS 78.138(7) was designed to protect directors from post hoc litigation by disgruntled shareholders "questioning, after the fact, the business judgment involved in his decision"—precisely the rationale underpinning the common law Business Judgment Rule. *Id.*; *see also Wynn Resorts, Ltd.,* 133 Nev. at 376-378.

The Legislative record further reflects that the addition of NRS 78.138(7) "merely clarifie[d]" the already existing law, codifying the longstanding common law protections provided by the Business Judgment Rule. Hearing on S.B. 577 Before the S. Judiciary Comm., 71st Leg. (Nev., May 22, 2001). The drafters of S.B. 577 emphasized that codification of the liability protections offered to corporate

directors under the Business Judgment Rule would "add a new level of predictability to Nevada's corporate statutes" and "make Nevada a more attractive place in which to domicile a business entity." *Id.*; Hearing on S.B. 577 Before the Assemb. Judiciary Comm., 71st Leg. (Nev., May 30, 2001).

The Legislature's treatment of limited liability companies in enacting NRS Chapter 86 reflects the same underlying policy objectives and intent to make Nevada "a more favorable place to conduct business" and "to attract new business into the state." Hearing on A.B. 655 Before a J. S. and Assemb. Comm. on Judiciary, 66th Leg. (Nev., May 7, 1991). These legislative purposes mirror those that led to the codification and expansion of the Business Judgment Rule in NRS Chapter 78, and support the District Court's finding that the Business Judgment Rule applies to limited liability companies.

Thus, while the limited liability company statutes do not explicitly codify the Business Judgment Rule, Nevada's legislative history makes clear that codification of the Business Judgment Rule in NRS Chapter 78 was intended merely as an acknowledgment of, not a departure from, the established common law rule. The Legislature's recognition of the common law Business Judgment Rule, together with the uniform purposes underlying the creation of the limited liability company and codification of the Business Judgment Rule, demonstrate that applying the Business Judgment Rule to limited liability companies is fully consistent with Nevada's

statutory scheme and legislative policy. Thus, the District Court's decision to apply the Business Judgment Rule to Silva's claims for breach of fiduciary duties comports with Nevada law and the Legislature's long-standing pro-business intent.

C. CODIFICATION OF THE BUSINESS JUDGMENT RULE IN THE CORPORATE STATUTES DOES NOT PRECLUDE ITS APPLICATION TO LIMITED LIABILITY COMPANIES.

Silva's argument that the codification of the Business Judgment Rule in Nevada's corporate statutes precludes application of the common law Business Judgment Rule to limited liability companies by negative inference is inconsistent with this Court's prior rulings. *See Gardner,* 133 Nev. at 736. In *Gardner*, this Court examined the legislative history of Nevada's business statutes and authority from other jurisdictions, concluding that codification of the alter ego doctrine within the corporate statutes did not "by omission, preclud[e] the application of the alter ego doctrine to LLCs." *Id*. Consistent with *Gardner*, the mere absence of the Business Judgment Rule from the limited liability company statutes does not preclude its application under the common law.

Accordingly, Silva's argument that NRS 78.138(3)'s enactment somehow bars application of the Business Judgment Rule in this matter is unsupported and inconsistent with this Court's reasoning in *Gardner*. The District Court's application of the common law Business Judgment Rule was therefore proper.

1. Under *Gardner*, the Legislature's Codification of a Judicially Created Doctrine in the Corporate Statutes Does Not Create a

Negative Inference Regarding Its Applicability to Limited Liability Companies.

In *Gardner,* this Court held that a plaintiff may pierce the corporate veil and assert claims against the members of a limited liability company individually under the common law theory of alter ego liability. *Id.* at 653. Like Silva in this case, the defendant in *Gardner* argued that the codification of the alter ego doctrine within Nevada's corporate statutes, combined with the absence of a similar provision in the limited liability company statutes, created "a negative inference that the Nevada legislature did not intend for [the alter ego doctrine] to apply to limited liability companies." Answer to Pet. for Writ of Mandamus, *Gardner v. Eighth Judicial Dist. Court*, 133 Nev. 730 (2017) (No. 70823), at 9. The district court agreed with the defendant's position, holding that the plaintiffs could not amend their complaint to assert claims against the members individually because the alter ego doctrine was not applicable to limited liability companies under Nevada law. *Gardner,* 133 Nev. at 733.

Upon review of the *Gardner* plaintiffs' writ petition, this Court undertook an extensive analysis of both Nevada's statutory framework and authority from other jurisdictions. *Id.* In doing so, it found that courts nationwide have consistently applied the alter ego doctrine to limited liability companies even in the absence of an express statutory provision. *Id.* at 735 (citing *BLD Prods. v. Tech. Plastics of Or., LLC,* No. 05-556-KI, 2006 U.S. Dist. LEXIS 89874, 2006 WL 3628062, at *3 (D.

Or. Dec. 11, 2006); *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 889 N.E.2d 671, 678, 321 Ill. Dec. 406 (III. App. Ct. 2008); *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 467-69 (Ky. Ct. App. 2012); and *Bottom Line Equip., LLC v. BZ Equip., LLC*, 60 So. 3d 632, 636 (La. Ct. App. 2011)).

This Court also noted that Nevada state and federal courts had either explicitly determined or implicitly assumed that the alter ego doctrine applies to limited liability companies under Nevada law. *Id.* at 735-36 (citing *Webb v. Shull*, 128 Nev. 85, 92 n.3, 270 P.3d 1266, 1271 n.3 (2012); *Volvo Constr. Equip. Rents, Inc. v. NRL Rentals, LLC*, 614 Fed. Appx. 876, 878 n.l, 880 (9th Cir. 2015); *Pharmaplast S.A.E. v. Zeus Med. Holdings, LLC*, No. 2:15-cv-002432-JAD-PAL, 2017 U.S. Dist. LEXIS 36227, 2017 WL 985646, at *3 (D. Nev. Mar. 14, 2017); and *In re Giampietro*, 317 B.R. 841, 846 (Bankr. D. Nev. 2004)). The *Gardner* Court further cited with approval the federal district court's reasoning in *Montgomery v. eTreppid Techs., LLC*, which recognized that common law principles governing corporations, including alter ego and the Business Judgment Rule, generally apply to limited liability companies. *Id.* at 735 (citing *Montgomery*, 548 F. Supp. 2d 1175, 1181 (D. Nev. 2008)).

Turning to Nevada's legislative history, the *Gardner* Court expressly held that the Legislature's codification of the judicially created alter ego doctrine in NRS Chapter 78 did not preclude its application to limited liability companies. *Id.* at 736. The Court recognized that, in enacting Nevada's limited liability company statutes,

the Legislature contemplated that limited liability companies would be subject to the same judicially developed doctrines applicable to corporations. *Id.* (citing Hearing on A.B, 655 Before the Assemb. Judiciary Comm., 66th Leg. (Nev., May 21, 1991)). The *Gardner* Court further observed that nothing in the legislative record indicated "that the Legislature was considering the LLC statutes" when it codified the alter ego doctrine, nor "that it intended, by negative-implication, to apply the alter ego doctrine to corporations but not limited liability companies." *Id.* (citing Hearing on S.B. 577 Before the S. Judiciary Comm., 71st Leg. (Nev., May 22, 2001); Hearing on S.B. 577 Before the S. Judiciary Comm., 71st Leg. (Nev., May 25, 2001); Hearing on S.B. 577 Before the Assemb. Judiciary Comm., 71st Leg. (Nev., May 30, 2001)).

Based on its comprehensive analysis of case law and legislative history, the *Gardner* Court conclusively determined that the judicially created alter ego doctrine applies to limited liability companies notwithstanding its codification in the corporate statutes. *Id.* In doing so, *Gardner* firmly established that the codification of a judicially created common law doctrine pertaining to corporations does not, as Silva argues, prohibit its application to limited liability companies under Nevada law. *Id.*

2. Application of the Business Judgment Rule to Claims for Breach of Fiduciary Duty Against Members of a Limited Liability Company Is Appropriate Under *Gardner*.

As with the alter ego doctrine, application of the common law Business

Judgment Rule to limited liability companies is consistent with both the legislative history of Nevada's business statutes and persuasive authority from other jurisdictions. By examining decisions from other courts applying of the Business Judgment Rule to limited liability companies, together with the very same legislative history analyzed by this Court in *Gardner*, it is apparent that the codification of the Business Judgment Rule in Nevada's corporate statutes does not preclude its application to limited liability companies.

As with alter ego, courts across the country have consistently applied the Business Judgment Rule to limited liability companies, even in the absence of an express statutory provision. *See*, *e.g., Bakerman,* 2006 Del. Ch. LEXIS 180, at *28; *Minn. Invco of RSA # 7,* 903 A.2d at 797; *Pinnacle Labs,* 2007 U.S. Dist. LEXIS 65620, at *11; *HLHZ,* 2007 U.S. Dist. LEXIS 78817, at *50; *Bernards*, 213 P.3d at 7; *Mooring Capital*, 2009 NCBC at 30; *Gagne,* 459 P.3d at 693; 2023 Colo. Dist. LEXIS 905, at *21; *Expansion Capital Group,* 514 F. Supp. 3d at 1113; *Bai Wen*, 695 F. Supp. 3d at 546; *Tuli*, 105 Cal. App. 5th at 998. Significantly, courts in Wisconsin, Oregon, North Carolina, and California applied to Business Judgment Rule to limited liability companies even where their legislatures had codified the Business Judgment Rule as to corporations, rejecting the notion that codification precludes the Rule's reach to other entity forms. *Id.*

Likewise, courts in Nevada have reached the same conclusion. *See Schreck,* 2013 Nev. Dist. LEXIS 412, at *7-8; *Montgomery*, 548 F. Supp. 2d at 1183. Cited with approval by this Court in *Gardner*, the *Montgomery* Court found that "federal and state courts have consistently applied the law of corporations to LLCs, including for the purposes of piercing the corporate veil, the 'alter ego' doctrine, determining standing, ***the 'business judgment rule,'*** and derivative actions." 548 F. Supp. 2d at 1183. Thus, application the Business Judgment Rule to limited liability companies under Nevada law is fully supported by the *Gardner* Court's analysis regarding the alter ego doctrine.

The legislative history of Nevada's business statutes further supports this conclusion. As with alter ego, the Legislature did not intend to create a negative inference concerning the Business Judgment Rule's applicability to limited liability companies. In fact, at the same legislative hearing relied upon by this Court in *Gardner*, the drafter of Nevada's limited liability company statutes stated that the intent of AB 655 was to create "[e]qual protections for limited liability companies and corporations." Hearing on A.B, 655 Before the Assemb. Judiciary Comm., 66th Leg. (Nev., May 21, 1991). Moreover, as explained above, the legislative history clearly demonstrates that codification of the Business Judgment Rule in NRS 78.138(3) was undertaken merely to confirm its applicability in "take-over

situations," not to preclude its reach to other types of business entities. Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Feb. 3, 1999).

Furthermore, as this Court found with the alter ego doctrine in *Gardner*, there is no indication whatsoever in the legislative history that the Legislature "intended, by negative implication," to restrict the Business Judgment Rule's application solely to corporations but not limited liability companies. *Gardner,* 133 Nev. at 734-36; *see also,* Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Feb. 3, 1999); Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Mar. 22, 1999); Hearing on S.B. 61 Before the S. Judiciary Comm., 70th Leg. (Nev., Apr. 27, 1999).

Like the alter ego doctrine, the Business Judgment Rule is a judicially created common law doctrine that the Legislature later codified in the corporation statutes without expressly considering its application to limited liability companies. The widespread application of the Business Judgment Rule to limited liability companies in other jurisdictions, combined with Nevada's legislative history, and this Court's analysis in *Gardner*, demonstrate that codification of a common law corporate doctrine does not preclude its application to limited liability companies.

D. Application of the Business Judgment Rule to Silva's Claims for Breach of Fiduciary Duty Is Consistent with the Operating Agreement.

Silva's contention that the District Court's application of the Business Judgment

Rule was "deeply flawed" rests on his misreading of CPI's Operating Agreement, misunderstanding of relevant precedent and scholarly authority, and a series of semantic arguments regarding fiduciary duties. *Pet.,* at 18-27. In reality, the District Court correctly applied the Business Judgment Rule to Silva's claims based on the Operating Agreement's incorporation of fiduciary duties of loyalty, care, and good faith and fair dealing. *App'x I,* PA032-33.

Under Nevada law, directors and officers of a corporation owe fiduciary duties of care and loyalty. *Shoen,* 122 Nev. at 632. By contrast, members of a Nevada limited liability company only owe the implied contractual covenant of good faith and fair dealing unless additional fiduciary duties are expressly imposed by the company's governing documents. *See* NRS 86.298. In accordance with that statute, Articles 6.1 and 6.3 of CPI's Operating Agreement expressly adopt fiduciary duties of care and loyalty, and Article 6.3, entitled "Fiduciary Duties," further requires that each member discharge duties consistently with the obligation of good faith and fair dealing. *App'x I*, PA032-33.

Because the Operating Agreement did not specify a standard of review for assessing whether those adopted fiduciary duties had been breached, the District Court correctly determined that the Business Judgment Rule applied by implication. *App'x III,* PA334. In doing so, the District Court determined that Silva was required to plead particularized allegations rebutting the Business Judgment Rule. *Id.*

As part of its analysis, the District Court relied in part on a law review article addressing the application of the Business Judgment Rule to unincorporated business organizations. *Id.*, PA334; Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?,* 30 DEL. J. CORP. L 343 (2005) (hereinafter, "Miller & Rutledge"). Contrary to Silva's assertions, the Miller & Rutledge analysis supports the District Court's reasoning in the instant case.[5]

As both Miller & Rutledge and the District Court recognized, where an operating agreement imposes fiduciary duties on the members but is silent as to the standard of review applicable to a breach of those duties, a court must infer that the members either: (1) intended to incorporate the Business Judgment Rule, or (2) intended to reject the standard of review customarily applied to duty. *App'x III,* PA334; Miller & Rutledge, at 384. Thus, while limited liability companies are generally creatures of contract, where an operating agreement adopts fiduciary duties, courts have no option but to make an assumption as to what standard of review should apply in assessing whether those fiduciary duties have been breached.

[5] As Silva notes, the District Court's decision applying the Business Judgment Rule to Silva's claims has received attention from several legal scholars and practitioners. *Pet.*, at 9. In one of the articles cited by Silva, an author of Miller & Rutledge explicitly praised the District Court's analysis and finding. *Id.* As such, Miller & Rutledge does not contradict the District Court's decision as Silva claims.

The District Court correctly concluded that the proper course of action is to assume drafters of such an operating agreement also intended to incorporate the Business Judgment Rule. *Id.* Otherwise, as stated by this Court in *Wynn*, courts will be forced to "substitute their own notions of what is or is not sound business judgment," the very conduct the Business Judgment Rule was created to prevent. *Wynn,* 133 Nev. at 378. Given the negative consequences of this alternative, together with the Business Judgment Rule's deep roots in the common law and the robust history of Nevada's business statutes, the District Court correctly determined that the Business Judgment Rule. *Id.*

Silva's semantic attacks on the District Court's reasoning pertaining to corporate "duties" of care and corporate "standards" of care only underscore his misunderstanding. *Pet.*, at 20. Silva erroneously contends that Miller & Rutledge's use of the term "standard of care" refers to "the degree of care a person must exercise to avoid liability," citing solely to *Ross v. Carson Constr*. 106 Nev. 885, 888-89, 803 P.2d 657, 659 (1990). However, *Ross* did not address corporate duties or standards and merely involved a statutory standard of care applicable to mine safety. *Id.* Moreover, the *Ross* Court repeatedly conflated the terms "standard" and "duty" of care. *Id.* Furthermore, Miller & Rutledge clearly define the standard of care as "the standard of conduct expected of directors in their decision making," not as a measure of liability. Miller & Rutledge, at 352.

For the same reasons, Silva's attempt to distinguish the Maryland District Court's holding in *Froelich v. Erickson* also fails. *Froelich,* 96 F. Supp. 2d 507, 520 (D. Md. 2000). As Silva notes but apparently fails to fully grasp, the application of the Business Judgment Rule in *Froelich* was based on the court's finding that the limited liability companies' operating agreement subjected its members to "the **duties** of a corporate fiduciary as defined by Maryland law." *Pet.*, at 19 (quoting *Froelich,* 96 F. Supp. 2d at 520). Where, as here, CPI's Operating Agreement imposes fiduciary duties of care, loyalty, and good faith and fair dealing, the Business Judgment Rule properly governs whether those duties have been breached.

Furthermore, Silva's comparison of corporate and limited liability company fiduciary duties to those in entirely different contexts, such as lawyers, trustees, or agents, is equally unavailing. The Business Judgment Rule and limited liability companies have deep roots in corporate law. These other roles do not involve the Business Judgment Rule's underlying purpose—to prevent the courts from second-guessing the decision maker's **business judgment** after the fact. *Wynn,* 133 Nev. at 378. As such, these comparisons in no way limit the applicability of the Business Judgment Rule to limited liability companies. Similarly, Silva's citation to *Clark v. Lubritz*, in which this Court did not mention the Business Judgment Rule in relation to a partner's fiduciary duties, is inapposite. *Pet.*, at 25 (citing *Clark v. Lubritz,* 113 Nev. 1089, 1096, 944 P.2d 861, 865 (1997)). The legislative history of Nevada's

limited liability company statutes confirms that limited liability companies were designed to afford the protections of a corporation, while retaining merely the tax benefits of a partnership. *See*, Hearing on A.B, 655 Before the Assemb. Judiciary Comm., 66th Leg. (Nev., May 21, 1991).

Reviewing CPI's Operating Agreement, the scholarly and judicial sources relied upon by the District Court, and fundamental principles of Nevada business law, it is evident that the District Court's reasoning was sound and its conclusion correct. The Business Judgment Rule applies by operation of the fiduciary duties expressly adopted in CPI's Operating Agreement and by longstanding common law principles limiting judicial interference in business decisions. Therefore, the District Court did not err by applying the Business Judgment Rule to Silva's claims for breach of the fiduciary duties imposed by CPI's Operating Agreement.

IV. CONCLUSION

This Court may deny Silva's Petition on procedural grounds alone, as he has failed to demonstrate that extraordinary writ relief is warranted. Alternatively, the Petition should be denied on the merits because the District Court correctly determined that the Business Judgment Rule applies to claims for breach of fiduciary duties contractually imposed upon members of a limited liability company. The District Court's application of the Business Judgment Rule is firmly supported by Nevada's common law and statutory framework, is not precluded by the codification

of the Business Judgment Rule in the corporate statutes, and is fully consistent with CPI's Operating Agreement. Accordingly, the District Court did not clearly err, and Silva's Petition for Writ of Mandamus must be denied.