IN THE SUPREME COURT
OF THE STATE OF NEVADA

FRANCISCO SILVA, AN INDIVIDUAL,

Petitioner,

vs.

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

Supreme Court Case No. 91228

District Court: A-25-909767-B

From the Eighth Judicial District Court, County of Clark, Dept IX.
Dist. Ct. Case: A-25-909767-B

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. Introduction

This Court should enforce CPI's operating agreement as drafted. If members of an LLC want a presumption in favor of their business judgment, Nevada law permits them to draft one into their LLC's operating agreement, either at formation or via subsequent amendment. But CPI's members never contracted for such a presumption, nor does NRS Chapter 86 legislate one. And common law confirms that courts may not rewrite parties' agreements. Thus, there is no legal basis to apply the Rule here. This case is really that simple.

Member Defendants advocate for an improper judicial rewriting of CPI's operating agreement based on noncontrolling, unsupported, and largely inapplicable case law. Likewise, Amici fail to mention CPI's operating agreement at all. Both focus on the merits of the business judgment rule generally, while avoiding the straightforward principles of contractual and statutory interpretation that control this Petition. Regardless of whether the Rule is good for LLCs, bad, or somewhere in between, its application to LLCs is controlled by the contracting parties unless and until the Legislature amends the LLC statute.

Reading the business judgment rule into CPI's operating agreement by implication would destroy the freedom of contract central to LLCs generally and NRS Chapter 86 specifically. Although LLCs and corporations both shield their owners from liability for the debts and obligations of the entity, the two entities are fundamentally different. LLCs are almost infinitely flexible creatures of contract, while corporations are highly regulated creatures of state law. The Legislature codified that reality with NRS 86.286(4)(b), which provides that courts must interpret an LLC's operating agreement by giving maximum effect to the principle of freedom of contract and enforceability. Giving maximum effect to the principle of freedom of contract requires interpreting CPI's unambiguous operating agreement as written, supplemented and limited only by the requirements of NRS Chapter 86. Neither CPI's operating agreement nor Chapter 86 includes a business judgment rule. The Court's analysis properly ends there.

The Court should grant the Petition, enforce CPI's operating agreement and Chapter 86 as written, and hold that CPI's members did not impliedly incorporate the common law business judgment rule

applicable to corporations simply by creating contractual fiduciary duties in the operating agreement.

II. Mandamus is Necessary and Warranted.

The Petition presents an issue ripe for mandamus. Member Defendants oppose consideration of the Petition for two reasons: (1) Silva may challenge the district court's decision on appeal from final judgment, and (2) the Rule's applicability "rarely arises" given the lack of statutorily imposed fiduciary duties under Nevada law. Ans. at 6. Both positions lack merit.

First, Silva does not have adequate recourse before an appeal from final judgment. Without intervention, the district court's error will taint every step of the proceedings by heightening Silva's burdens in discovery, at summary judgment, and at trial. It will also infect any verdict on Silva's claims for Member Defendants' breaches of their fiduciary duties. *See* Nev. Model Jury Ins. 15.14 ("Fiduciary Duties: Business Judgment Rule"). By resolving the issue now, the Court will clarify the instant litigation in the underlying case and for all LLCs that incorporate fiduciary duties, but not the business judgment rule, in their operating agreements. Thus, "considerations of sound judicial economy and

administration militate in favor of granting the petition." *Gardner ex rel L.G. v. Eighth Jud. Dist. Ct.*, 133 Nev. 730, 732, 405 P.3d 651, 654 (2017) (quoting *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197–98, 179 P.3d 556, 559 (2008)).

Second, the Petition also raises an important and novel issue of law in need of clarification: whether the business judgment rule applies to LLCs that chose not to incorporate the business judgment rule into their operating agreements. The issue is novel because Nevada's appellate courts have never ruled on it, as Member Defendants agree. Ans. at 6. The issue is important because it affects potential liability for many LLC members and managers in this state. This importance is indicated by the immediate publicity that the district court's interpretation garnered, including from professors of law and national law firms. *See* Pet. at 9 & n. 4–6.[1] That this issue purportedly "rarely arises" does not affect its importance.

[1]This contradicts Member Defendants' and Amici's suggestion that the district court's ruling is simply business as usual. Ans. at 10–11.

III. There is No Legal Basis to Apply the Business Judgment Rule to CPI.

Limited liability companies are creatures of contract and statute. *Weddell v. H2O Inc.*, 128 Nev. 94, 102, 271 P.3d 743, 749 (2012), *abrogated on other grounds by Tahican, LLC v. Eighth Jud. Dist. Ct.*, 139 Nev. 11, 15–16, 523 P.3d 550, 554 (2023) (recognizing that an LLC is a "statutorily based creature"); *Holifield v. XRI Inv. Holdings*, 304 A.3d 896, 922 (Del. 2023) (stating that LLCs are creatures of contract because similar to Nevada, Delaware's LLC Act provides that it "is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements"). Chapter 86 provides members with broad discretion in drafting the limited liability company agreement and furnishes default provisions when the members' agreement is silent. *Holifield*, 304 A.3d at 922 (explaining similar framework under Delaware's LLC Act); *see generally* NRS Chapter 86.[2]

[2] NRS Chapter 86 includes the phrase "except as otherwise provided in this [section or chapter] or in the articles of organization or the operating agreement" at least 13 times.

CPI's operating agreement includes fiduciary duties, but neither CPI's operating agreement nor Chapter 86 contain the business judgment rule. No decision by this Court or the Supreme Court of the United States supports applying the corporate common law business judgment rule to contractually created fiduciary duties in the LLC context. And even if this Court accepts that other states or the common law have applied the Rule to LLCs, CPI's operating agreement and Chapter 86 displace them.

a. CPI's Operating Agreement is the Only Source of Fiduciary Duties and Does Not Include a Business Judgment Rule.

Members of an LLC who desire the protections of the business judgment rule may simply draft an operating agreement containing the Rule. This is permitted, but not required, by NRS Chapter 86. An operating agreement may provide any legal provision "which the members elect to set out in the operating agreement for the regulation of the internal affairs of the company." NRS 86.286(4)(a)(5). It may even "provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties"—except for bad-faith violations

of the implied contractual covenant of good faith hand fair dealing. NRS 86.286(7). Thus, just as LLCs are creatures of contract, the contractual operating agreement is the source of any duty, liability, or limitation thereof except in those few instances where NRS Chapter 86 specifically supplements or limits the operating agreement.

Chapter 86 does not create any fiduciary duties; CPI's operating agreement does. The operating agreement expands the members' duties to each other and to CPI by establishing duties of loyalty, care, and various fiduciary duties. 1 PA 93–94. But it does not include any presumption of good faith in evaluating breaches of those duties. *Id.* Ultimately, "the parties' intent must be discerned from the four corners of the contract." *MMAWC, LLC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (internal quotation marks omitted). This Court has made clear that a court may not "revise a contract under the guise of construing it," nor "interpolate in a contract what the contract does not contain." *Traffic Control Servs., Inc., v. United Rentals Northwest, Inc.,* 120 Nev. 168, 175–76, 87 P.3d 1054, 1059 (2004) (internal citations omitted). Yet, that is precisely what the district court's decision does.

There is no basis to find the business judgment rule applies to CPI based on the language of CPI's operating agreement. Indeed, the operating agreement's creation of additional duties evinces an intent to expand rather than restrict member liability. If CPI's members wanted to temper this expansion through application of the business judgment rule, they could and would have done so. The district court erred by applying the Rule because CPI's operating agreement unambiguously omits it.

b. NRS Chapter 86 Does Not Create any Fiduciary Duties or Include a Business Judgment Rule.

"The rules governing the formation and operation of Nevada LLCs are set forth in NRS Chapter 86." *Weddell*, 128 Nev. at 102, 271 P.3d at 749. "Those who wish to enter into an LLC should be vastly familiar with this chapter in order to properly protect their interests." *Id.* at 102–03, 271 P.3d at 749. NRS Chapter 86 does not include any fiduciary duties or a business judgment rule, leaving any such provisions to contract. This is in sharp contrast to NRS 78.138, which creates fiduciary duties for corporate directors and officers; contains an exculpatory provision limiting their liability to breaches involving intentional misconduct,

fraud, or a knowing violation of law; and contains the corresponding business judgment rule by which their conduct must be judged.

Nevada's Legislature recognized the significant differences between LLCs and corporations when it enacted these two distinct statutory chapters. *See Randono v. CUNA Mut. Ins. Grp.*, 106 Nev. 371, 375, 793 P.2d 1324, 1327 (1990) ("We must assume that the legislature, when it enacted the statute, was aware of the various policy considerations and purposely drafted the statute to read as it does."). As Amici observe, the Nevada Legislature codified a statutory business judgment rule **for corporations** in 1999. Amici Resp. at 9–10. The Legislature could have codified a similar rule for LLCs, which had existed in Nevada for eight years by that point. It did not, implicitly recognizing the differences between LLCs and corporations, including that Chapter 86 includes no fiduciary duties to which the Rule might apply.

Nevada follows the basic principle "that where there is no ambiguity in a statute, there is no opportunity for judicial construction and the law must be followed regardless of result." *Randono*, 106 Nev. at 374, 793 P.2d at 1326 (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Like CPI's operating agreement, NRS

Chapter 86 unambiguously omits the business judgment rule. This is Nevada law, and it must be followed regardless of result. Though, given the intentional flexibility of LLCs, the mandate to give maximum effect to freedom of contract, and the parties' decision not to include the business judgment rule, this result is correct.

c. CPI's Operating Agreement and NRS Chapter 86 Control.

Member Defendants and Amici identify various cases that they represent constitute the "common law" wherein courts apply the business judgment rule to corporations. Ans. at 10–13; Amici Resp. at 7–11. Those cases pre-date the existence of LLCs, which are recent inventions deriving from statute and contract. Furthermore, there is no "common law" that applies the Rule to Nevada LLCs or to evaluate contractually created fiduciary duties in the LLC context (both discussed below). But even if there were, the Legislature's enactment of NRS Chapter 86 coupled with CPI's operating agreement displaces the common law.

The common law is repealed "by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject matter[.]" *West Indies, Inc. v. First Nat'l Bank of Nev.*, 67 Nev. 13, 32, 214 P.2d 144, 153 (1950) (statutes authorizing gambling under licensing did

not "revise and cover the whole subject matter" and did not repugn and thus impliedly repeal common law rule against permitting action at law to recover gambling debt). Chapter 86 displaces and repugns any common law that would apply to LLCs. LLCs are "statutorily based creature[s]" originally enacted by Wyoming in 1977. *Weddell*, 128 Nev. at 102, 271 P.3d at 749. Nevada enacted LLCs in 1991. *Id.* NRS Chapter 86 plainly governs the formation and operation of Nevada LLCs, covering the whole subject matter—except as permissibly modified by contract.

NRS Chapter 86 covers duties owed by LLC members, managers, and other persons bound by the operating agreement to the LLC and to each other. NRS 86.298 (limiting duties to "[o]nly the implied covenant of good faith and fair dealing" and "[s]uch other duties, including without limitation fiduciary duties; if any, as are expressly prescribed by the articles of organization or the operating agreement"). Chapter 86 governs to what extent those duties may be expanded, restricted, or eliminated. NRS 86.286(5) ("If, and to the extent that a member or manager or other person has duties . . . such duties may be expanded, restricted or eliminated by provisions of the operating agreement, except that an operating agreement may not eliminate the implied contractual covenant

of good faith and fair dealing."). And Chapter 86 covers the circumstances under which individuals may be protected from liability for breach. NRS 86.286(6) ("Unless otherwise provided for in the operating agreement, a member, manager or other person is not liable for breach of duties, if any . . . for conduct undertaken in . . . good faith reliance on the provisions of the operating agreement."); NRS 86.286(7) ("An operating agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, if any," except that an "operating agreement may not limit or eliminate liability for any conduct that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing."). Therefore, Chapter 86 coupled with any permissible contractual modifications displaces the common law to the extent that any common law applied to supply default duties and corresponding presumptions to LLCs.

Again, NRS Chapter 86 seeks to maximize the freedom of contract. A court cannot give maximum effect to freedom of contract as required under NRS 86.286(4)(b) by reading non-existent terms into an LLC's operating agreement. Just as LLCs may incorporate fiduciary duties into their operating agreements, they may incorporate the Rule or other

standards by which breach of those duties should be judged, subject only to limitations regarding the contractual implied covenant of good faith and fair dealing as discussed above. Put differently, just as fiduciary duties of LLC members and managers are creatures of contract, so are any presumptions applicable to those duties.

d. There is no Binding or Persuasive Common Law Applying the Rule to Nevada LLCs.

Member Defendants seize on two Nevada trial court cases that apply the business judgment rule to LLCs. Ans. at 10–11. Of course, these decisions are not binding on this Court (or any court). Regardless, those decisions are fundamentally flawed—just as the district court's order below—and based on an overblown line of dicta.

The first Nevada case on which Member Defendants rely is *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175 (D. Nev. 2008). But the issue in *eTreppid* was whether corporate law applied to the LLC for purposes of the attorney-client privilege—not whether the common law corporate business judgment rule applies to all LLCs that elect to create fiduciary duties. In dicta, Magistrate Judge Baldwin surveyed other areas in which courts have applied corporate law to LLCs

and noted that courts applying Virginia and Missouri law have applied the corporate business judgment rule to LLCs. *eTreppid*, 548 F. Supp. 2d at 1181. However, the court's reliance on those cases was misplaced. The Virginia Supreme Court's decision in *Flippo v. CSC Associates III, LLC,* involved application of the statutory business judgment rule under Virginia's LLC Act to LLCs, not a common law corporate rule. 547 S.E.2d 216, 221–22 (Va. 2001). The *Flippo* Court merely interpreted the relevant provision under the LLC Act consistent with the identically worded provision under Virginia's Corporations Act. *Id.* Similarly, *In re Tri-River Trading* involved a statutory duty of care and limitation on liability under Missouri's LLC Act as supplemented by the company's operating agreement. B.R. 252, 267–68 (BAP 8th Cir. 2005). Thus, neither *eTreppid* nor the cases upon which it relied in discussing the business judgment rule address whether the common law corporate business judgment rule applies to contractually created fiduciary duties where there are no statutory fiduciary duties or business judgment rule applicable to LLCs.

The only other Nevada case Member Defendants cite is Judge Denton's order in *Schreck v. Babcock*, 2013 Nev. Dist. LEXIS 412 (Nev. Dist. Ct. Aug. 19, 2013). But that order simply stated, without analysis,

that "application of [NRS 78.138(7)] to limited liability companies is not unusual." While it is true that LLCs will often incorporate the Rule into their operating agreements, not even Member Defendants believe that the statutory business judgment rule in NRS Chapter 78 applies to LLCs. *Schreck*'s only citation to a Nevada case is to *eTreppid*, which is flawed for the reasons stated above and did not apply NRS 78.138(7) to LLCs.

That's it. Those are the two cases upon which Member Defendants and Amici base their arguments that the business judgment rule is part of Nevada's "common law" applying to LLCs. Ans. at 10–11. These cases are not binding or persuasive, nor are the other states' decisions on which Member Defendants and Amici rely.

e. The Non-Nevada Cases Are Inapplicable and Unpersuasive.

Member Defendants and Amici argue that a handful of cases from other jurisdictions support application of the business judgment rule to CPI. Ans. at 11–13; Amici Resp. at 10–12. To begin, none of these cases is from a State Supreme Court or constitutes binding precedent even in the jurisdiction in which it was decided. Regardless, these cases do not

address the issue at hand in any depth and none apply a default business judgment rule to contractually created fiduciary duties.

California's, Colorado's, New York's, North Carolina's, Minnesota's, and Oregon's LLC Acts all create and limit duties, including fiduciary duties, similar to the default rules applicable to corporations. Unlike these states, Nevada does not create any default duties other than the implied contractual covenant of good faith and fair dealing. NRS 86.286(5). Nevada further expressly provides that any and all liability for breach of any duty (except breach of the implied covenant of good faith and fair dealing) may be limited or eliminated. NRS 86.286(7). But the states referenced by Member Defendants differ. *See* Cal. Corp. Code § 17704.09(c) (A member's duty of care is limited to "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law");[3] Colo. Rev. Stat. § 70-80-

[3] The parties in *Tuli v. Specialty Surgery Center of Thousand Oaks, LLC* did not litigate whether the Rule applied to LLCs and thus the Court simply assumed the Rule applied without analysis. 105 Cal. App. 5th 997, 1010 (Ct. App. 2024) ("The parties do not dispute that this [business judgment] rule applies to limited liability companies as well as corporations."). There, the plaintiff assumed the rule applied but argued that it did not insulate the defendant from liability based on conflict of interest, bad faith, and improper investigation.

404(2) (same, but for managers or members in member-managed LLC);[4] NY LLCL § 409(a) (providing that LLC managers must perform their duties "in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances);[5] N.C. LLCA § 57D-3-21 (requiring managers to exercise their duties in good faith, with the care an ordinary prudent person in a like position would exercise under similar circumstances and subject to the operating agreement, in a manner the manager believes to be in the best interests of the LLC and providing that a manager is not liable for any acts taken in compliance with this section);[6] Minn. Stat. § 322B.69

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[4] In *Gagne v. Gagne*, the Colorado Court of Appeals simply assumed without analysis that the Rule applies to LLCs but concluded that it afforded no shelter to the defendant as the district court provided ample record support for its conclusions that the defendant acted purely in self-interest, in bad faith, and in breach of her fiduciary duties to the LLCs and their members. 459 P.3d 686, 693–94 (Colo. Ct. App. 2019).

[5] As courts applying New York law have explained, the limited liability company statute applies the same fiduciary standards to LLC managers as corporate directors. *In re Die Fliedermaus LLC*, 323 B.R. 101, 110 (S.D.N.Y. Bankr. 2005). Thus, application of the business judgment rule was supported by statute, unlike in Nevada.

[6] Member Defendants' North Carolina case states only that "[t]he managers of an LLC *may* also be entitled to the protections of the 'business judgment rule," and that the state's statutory language "suggests application of the business judgment rule." *Mooring Capital Fund, LLC v. Comstock N.C. LLC*, 2009 WL 4644708, at *4, n.8 (Sup. Ct. N.C. Nov. 13, 2009) (emphasis added). Member Defendants also cite *Long*

("A manager shall discharge the duties of an office in good faith, in a manner the manager reasonably believes to be in the best interests of the limited liability company, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances");[7] ORS § 63.1551 (creating duty of care and loyalty applicable to member-managed LLCs).[8] Member Defendants' reliance on Delaware Court of Chancery decisions regarding the business judgment rule are similarly misplaced

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v. ILA Corp. for the proposition that the North Carolina Court of Appeals has held that codification of the Rule does not abrogate the common law of the business judgment rule "for any business entity." Ans. at 13. But that case involved a corporation, not an LLC, and concluded that either the statutory protections in the corporations act or the corporate common law could insulate the director from liability, noting that the commentary to the corporations statute incorporated rather than abrogated the common law. 513 S.E.2d 812, 821 (Ct. App. N.C. April 6, 1999).

[7] Member Defendants assume that *Pinnacle Labs, LLC v. Goldberg* applied Wisconsin law because it is a federal district court decision from the Western District of Wisconsin. Ans. at 12. However, the federal court applied Minnesota law and Minnesota's LLC Act. 2007 WL 2572275, at *4 (W.D. Wis. Sept. 5, 2007).

[8] The only case the *HLHZ Investments Court* cited to support application of the Rule to Oregon LLCs was the Delaware Court of Chancery's unpublished disposition in *Bakerman* discussed *infra* at n.9. *HLHZ Invest., LLC v. Plaid Pantries, Inc.*, 2007 WL 3129985, at *17 (D. Or. Oct. 23, 2007), *reversed on reconsideration*, 2007 WL 4180659 (D. Or. Nov. 21, 2007). Member Defendants' other case fares even worse. *Bernards v. Summit Real Estate Mgmt. Inc.* turned on the similarity in language between Oregon's corporation and LLC statutes and "the more specific but fundamentally similar language of the LLCs' operating agreements." 213 P.3d 1, 4 (Ct. App. Or. 2009)

because "Delaware law presumes that managers of limited liability companies owe fiduciary duties unless explicitly disclaimed." *In re Bayou Steel BD Hldgs LLC*, 651 B.R. 179, 190 (Del. Bankr. 2023) (citing *Largo Legacy Group, LLC v. Charles*, 2021 WL 2692426, at *12 (Del. Ch. June 30, 2021)).[9]

Unlike each of these states, Nevada law imposes no default fiduciary duties and includes no presumptions against liability except the contractual duty of good faith and fair dealing and good-faith reliance on the operating agreement. NRS 86.298, NRS 86.286(6). None of Member Defendants' authorities supports applying the Rule to evaluate breach of contractually created fiduciary duties, let alone where the state's LLC statute and the relevant operating agreement intentionally omit the Rule. While it may make sense to import a default business judgment

[9] Member Defendants' Delaware cases, *Bakerman v. Sidney Frank Importing Co.* 2006 WL 3927242 (Del. Ch. 2006) (unpublished) and *Minn. Invco of RSA #7, Inc. v. Midwest Wireless Hldgs. LLC*, 903 A.2d 786 (Del. Ch. 2006), do not discuss the basis for application of the Rule to LLCs in any depth, and *Bakerman* addressed the Rule only in the context of demand futility. While Member Defendants cite *Expansion Capital Grp. v. Patterson*, 514 F. Supp. 3d 1095 (D.S.D. 2021) as holding that the Rule applies under South Dakota law, Ans. at 13, that court cited only Delaware law to support its decision and applied the default fiduciary duties under Delaware law.

rule for LLCs in states that have adopted default fiduciary duties for LLCs, Nevada has declined to do so and has instead left fiduciary duties in the LLC context to the customizable province of contract. Where, as here, there are no default fiduciary duties, there is no basis for applying a default presumption that LLC members or managers have complied with them. Ultimately, this Court need not survey other states—or perform work analyzing the differences in state substantive law that Member Defendants ignored—because CPI's operating agreement and NRS Chapter 86 alone control this dispute. To survey other states for policy reasons is the province of the Legislature.

f. This Court's Application of the Alter Ego Doctrine to LLCs in *Gardner* Neither Compels Nor Supports Applying the Corporate Business Judgment Rule to LLCs.

As pertinent here, the *Gardner* Court considered whether the alter ego doctrine applies to LLCs despite that NRS Chapter 78 codifies an alter ego exception while NRS Chapter 86 does not. *Gardner v. Eighth Jud. Dist. Ct.*, 133 Nev. 730, 735, 405 P.3d 651, 655 (2017). The *Gardner* Court reasoned that the alter ego doctrine is a judicially created doctrine that courts had long applied to LLCs (unlike the business judgment rule,

as discussed above). *Gardner*, 133 Nev. at 735–36, 405 P.3d at 656–66. Further, "[t]he Legislature contemplated that LLCs would be subject to the same then judicially applied doctrine of alter ego as corporations" (neither Member Defendants nor Amici have pointed to similar discussion regarding the Rule). *Gardner*, 133 Nev. at 736, 405 P.3d at 656. Finally, "LLCs provide the same sort of possibilities for abuse as corporations, and creditors of LLCs need the same ability to pierce the LLCs' veil when such abuse exists." *Id.* (citation omitted).

Gardner thus stands for the proposition that courts may look to principles of corporate law when addressing areas in which corporations and LLCs are similar, particularly where the legislature has contemplated that the two should be treated the same. In such a situation, codification in NRS Chapter 78 will not necessarily preclude application of an otherwise applicable judicially created equitable rule to LLCs. Likewise, in areas in which LLCs and partnerships are similar, this Court has looked to the law of partnerships. *See Weddell*, 128 Nev. at 102 n.5, 271 P.3d at 749 n.5 ("It is noteworthy that some sections of Chapter 86 appear to have been borrowed from Nevada's partnership law, Chapter 88.").

Other courts have followed a similar approach rather than wholesale adoption of corporate common law to LLCs. *See Midwest Renewable Energy, LLC v. Am. Eng'g Testing, Inc.*, 894 N.W.2d 221, 230 (Neb. 2017) ("In cases concerning limited liability companies, we have looked to the principles of corporate law *when addressing areas of similar functions* . . . .") (emphasis added). Because LLCs were created, in part, "to provide a corporate-styled liability shield," *Weddell*, 128 Nev. at 102, 271 P.3d at 748, it makes sense that equitable law preventing abuse of that shield also applies to LLCs. But that does not mean that corporate law always applies to LLCs or applies in areas where corporations and LLCs are dissimilar, let alone where application of corporate law would contradict the parties' operating agreement.

g. The Differences Between Corporations and LLCs Preclude Applying the Rule to LLCs.

While LLCs and corporations similarly shield individuals from liability for the debts and obligations of the company absent veil piercing and thus may be analogous for that purpose, the two forms are otherwise very different. The differences between the laws governing corporations versus LLCs reflect the realities that: (1) LLC managers are not as

scrutinized or regulated as corporate directors, and therefore are not entitled to the Rule's presumptions; (2) LLCs are more likely to be closely held and therefore do not need the Rule's presumptions to shield them from disruptive disgruntled shareholder litigation;[10] and (3) LLCs allow for much more contractual customization than corporations and if the members elect to create fiduciary duties, they can also contract for limitations on individual liability for their breaches or protective presumptions for evaluating whether a breach has occurred.

Neither Member Defendants nor Amici explain why the corporate business judgment rule should override the parties' LLC operating agreement, especially in light of these differences. Amici offer a parade of horribles including vexatious litigation, increased insurance costs, and business disincentives unsupported by relevant authority or data. Amici Resp. at 14–20. Regardless, LLC members who wish to avoid these risks

[10] The "vast majority of LLCs are closely held" and "[t]he problems and concerns of closely held entities and their owners are different from those of publicly traded entities and large, widely held private entities. Most legislatures and courts recognize this difference." Sandra Feldman, "Understanding LLC law: Its past and its present". https://www.wolterskluwer.com/en/expert-insights/understanding-llc-law-its-past-and-its-present, updated September 30, 2022. Last accessed online on November 12, 2025.

may simply contract for the protection of the business judgment rule just as they must contract for fiduciary duties in the first place. "Those who wish to enter into an LLC should be vastly familiar with [NRS] chapter [86] in order to properly protect their interests." *Weddell*, 128 Nev. at 102–03, 271 P.3d at 749. Similarly, "the doctrine of caveat emptor is fitting in the alternative entity context . . . Members of alternative entities must appreciate that with the benefits of investing in alternative entities often comes the limitation of looking to the contract as the exclusive source of protective rights." *Holifield*, 304 A.3d at 923 (cleaned up). The Court should not and cannot properly rewrite the parties' operating agreement to include the Rule in violation of the parties' freedom of contract.

Finally, Amici argue that mandatory application of the business judgment rule to LLCs "maintains consistency with Nevada's existing policy preferences for business entities." Amici Resp. at 20. But it doesn't. Nevada's existing policy preferences are codified in NRS Chapters 78 and 86, and the Legislature did not enact a business judgment rule for LLCs. *See generally* NRS Chapter 86. Amici are asking this Court to judicially amend NRS Chapter 86.

Further, NRS Chapter 86 is clear that an operating agreement must "be interpreted to give the maximum effect to the principle of freedom of contract and enforceability." NRS 86.286(4)(b). Declining to read a business judgment rule into CPI's operating agreement is consistent with Nevada's promotion of business entities and prioritization of the freedom and flexibility of contract in the LLC context. It is also consistent with Nevada's general policy of enforcing clear and unambiguous contracts as written. *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015). If LLC members wish to create fiduciary duties and apply a business judgment rule to evaluate their breaches, they need simply include the Rule in the operating agreement. And if the Legislature wishes to apply a default business judgment rule in the LLC context notwithstanding the absence of default fiduciary duties, it may do so by statute. Though, for the reasons already explained, including the significant differences between corporations and LLCs, the deliberately flexible form of LLCs, and the ease of contracting for desired presumptions, there appears little reason for the Legislature to do so.

IV. Conclusion

This Petition should be resolved by reference to CPI's operating agreement and NRS Chapter 86. Member Defendants and Amici neglect these authorities. They must direct their policy arguments supporting the creation of a default Rule to the Legislature, not the Court. Because the district court plainly erred in applying the Rule to CPI, this Court should reverse the district court's order and remand for further proceedings consistent with non-application of the Rule.

DATED: December 5, 2025

SNELL & WILMER L.L.P.

BY: */s/ Xyzlo Lee*

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VERIFICATION

I am counsel for Petitioner Francisco Silva. I have read the foregoing Reply and all factual statements in the Reply are within my personal knowledge and are true and correct or supported by citations.

Dated this 5th day of December 2025.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface and type style requirements of NRAP 32(a)(4)–(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word processing program in 14-point Century Schoolbook font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 6,088 words.

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 December 2025.

BY: */s/ Xyzlo Lee*

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CERTIFICATE OF SERVICE

This is to certify that on December 5, 2025, a true and correct copy of the foregoing **REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** was served on the following by United States Mail, first class, and by the Supreme Court Electronic Filing System:

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