

Response to Michal Barzuza’s
Draft Article *Nevada v. Delaware*

With increasing amounts of national attention now focused on Nevada corporate law as a distinct alternative to the corporate laws of other jurisdictions, we write to provide information to a broader national audience and respond to widely-circulated, but misguided claims about Nevada law.

In particular, we respond to a recent draft article by Professor Michal Barzuza entitled “*Nevada v. Delaware*” (the Draft).¹ Professor Barzuza has written about Nevada law for some time, bringing significant attention to the benefits of incorporation in our state, and we appreciate her work. Nonetheless, Nevada law continues to evolve, and we offer some important addenda and amendments to her Draft.²

Our responses here are driven in part by worries about the Draft’s misperceptions about Nevada corporate law and practice.³ We hope that

¹ Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* (Eur. Corp. Governance Inst., Law Working Paper No. 761/2024, 2024), <https://ssrn.com/abstract=4746878> [hereinafter “Draft” or the “Draft”]. A copy of Professor Barzuza’s paper as it was broadly disseminated has been attached as an exhibit to this Response.

² The Draft was also disseminated by posts on the Harvard Law School Forum on Corporate Governance and the Columbia Blue Sky Blog. Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law*, Harv. L. Sch. F. on Corp. Governance (Feb. 26, 2026), <https://corpgov.law.harvard.edu/2026/02/26/nevada-v-delaware-the-new-market-for-corporate-law/>; Michal Barzuza, *In Nevada, Controlling Shareholders Are Off the Hook*, CLS Blue Sky Blog (Mar. 3, 2026), <https://clsbluesky.law.columbia.edu/2026/03/03/in-nevada-controlling-shareholders-are-off-the-hook/>. It was also promoted by the Editor-In-Chief of the Chancery Daily, giving the Draft substantial reach and visibility. Lauren Pringle, LinkedIn, (Mar. 2026), https://www.linkedin.com/posts/thislaurenpringle_when-your-whole-vibe-is-cucking-not-just-share-7434615407145136130-7taF?utm_source=share&utm_medium=member_desktop&rcm=ACoAAAGExSUBWX7prU4rFMrtygNs-XxU3X94qu8.

³ Previous versions of the Draft have been circulated since at least 2024. See Brief of Amicus Curiae State of Nevada ex rel. Francisco V. Aguilar, Secretary of State of Nevada, in Support of Appellants and Reversal, *Maffei v. Palkon*, No. 125, 2024, at 7-8 (Del. June 4, 2024) (citing to prior edition of Draft). Although unpublished, the Draft has been cited repeatedly in the years that it has been available. Angela N. Aneiros, *Reincorporation: The Trojan Horse of Self-Dealing*, 77 BAYLOR L. REV. 67, 99 (2025);

our responses here will help to educate investors and advisors who might otherwise rely solely on the Draft for information about Nevada law.⁴ We are also enthusiastic to engage in an informative exchange of views about Nevada corporate law, which Professor Barzuza has invited.⁵ In preparing this response, we have done our best to ensure that it fairly and accurately characterizes cases, quotations, and the opinions and arguments presented in the Draft. To the extent that there are any errors, we will gladly amend this response to correct any error.⁶

We have divided this response into multiple parts. In Part I, we explain a few differences between Nevada law and Delaware law that the Draft has missed. In Part II, we turn to identifying some of the potential reasons for the mistakes in the Draft, including places in the Draft where there are claims we cannot substantiate, or where there are quotations allegedly from caselaw that we cannot find.⁷ In Part III, we identify significant passages connected to the Draft's characterization of Nevada's legislative history. When those passages are corrected, the history shows that Nevada has in fact been considering policy tradeoffs and efficiency goals. In Part IV, we identify cases and settlements that contradict the misconception, which Professor Barzuza shares, of Nevada as a liability-free jurisdiction.

William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH U. L. REV. 829, 840, 842, 853-56 (2026).

⁴ Although the undersigned do not all necessarily agree that every decision or settlement provided here was correct under Nevada law, the decisions or settlements occurred. Any comprehensive analysis of Nevada law must engage with these outcomes.

⁵ E-mail from Michal Barzuza, Professor of Law, Univ. of Va. Sch. of Law, to Ben Edwards, Professor of Law, Univ. of Nev., Las Vegas, William S. Boyd School of Law, (Feb. 28, 2026) (“I am sharing an updated version of my article *Nevada v. Delaware*, which includes responses to challenges I was fortunate to receive from Nevada Secretary of State Francisco V. Aguilar, UNLV Professor Ben Edwards, Professor Steven Davidoff Solomon, and others. I would love to hear any comments, responses, and thoughts.”). Notably, prior to this Response, Professor Edwards and Secretary Aguilar never had any direct communication with Professor Barzuza about her Draft.

⁶ We also note that Professor Edwards served as the principal drafter for this response and that not all signatories necessarily agree with Professor Edwards on every point or that every case or settlement cited in this response reached the correct outcome under Nevada law. Rather signatories all generally agree that the Draft fails to meaningfully engage with Nevada law as understood by Nevada business lawyers.

⁷ We have used the terms “false quotation” or “mistaken quotation” to describe instances where statements quoted by Professor Barzuza cannot be located in the sources she identifies. We chose these terms to avoid characterizing these errors as being made with any deliberate attempt to deceive.

We also invite others to engage with this response and review the Draft and this response together. Other scholars have also written excellent work on this topic, and we note them in the footnotes and invite others to read those important pieces of the discussion as well.⁸

I. Nevada Corporate Law Differs from Delaware Corporate Law

Before getting to our specific concerns with the Draft's claims, we want to make a broader point about the differences between Nevada and Delaware law. Nevada and Delaware do differ on certain issues, and these differences do not mean that either state's approach is right or wrong.

Delaware's law creates tradeoffs and imposes costs on companies operating under Delaware law by subjecting them to a greater degree of oversight through litigation. Some view this litigation as offering benefits and preventing misconduct. The Draft expresses concern that Nevada unduly limits these litigation rights.

But not all scholars, jurists, or practitioners agree that Delaware's level of stockholder litigation is optimal or even good. Most governance litigation in Delaware resolves on terms covered by corporations' insurance.⁹ The

⁸ This response is not the first piece to express concern about Professor Barzuza's views about Nevada corporate law. See Jens Dammann, *How Lax Is Nevada Corporate Law? A Response to Professor Barzuza*, 99 VA. L. REV. IN BRIEF 1, 3 (2013) ("I am not convinced that Nevada's law on director and officer liability is shockingly lax and that this implies a substantial drawback of regulatory competition."). Professor Dammann also explained that "there is reason to doubt that Nevada corporate law is as shockingly lax as it is made out to be [by Professor Barzuza]." *Id.* at 5. Notably, he also explains that "the protections that directors enjoy under Nevada law do not really go beyond what can be achieved under the MBCA via exculpation provisions. The MBCA does not represent the effort of an unscrupulous state to get ahead in the charter market; rather, it was written by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and presumably reflects widely held views on what is reasonable." *Id.* at 10.

⁹ See, e.g., Tom Hals, *Zuckerberg, Meta Directors Agree to \$190 Million Settlement of Shareholder Privacy Case*, Reuters (Nov. 20, 2025), <https://finance.yahoo.com/news/zuckerberg-meta-directors-agree-190-212626624.html>.

“real beneficiaries of circular indemnification are the stockholders’ lawyers.”¹⁰

Indeed, it is widely understood that Nevada corporate law offers more certain and durable protection for directors and officers than does Delaware corporate law. As Professor Couture has recognized, Nevada has made different policy choices, and Nevada’s corporate law “prioritizes limiting the negative impacts of monetary liability, such as disincentivizing qualified officers from serving, over deterring officer breaches of fiduciary duty.”¹¹

Nonetheless Nevada is not offering up a liability-free legal regime, and Nevada, as a jurisdiction, remains far from indifferent to misconduct. Nevada law plainly prohibits directors from engaging in “intentional misconduct, fraud, or a knowing violation of law.”¹² It also imposes liability on directors for making unlawful distributions.¹³ If Nevada errs, it errs on the side of preventing low-value litigation, creating clear rules to guide transaction planners, and allowing boards of directors efficiently to operate corporate entities.

That some litigation might be possible in Delaware while dead on arrival in Nevada does not mean that Nevada’s approach is wrong—it is just different from Delaware law, and time will tell which is better for which types of corporations. Some differences arise in connection with shareholder access to books and records, and the codification of Nevada’s business judgment rule as applied in change of control contexts, which we clarify below.

¹⁰ James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. L. 1207, 1240 (1988) (explaining that with circular payments “the corporation winds up paying not only the amount of the loss but also the stockholders’ and individual’s attorneys’ fees and costs. Thus, the corporation is actually in a worse economic position than if it had simply sustained the loss without the cost of recovery and consequent reimbursement.”).

¹¹ Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. 145, 201 (2025).

¹² Nev. Rev. Stat. § 78.138(7)(b)(2) (2025).

¹³ *Id.* § 78.300 (2) (“[T]he directors under whose administration the violation occurred 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.”).

A. Access to Nevada Corporations’ Books, Records, and Information

Nevada does not require publicly traded entities that remain current on securities reporting to allow stockholders to inspect all books and records on demand, but this difference does not mean that Nevada entirely locks shareholders out.¹⁴

The Draft spends substantial time discussing the downsides of Nevada’s law on books and records. In particular, it notes that “Nevada[’s] inspection rights do not apply to any corporation that furnishes its stockholders with a detailed, annual financial statement” and claims that “*this provision excuses the vast majority of publicly traded Nevada corporations from respecting stockholder inspection rights.*”¹⁵

This statement, though, overstates the limits of Nevada’s books and records laws because Nevada allows access to more information in proxy contests. It also overlooks the considered policy reasons that have led Nevada’s legislature to choose this level of books-and-records access. We address each in turn.

Although the Draft may cause activists and institutional investors to erroneously believe that they will be very limited in their books-and-records rights in all circumstances under Nevada law, the reality is that Nevada, in practice, allows fair competition in proxy contests without exposing Nevada corporations to fishing expeditions. Moreover, Nevada’s law protects Nevada corporations from the very types of value-eroding speculative litigation for which the Delaware corporate ecosystem has been criticized. This legislative choice is a balance that many stockholders might prefer to Delaware (or other states’) law.

1. Nevada Investors Have Obtained Stockholder Lists

In its critique of Nevada’s books and records policy, the Draft suggests investors may never obtain any documents from a publicly traded Nevada

¹⁴ Nev. Rev. Stat. § 78.257(7) (2025).

¹⁵ Draft, *supra* note 1, at 29-30 (emphasis in original) (citation omitted). As most stockholder inspection rights are creatures of statute, we do no disrespect to rights our statute does not create.

corporation. However, the reality on the ground in Nevada is quite different.

Under Nevada’s statute, a stockholder or group of stockholders holding 5% or more may obtain a list of stockholders of record.¹⁶ This statutory right applies whether a corporation is private or publicly traded. Unfortunately, the Draft does not cite to this statute or to any state or federal court decision on access to Nevada corporate records. Both Nevada and federal courts have considered these issues.

Beyond the explicit statutory text, Nevada courts have also allowed access to other materials on equitable grounds. In *Camac Fund, L.P. v. Liberated Syndication, Inc.*,¹⁷ a fund sought to require the Defendant to make “lists of non-objecting beneficial owners of common stock” (“NOBO” list) “immediately available for inspection and copying.”¹⁸ The Nevada Business Court allowed it if the Defendant had such a list.¹⁹ It found that Nevada’s statute did “not abrogate the common law favoring shareholder access to records and fairness in corporate governance” and issued an injunction “restraining Defendant’s use of the NOBO lists in soliciting proxies unless the same are seasonably and practicably provided to Plaintiff upon any acquisition of the same by Defendant[.]”²⁰

On the federal front, the *Camac* decision cited approvingly to a federal district court decision, *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, ruling that a corporation must allow “access to any and all shareholder information, such as NOBO lists and Cede & Co. breakdowns, which it has in its possession at this time for the purpose of contacting its shareholders.”²¹

Notably, the *Camac* decision bears striking similarity to the Delaware result in *Shamrock Associates v. Texas American Energy Corp.*²² That case found

¹⁶ NRS 78.105.

¹⁷ *Camac Fund, L.P. v. Liberated Syndication, Inc.*, No. A-19-798511-B (Nev. Dist. Ct., Clark Cnty. Aug. 5, 2019).

¹⁸ *Id.* at 2.

¹⁹ The plaintiff argued that Nevada’s statutes do not “limit or supersede the common law of England insofar as it pertains to stockholder access to corporate records, including the NOBO lists.” *Id.* at 2-3.

²⁰ *Id.* at 5-6.

²¹ 662 F. Supp. 1144, 1147 (D. Nev. 1987).

²² 517 A.2d 658 (Del. Ch. 1986) (finding that fairness required access to NOBO lists).

that since the corporation had obtained a NOBO list, a record stockholder should also be able to obtain it.²³

In short, Professor Barzuza’s Draft misses, in its analysis, both cases and statutes that allow a broader degree of stockholder access to books and records under Nevada law. We urge investors and companies considering reincorporation to do their own investigations and consult with Nevada lawyers for advice on Nevada law.²⁴

2. Limiting General Access to Books and Records Offers Governance Benefits

The Draft also fails to consider Nevada’s policy goals in limiting stockholder rights to inspect books and records. Although Nevada’s provision differs from other states, it aligns with federal policy for securities litigation. The Private Securities Litigation Reform Act of 1995 stays discovery during the pendency of any motion to dismiss.²⁵ Although some commentators at the time argued that the PSLRA would make it impossible to litigate fraud claims, federal securities litigation has remained a vibrant practice area—and Nevada, which treads in federal footsteps, will likely also remain a place where stockholders can have valid claims vindicated in court.

We suggest that the Draft might want to consider the downside of expansive inspection rights. In other jurisdictions, management may prepare corporate books and records more for liability management than for governance purposes. Nevada’s approach allows corporate boards to focus on running the business and not on how best to document every decision for a plaintiff’s inspection. Paradoxically, the different disclosure environment may make Nevada books and records more useful both to corporations themselves and to plaintiffs that secure production in litigation than the potentially over-lawyered books and records prepared in other jurisdictions.

²³ *Id.* (“[H]ere, the corporation has obtained a NOBO list and is or will be using it to solicit its stockholders in connection with the annual meeting, [a record holder] should be allowed the same channel of communication.”).

²⁴ Relying on the Draft as a “comprehensive analysis” may lead readers into error. *See* Draft, *supra* note 1, at 1, 4, 8, 14 (variously claiming to be the “first comprehensive” analysis of Nevada law).

²⁵ 15 U.S.C. § 78u-4(b)(3)(B) (providing for a discovery stay).

B. Nevada Law in Change of Control Situations

A portion of the Draft considers differences in Delaware and Nevada laws relating to change of control. That section raises many questions for us.

First, the Draft claims that in Nevada, “managers may sell the company to the lowest bidder simply because that bidder keeps them in office, with no intervention from Nevada courts.”²⁶ The Draft cited no authority for this reading of Nevada’s statute, and we could find none either.

Indeed, understanding this section of the Draft was difficult due to some internal inconsistencies. In describing how Nevada’s statute operates in change of control situations, the Draft states that, under Nevada law, “directors who engage in defensive tactics receive deference from the court in Nevada, and the balancing analysis set out in *Unocal* for Delaware corporations is wholly set aside.”²⁷ In the next paragraph, it contends that Nevada “adopted the *Unocal* standard” and applied it “to interference in the shareholder franchise in Nevada.”²⁸ A reader relying on the Draft may be left confused: Did Nevada “set aside” *Unocal*, or did it “adopt[]” *Unocal*?²⁹

For readers who want to know more, Nevada law works as follows: Nevada has a widely celebrated statutory business judgment rule, with three pieces. The statutory business judgment rule creates a presumption that officers and directors “act in good faith, on an informed basis and with a view to the interests of the corporation.”³⁰ If a plaintiff rebuts that presumption,

²⁶ Draft, *supra* note 1, at 6, 51 (claiming without authority that “Nevada managers could sell the company to the lowest bidder simply because that bidder retains them in office, and shareholders could not obtain an injunction to block the sale.”).

²⁷ Draft, *supra* note 1, at 40.

²⁸ *Id.*

²⁹ Although this response focuses on Nevada law, the Draft may not reflect Delaware law precisely. As Professor Couture noted in a recent work, “the Delaware Supreme Court recognized that the *Blasius* standard, ‘as a matter of precedent and practice, has been and can be folded into *Unocal* review to accomplish the same ends--enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control.’” Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. 145, 157 n. 67 (2025) (citing *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 672 (Del. 2023)). Professor Couture’s work explicitly cited to a prior iteration of the Draft and noted this distinction in work published before the re-release of the Draft.

³⁰ Nev. Rev. Stat. § 78.138(3) (2025).

personal liability exists if the plaintiff establishes two additional elements: (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 (2) the “breach involved intentional misconduct, fraud or a knowing violation of law.”³¹

In the change-of-control context, Nevada’s business judgment rule’s default presumption of good faith does not automatically apply to actions that “impede[] the exercise of the right of stockholders to vote for or remove directors.”³² In those circumstances, the directors must (1) “have reasonable grounds to believe that a threat to corporate policy and effectiveness exists;” and (2) establish that the “action taken which impedes the exercise of the stockholders’ rights [was] reasonable in relation to that threat.”³³ Nevada also creates limited safe harbors for defensive tactics. It allows actions that simply delay a stockholder’s right to vote and authorizes the adoption of poison pills.³⁴

Although Nevada law operates here by removing the presumption and permitting litigation to proceed further in some circumstances, it does not remove the other protections of the business judgment rule. There are good reasons: In Delaware, directors may follow the advice of counsel and act in good faith to take actions they see as reasonable responses to threats. Later, if a Delaware court disagrees with their assessment and sends the matter to trial, a director acting in good faith and following the advice of counsel faces personal liability.³⁵ This feature of Delaware’s law creates enormous pressure to settle the litigation to avoid potentially ruinous personal liability. In contrast, Nevada directors implementing defensive tactics in good faith are much less likely to face personal liability and the attendant pressure to settle claims that they should fight.

It would be helpful for the Draft to more accurately explain how Nevada’s law operates in this context. Until then, we urge investors, again, to do their own research about Nevada law with the assistance of Nevada counsel, rather than relying on the Draft’s characterizations.

³¹ *Id.* § 78.138(7)(b).

³² *Id.* § 78.139(1).

³³ *Id.* § 78.139(1).

³⁴ *Id.* § 78.139(2).

³⁵ *See* *Chen v. Howard-Anderson*, 87 A.3d 648, 678 (Del. Ch. 2014) (explaining that Delaware law considers these issues under the duty of loyalty).

Nevada and Delaware are not the equivalent of separate planets: there are many similarities between Nevada and Delaware law, and courts applying Nevada law sometimes reach the same conclusions as Delaware jurists.³⁶

II. The Draft Includes Misleading Claims and False or Mistaken Quotations About Caselaw

The Draft notes that it “exposed the true content of Nevada corporate law” and shows that “Nevada corporate law forecloses shareholder litigation.”³⁷ These statements confused us. We have identified some concerns with the Draft and welcome any clarification or correction.

A. *The McFarland Decision*

Consider the description of one decision, *McFarland v. Long*.³⁸ Notably, *McFarland* was the most-discussed decision in the Draft. The Draft highlights it in the introduction and devotes a subsection to discussing the case to support a claim that “Nevada courts routinely dismiss cases involving clear conflicts of interest, even those with extreme and outrageous facts.”³⁹ A review of the decision reveals that it was not adjudicated by a Nevada court and for whatever reason, we could not find many of the Draft’s claimed quotations from the opinion in the opinion.⁴⁰

³⁶ For example, the Draft explicitly references *In re Zagg Shareholder Derivative Litigation*. Draft, *supra* note 1, at 30. But the Draft does not provide any citation to the decision. *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222 (10th Cir. 2016). There, the 10th Circuit affirmed the dismissal of shareholder derivative claims because the plaintiff failed to allege that a disclosure error constituted intentional misconduct without any allegation that the Defendants understood that a CEO’s margin loan against the corporation’s shares needed to be disclosed. The *Zagg* court explained that Delaware courts likely would have seen the issue the same way because a board approval of a transaction or disclosure that violated some rule does not show the board consciously disregarded its duties. *Id.* at 1234 (“Delaware cases do not infer knowledge of detail (factual or legal) merely from committee membership or execution of SEC filings, but require specific allegations from which one can infer knowledge.”). The Draft provides none of this context. Moreover, the case that Professor Barzuza relies on does not actually reflect a difference between the two jurisdictions. Neither Nevada nor Delaware police every possible instance of alleged misconduct.

³⁷ Draft, *supra* note 1, at 61.

³⁸ 216CV00930RFBPAL, 2017 WL 4582268 (D. Nev. Oct. 7, 2017).

³⁹ Draft, *supra* note 1, at 5.

⁴⁰ The Draft includes quotations to statements that do not appear in *McFarland*. For example, Professor Barzuza quotes the opinion as stating that “[t]he trial court found

We pause again to stress that *McFarland* is not a Nevada court decision, and note that Professor Barzuza never cautions her readers that because it is an unpublished, seven-page 2017 federal district court decision, it may not have significant influence.⁴¹ Instead, the Draft repeatedly presents the decision as support for the claim that “Nevada courts routinely dismiss cases involving clear conflicts of interest, even those with extreme and outrageous facts.”⁴² The Draft never mentions that although the unpublished decision appears on both Westlaw and Lexis, neither Westlaw nor Lexis has demonstrated that any court, state or federal, has ever cited to *McFarland*.⁴³

Other statements are difficult to parse and include false or mistaken quotations. For example, the draft includes the following sentence fragment with quotations attributed to the *McFarland* decision: “Beginning 2007, however, Kirby ‘utterly relinquishing his duties’, [sic] in fact, ‘Kirby simply allowed the executive officers themselves to decide how they would be paid.’”⁴⁴ As far as we could tell, the phrase, “utterly relinquishing his duties” does not appear in the decision.

The Draft also contains factual assertions that do not appear in the opinion. For example, it contends that, in *McFarland*, executives increased their

that the executives ‘milked’ the company and that the remaining director had ‘completely relinquished his duty.’” Draft, *supra* note 1, at 5 & 30, citing *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *2 (D. Nev. Oct. 7, 2017). Professor Barzuza describes the quoted material as “findings” made by the federal district court. These statements do not appear in the opinion cited and the court did not make any such findings in the cited opinion. See *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *2 (D. Nev. Oct. 7, 2017). Procedurally, the court was ruling on a motion to dismiss. It did not make any findings. The statements “milked” and “completely relinquished his duty” do not appear in the opinion cited.

⁴¹ 216CV00930RFBPAL, 2017 WL 4582268 (D. Nev. Oct. 7, 2017). Professor Barzuza cites or references *McFarland* eight times in the draft, spelled either as *McFarland* (five times) or *MacFarland* (three times).

⁴² Draft, *supra* note 1, at 5.

⁴³ In describing *McFarland*, the Draft contends “Thus, [sic] Nevada court here decides that Nevada exculpation statute protects from Delaware Caremark [sic] liability, namely [sic] liability of failure to oversight.” Draft, *supra* note 1, at 32.

⁴⁴ Draft, *supra* note 1, at 31, citing *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *2 (D. Nev. Oct. 7, 2017).

ownership from “5% to 50%,” but the opinion does not contain any such statement.⁴⁵

Our review found that this false or mistaken quotation issue extends beyond the Draft’s quotations from *McFarland*.⁴⁶ For example, the Draft quotes *In re Parametric Sound Corp. Shareholders’ Litigation*⁴⁷ as saying, “the court states that ‘Even if this allegation shows self-interest, Plaintiffs do not allege that this constituted ‘intentional misconduct, fraud, or a knowing violation of law.’”⁴⁸ The cited decision does not use the quoted language—or anything close to it. Notably, the Draft cites the decision to argue that Nevada courts apply Nevada’s “exculpation statute in accordance with the legislative intent to protect self-dealing transactions.”⁴⁹ The *Parametric Sound* decision cited in the Draft does not engage at all with these issues and affirms the dismissal of an action for failing to plead a direct claim.⁵⁰ This distinction matters.

For readers interested in a review of the facts and posture of the case, we quickly provide it here (though we do not see it as particularly significant and actually encourage readers to skip ahead to the next subsection). In

⁴⁵ Draft, *supra* note 1, at 5, 30. We pulled the Complaint to see what it said. The Complaint in the action does contain allegations that “Officer Defendants” increased their ownership from 8.9% to 54.13% between 2003 and 2012. Verified Shareholder Derivative and Class Action Complaint, *McFarland v. Long*, No. 2:16-cv-00930-RFB-GWF (D. Nev. Apr. 25, 2016), ECF No. 1. The Draft does not contain any citation to the Complaint in the action, and the Complaint does not say 5% to 50%. The *McFarland* opinion does say that Officer Defendants holdings reached 54.13% in 2012, but does not contain the 5% to 50% claim. *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *2 (D. Nev. Oct. 7, 2017).

⁴⁶ Professor Barzuza writes that the board included a director “which the court described as a ‘supposedly independent director.’” Draft, *supra* note 1, at 31, citing *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268 (D. Nev. Oct. 7, 2017). The court never used that phrase. The decision does not once use the word “supposedly.” The opinion used the phrase “purportedly independent” in quotes to make clear that the allegation was from the plaintiff and not the court’s characterization.

⁴⁷ 140 Nev. Adv. Op. 36 (2024).

⁴⁸ Draft, *supra* note 1, at 25, n.134. Here the Draft contains three quotation marks, making it difficult to determine exactly what is being quoted, but none of the material in the parenthetical appears in the case.

⁴⁹ Draft, *supra* note 1, at 24.

⁵⁰ *In re Parametric Sound Corp. Shareholders’ Litigation*, 549 P.3d 1189, 1197 (Nev. 2024) (“district court did not err in granting judgment on partial findings to respondents, given PAMTP’s failure to plead direct claims. Therefore, we affirm the appeal”).

McFarland, the plaintiff alleged that a director failed adequately to oversee compensation and stock grants and that other directors and officers were permitted to award themselves excessive compensation.⁵¹

Understanding the case requires understanding Nevada law. Nevada law provides that “[t]he judgment of the board of directors as to the consideration received for the shares issued is conclusive in the absence of actual fraud in the transaction.”⁵² It also provides for a statutory business judgment rule that requires plaintiffs to show that a breach of fiduciary duty “involved intentional misconduct, fraud or a knowing violation of law.”⁵³ Both of these statutes matter.

Professor Barzuza relies heavily on the *McFarland* case to showcase what she sees as problems with Nevada law. Yet this case involves a plaintiff that tried to convince a federal court to apply Delaware law to a Nevada entity.⁵⁴ It is not surprising that a federal court dismissed the claim. Further, the Draft does not explain that the plaintiff argued that Delaware law and Delaware’s entire fairness standard should apply to the Nevada corporation.⁵⁵ Moreover, the plaintiff in that action disclaimed any fraud allegation.⁵⁶

This is how the *McFarland* court explained the situation:

The allegations do not show that the challenged awards were illegal, nor does Plaintiff allege that the awards were prohibited by the Company's charter or bylaws or other formation

⁵¹ *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *1-3(D. Nev. Oct. 7, 2017).

⁵² Nev. Rev. Stat. § 78.211(1) (2025).

⁵³ *Id.* § 78.138(7)(b)(2).

⁵⁴ *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *2 (D. Nev. Oct. 7, 2017) (finding that “that the plain language of the text of the Nevada statute governs the claims in this case”).

⁵⁵ *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *4 (D. Nev. Oct. 7, 2017) (“Plaintiff argues that Delaware's “entire fairness” doctrine applies to the compensation awards.”)

⁵⁶ *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *4 (D. Nev. Oct. 7, 2017) (“At the prior hearing, Plaintiff disclaimed any fraud allegations, and was permitted to amend the Complaint to state more specific facts regarding “intentional misconduct,” which is the theory by which Plaintiff attempts to overcome the presumption of the Nevada business judgment rule.”)

documents, nor that there were any intentional wrongdoings or fraudulent activities. All of the challenged awards were disclosed in SEC filings. **At the prior hearing, Plaintiff disclaimed any fraud allegations, and was permitted to amend the Complaint** to state more specific facts regarding “intentional misconduct,” which is the theory by which Plaintiff attempts to overcome the presumption of the Nevada business judgment rule.

The Amended Complaint is largely the same as the initial Complaint, however, Plaintiff has added allegations that Kirby was a long-tenured director and was on the Our Lady of the Lake University Business School faculty 25 years ago when Hoch was a student, and therefore had a longstanding relationship with him. There is no allegation that Kirby received any compensation in connection with the 2013 and 2014 cash awards. Plaintiff has alleged that Kirby’s award was a “quid pro quo” in exchange for Kirby’s vote on the executive grants. Plaintiff fails to plead any other specific facts related to the alleged “quid pro quo.” These allegations do not amount to “knowledge of wrongfulness” or “intentional misconduct” sufficient to overcome the strict Nevada statutory bar to liability regarding executive compensation decisions.⁵⁷

The law faculty among us are scratching their heads over the concept that there is automatically a longstanding relationship when a faculty member taught a student a quarter century ago.

B. The Draft Does Not Accurately Present Chur v. Eighth Judicial District Court

Additionally, the Draft repeatedly cites to *Chur v. Eighth Judicial District Court (Chur I)*, without discussing or disclosing the relevant context or revealing to readers that the Nevada Supreme Court later revisited the case.⁵⁸ The Draft does not mention that the breach of fiduciary duty claim

⁵⁷ *McFarland v. Long*, 216CV00930RFBPAL, 2017 WL 4582268, at *4-5 (D. Nev. Oct. 7, 2017) (emphasis added).

⁵⁸ *Chur v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 136 Nev. 68, 458 P.3d 336, 342 (2020). For the Draft’s citations to *Chur I*, see Draft, supra note 1, at 26-27 n.145-48. The Draft appears to reference *Chur* in some form in the discussion of *McFarland*,

in *Chur I* was entirely premised on gross negligence.⁵⁹ The Draft engages with “gross negligence” when discussing Delaware law recognizing that corporations “can waive liability to gross negligence, since such liability might chill directors from undertaking profitable risky investments.”⁶⁰ The Draft does not explain why it is right for Delaware corporations to avoid liability for alleged gross negligence but wrong for Nevada corporations to do the same.

The Draft omits that the *Chur* litigation remains ongoing, and the Nevada Supreme Court recently released its second opinion (“*Chur II*”) related to the case.⁶¹ The Supreme Court concluded that the plaintiff should be allowed to replead to allege intentional misconduct and knowing violations of law by reference to administrative regulations governing insurance.⁶² The Draft does not engage at all with *Chur II*’s implications for its thesis. The court did not hold that the plaintiff could not make out a viable claim. It simply held that the plaintiff had not alleged the proper standard under Nevada law, a similar defect as the plaintiff in *McFarland*. It is hard to fault a court for requiring plaintiffs to allege the required elements under the law.

Other commentators on Nevada law had publicly discussed this issue prior to the republication of the Draft.⁶³ The *Chur II* decision somewhat parallels the Delaware Supreme Court’s decision in *In re Walt Disney Co. Derivative*

claiming *McFarland* cites to *Chur*, which it does not. *Chur* is also misspelled. Draft, *supra* note 1, at 31. *McFarland* could not have cited to *Chur I* because it was not decided until 2020, years after *McFarland*.

⁵⁹ See *id.* at 342 (“Considering whether the Commissioner here sufficiently pleaded that the Directors knew their conduct to be wrongful, we conclude that the Commissioner did not. Instead, the complaint focuses solely on gross negligence and alleges facts that purport to rebut the business judgment rule”).

⁶⁰ Draft, *supra* note 1, at 15, 20, 23.

⁶¹ Commissioner of Insurance v. *Chur*, 581 P.3d 441, 141 Nev., Adv. Op. 69 (2025).

⁶² *Id.* at 449.

⁶³ See, e.g., Sean Donahue, *Nevada Supreme Court Finds Knowing Violation of Regulations May Constitute Breach of Fiduciary Duty*, Paul Hastings LLP Client Alert (Dec. 31, 2025), <https://www.paulhastings.com/insights/client-alerts/nevada-supreme-court-finds-knowing-violation-of-regulations-may-constitute-breach-of-fiduciary-duty> (“In finding that a violation of administrative regulations may constitute a knowing violation of law for purposes of the statute, the court has added additional clarity to the meaning of the language in 78.138.”).

*Litigation.*⁶⁴ In that litigation, it took Delaware courts some time to arrive at the final decision.

The Draft contends that “[c]onscious disregard—which Delaware treats as a breach of the duty of good faith and therefore a breach of the duty of loyalty—receives protection under Nevada’s exculpation statute.”⁶⁵ This claim appears inconsistent with the Nevada Supreme Court’s statements in *Chur II*. To our knowledge, no Nevada court has ever found that corporate directors may knowingly scoff at their duties under Nevada law. Instead, it simply found that the plaintiff must allege the elements required under Nevada law. Nevada recognizes claims for fraud, intentional misconduct, and for knowing violations of law, so the case cannot be used as evidence that Nevada allows directors to knowingly or “consciously” ignore their duties under Nevada law.

C. The Draft Entirely Omits Relevant Nevada Decisions

Professor Barzuza maintains that the Draft offers the “first comprehensive analysis of Nevada’s . . . case law” despite never engaging or citing significant Nevada Supreme Court decisions.⁶⁶ Moreover, a review of the draft reveals that it cites to only four decisions rendered by Nevada state courts.⁶⁷ In contrast, the Draft cites uncritically to over twenty different Delaware decisions. Several major Nevada Supreme Court decisions contradict the Draft’s core claims.

1. The Nevada Supreme Court Affirms Finding That Directors Engaged in Fraudulent Conduct

⁶⁴ In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) (“Because the statute exculpates directors only for conduct amounting to gross negligence, the statutory denial of exculpation for ‘acts ... not in good faith’ must encompass the intermediate category of misconduct captured by the Chancellor’s definition of bad faith.”).

⁶⁵ Draft, *supra* note 1, at 51.

⁶⁶ Draft, *supra* note 1, at 4.

⁶⁷ The Draft cites the following four Nevada state court decisions: *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (Nev. 2006); *Order Denying Defendants’ Motion to Dismiss and Granting Lead Plaintiffs’ Motion to Strike*, In re Wynn Resorts, Ltd. Derivative Litigation, No. A-18-769630-B (Nev. Dist. Ct. Sept. 4, 2018); *Chur v. Eighth Judicial Dist. Court*, 458 P.3d 336 (Nev. 2020); *In re Parametric Sound Corp. S’holders’ Litig.*, 140 Nev. Adv. Op. 36 (2024).

In 2011, the Nevada Supreme Court issued an unpublished decision in *Nutraceutical Dev. Corp. v. Summers*.⁶⁸ The Nevada Supreme Court affirmed the findings that directors fraudulently breached their fiduciary duties and the award of substantial compensatory damages.⁶⁹ The Supreme Court specifically affirmed the trial court's finding that defendants "owed \$425,237 to [the corporation] for unreasonable expenditures."⁷⁰

Summers sits in tension with central claims in the Draft that "Nevada courts appl[y] the exculpation statute in accordance with the legislative intent to protect self-dealing transactions"⁷¹ and that shareholders face an "insurmountable" task to establish liability under Nevada law.⁷²

The *Summers* decision matters because it shows, like other cases omitted from the Draft, that *Wynn Resorts* never stood alone and that the Nevada Supreme Court will affirm damages awards against directors in appropriate circumstances. When combined with the additional decisions cited below, *Summers* joins a long train of unmentioned outcomes directly contradicting the Draft's thesis.

2. The Draft Entirely Omits *Guzman v. Johnson*

The Draft also skips *Guzman v. Johnson*, a seminal Nevada Supreme Court case.⁷³ *Guzman* clarified that Nevada does not apply Delaware's entire fairness standard against officers and directors under any circumstance.⁷⁴ The case dismissed claims against directors when a special committee negotiated a merger. This is how the Nevada Supreme Court described the trial court's evaluation:

[T]he district court asked Guzman what allegations in her complaint supported her claim that the Special Committee was not disinterested in the transaction. Guzman responded that "they were at risk of being ousted and that's not a good footing."

⁶⁸ 127 Nev. 1163, No. 53565, 2011 WL 2623749 (July 1, 2011) (unpublished disposition).

⁶⁹ *Id.* at *4 (holding "that sufficient evidence supported the district court's finding that appellants committed fraud against respondents" and "that the district court did not abuse its discretion in its award of actual damages to respondents.").

⁷⁰ *Id.* at *4-6.

⁷¹ Draft, *supra* note 1, at 4.

⁷² Draft, *supra* note 1, at 34.

⁷³ *Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (Nev. 2021).

⁷⁴ *Id.*

Guzman then conceded, however, that she had no specific allegations implicating the Special Committee. The district court concluded that Guzman failed to state adequate facts in her complaint showing the Special Committee was not disinterested. Therefore, the court determined that the business judgment rule applied because RLJE had given the Special Committee full authority to determine whether to merge[.]⁷⁵

In analyzing the claim, the Nevada Supreme Court rejected arguments that a plaintiff could rebut the presumption of Nevada’s business judgment rule merely by alleging speculative allegations that directors “were motivated by self-interest to undersell the stock.”⁷⁶ The Nevada Supreme Court also affirmed dismissal against a controlling stockholder because the plaintiff “failed to allege particularized facts to demonstrate a lack of fair dealing or lack of fair price.”⁷⁷

3. The Draft Omits a Landmark Nevada Case Establishing Subsidiary Liability

The Draft entirely omits the Nevada Supreme Court’s recent decision in *Capital Advisers, LLC v. Cai*.⁷⁸ In *Capital Advisers*, the Nevada Supreme Court followed Delaware law and concluded that “that officers and directors of a parent corporation can breach their fiduciary duties by intentionally implementing or knowingly permitting actions adverse to the parent corporation through a wholly owned subsidiary.”⁷⁹ The plaintiffs successfully rebutted Nevada’s statutory business judgment rule by “present[ing] evidence that [a defendant] had a personal interest in the challenged loan . . . and thus rebutted the business judgment rule for the purposes of evading judgment as a matter of law.”⁸⁰

The *Capital Advisers* decision sharply contrasts with the Draft’s claims that *McFarland* represents ordinary practice in Nevada courts, that Nevada courts “routinely dismiss cases involving clear conflicts of interest, even those with extreme and outrageous facts,” and that “Nevada applies no

⁷⁵ *Id.* at 129, 535.

⁷⁶ *Id.* at 133, 538.

⁷⁷ *Id.* at 134, 539.

⁷⁸ 548 P.3d 1202 (2024).

⁷⁹ *Id.* at 1208.

⁸⁰ *Id.* at 1209.

judicial scrutiny to self-dealing transactions.”⁸¹ Omitting the Nevada Supreme Court’s published decision in *Capital Advisers* leaves the Draft’s readers without the information they need to predict what Nevada courts will actually do.

The Nevada Supreme Court allowed claims to go forward in *Capital Advisers*. It allowed a “claim for breach of fiduciary duty and self-dealing” to go forward when plaintiffs “presented sufficient evidence by which a jury could grant relief[.]”⁸² It also allowed a waste claim to proceed when the plaintiff alleged that a “loan was unsecured, offered at zero-percent interest, and allegedly drained approximately 80% of all cash reserves,” finding that on this evidence “appellants presented sufficient evidence by which a jury could conclude that no ordinary business person could find the loan was made under terms that were anything other than one-sided.”⁸³

The Draft’s omission of *Capital Advisers* matters because it directly undercuts multiple core claims. *Capital Advisers* shows that Nevada courts do not turn a blind eye to “extreme and outrageous facts” and that Nevada’s business judgment rule is not “impossible” to rebut.

Collectively these cases demonstrate that, although Nevada draws different lines from Delaware, Nevada courts do police a range of misconduct. The Draft, by omitting relevant Nevada law, creates a false impression that stockholders will never have recourse in the Nevada courts.

III. The Draft Misinterprets Nevada Legislative History

The Draft argues that Nevada does not consider policy when making law, contending that “there is no evidence that Nevada law reflects a different balance of policy considerations.”⁸⁴ But it makes this argument by misunderstanding the factual record. For example, the Draft decries Nevada’s decision to make its statutory business judgment rule a default in contrast to Delaware’s opt-in exculpation provision.⁸⁵ Professor Barzuza contends that Nevada’s shift to an opt-out structure “was not justified by policy considerations” and that “no one explained why Nevada should

⁸¹ Draft, *supra* note 1, at 4-5.

⁸² *Capital Advisers, LLC v. Cai*, 548 P.3d 1202, 1210 (Nev. 2024).

⁸³ *Id.* at 1211.

⁸⁴ Draft, *supra* note 1, at 18.

⁸⁵ Draft, *supra* note 1, at 16-17.

deprive shareholders of the opt-in authority they retain in every other state.”⁸⁶

But Nevada’s legislative history specifically addresses policy in legislative minutes cited in the Draft.⁸⁷ Testimony from Michael Bonner, whom many of us know and respect, explained that “the proposal actually benefits the small ‘mom-and-pop’ operation” and that “he has probably seen thousands of corporations since 1987, and he can think of only one instance in which a corporation charter did not have that provision because it was, essentially, a small business that apparently did not have the funds to seek legal counsel.”⁸⁸ He went on to explain that the corporation had used “some office supply form, and missed the director and officer protection.”⁸⁹ Notably, Professor Couture had specifically identified this policy rationale in a paper published before Professor Barzuza re-released the Draft.⁹⁰

Nevada’s Legislative history also contradicts the Draft’s claim that no other state allowed automatic protections. The same legislative minutes state that “Florida, Indiana, Maine, Ohio, and Wisconsin have so-called self-executing statutes, meaning as a matter of statutory law, liability protection is available.”⁹¹

Contrary to the Draft’s claims, the legislative record shows that Nevada did consider the opt-in option and rejected it because nearly every company elects to opt in to exculpation and therefore it made sense to make exculpation the default rule, given that it operated as a default in practice. Delaware may have come to a different policy judgment, but that does not mean that Nevada’s legislative judgment was unconsidered.

⁸⁶ *Id.*

⁸⁷ Draft, *supra* note 1, at 17 n.88.

⁸⁸ Minutes of the Senate Committee on Judiciary, Nevada Legislature, 71st Sess. (May 22, 2001) (statement of Michael Bonner), <https://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/1464.html>.

⁸⁹ *Id.*

⁹⁰ Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19 VA. L. & BUS. REV. 145, 163 (2025) (explaining that legislators supported the switch to an opt-out provision in order to extend exculpation “to all of those people including small business people who may not have that sophisticated legal advice.” (citing Nevada Senate Daily Journal, 71st Session, May 26, 2001, Remarks of Senator Mark A. James re: S.B. 577.))

⁹¹ Minutes of the Senate Committee on Judiciary, Nevada Legislature, 71st Sess. (May 22, 2001) (statement of Michael Bonner), <https://www.leg.state.nv.us/71st/Minutes/Senate/JUD/Final/1464.html>.

We pause to affectionately tweak our friends in Delaware. Delaware’s decision to require incorporators to hire Delaware lawyers to advise them that nearly everyone deviates from its statutory default imposing director liability for breach of the duty of care remains an interesting quirk. Although Delaware recently amended its statute to conform to market practice in some areas, it has not conformed exculpation to market practice. Considering the relatively small population of corporate lawyers in Nevada relative to Delaware’s thriving corporate bar, the policy decision to provide exculpation as a default rule makes sense in Nevada.

Notably, the Draft also entirely omits other legislative history indicating that Nevada aims to foster predictability while prohibiting fraud and real misconduct. For example, Michael Bonner explained that “a corporation wants predictability, and if Nevada can enhance the liability protection for them and strike the proper balance to not protect those who have participated in a criminal activity or fraud, the State will go a long way to making Nevada an attractive place in which to incorporate.”⁹² It also entirely ignores Mr. Bonner’s statement that Nevada should avoid doing things to attract “less desirable businesses, because that is not in our best interests.”⁹³

IV. The Draft Mischaracterizes Nevada’s Corporate Liability Environment & Caselaw

The Draft repeatedly contends that Nevada is a “liability-free” jurisdiction and that settled litigation involving Wynn Resorts is the “Exception That Proves the Rule” (capitalization in original) because the case advancing past a motion to dismiss depended on “extraordinary luck: a marital dispute, a media frenzy, and corporate admissions made for public relations purposes.”⁹⁴ The Draft asserts that the litigation only survived because the conflict between Elaine and Steve Wynn “forced information into the open that would normally remain hidden” and that a company press release

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Draft, *supra* note 1, at 34-36 (“The case involved a bitter public fight between Steve Wynn and his wife, Elaine Wynn, who was both a director and significant shareholder.”). This mischaracterizes the relationship between Steve and Elaine Wynn at the time. At the time of the dispute, Elaine and Steve Wynn had been divorced for about eight years.

“provided the smoking gun evidence of knowledge that shareholders could never have obtained through formal legal channels.”⁹⁵

Yet the actual order denying a motion to dismiss in the Wynn Resorts matter does not support these claims.⁹⁶ The order explicitly rejects the need to show any “smoking gun of Board knowledge[.]”⁹⁷ It also lists a litany of information that indicated board knowledge, with much of the information being available publicly, entirely separate from Elaine Wynn’s litigation.⁹⁸ The list includes litigation with the National Labor Relations Board, other actions in federal court, subsidiary litigation filings, lawsuits filed against the board, and the fact that “Wynn’s inappropriate behavior was well-known by Wynn employees . . . and *on public display* in various Wynn Las Vegas locations[.]”⁹⁹ The Draft’s claim that, absent the rarest of circumstances, this information would not have been available to stockholders is not consistent with the court’s statement that the information was available.

The Draft is also incorrect in claiming that the case survived only because of company “admissions” in a press release.¹⁰⁰ To the extent that the press release “admitted” that the board knew that it had obligations as a regulated gaming entity, the same knowledge could also be easily shown by reference to Wynn Resorts’ public filings and prior litigation, where it

⁹⁵ Draft, *supra* note 1, at 36.

⁹⁶ Notably, the Draft’s citations to Wynn Resorts are not accurate. To be charitable, we assume Professor Barzuzza read the actual order even though the Westlaw citation is not accurate and the date is not correct. Professor Barzuzza provides the following citation, *In re Wynn Resorts, Ltd. Derivative Litig.*, NO. A-18-769630-B, 2018 WL 11252194 (Nev. Dist. Ct. Sept. 6, 2018), but no such document appears on Westlaw at that citation. The order denying Wynn Resorts motion to dismiss is properly cited as Order Denying Defendants’ Motion to Dismiss and Granting Lead Plaintiffs’ Motion to Strike, *In re Wynn Resorts, Ltd. Derivative Litigation*, No. A-18-769630-B (Nev. Dist. Ct. Sept. 4, 2018).

⁹⁷ Order Denying Defendants’ Motion to Dismiss and Granting Lead Plaintiffs’ Motion to Strike, *In re Wynn Resorts, Ltd. Derivative Litigation*, No. A-18-769630-B, at 4 (Nev. Dist. Ct. Sept. 4, 2018) (*quoting Rosenbloom v. Pyott*, 765 F.3d 1137, 1155-56 (9th Cir. 2014)).

⁹⁸ *See* Order Denying Defendants’ Motion to Dismiss and Granting Lead Plaintiffs’ Motion to Strike, *In re Wynn Resorts, Ltd. Derivative Litigation*, No. A-18-769630-B, at 6 (Nev. Dist. Ct. Sept. 4, 2018).

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ Draft, *supra* note 1, at 35.

plainly demonstrates that its board knows it owes substantial regulatory duties.¹⁰¹

The Draft also entirely omits that there were two independent reasons for allowing the litigation to go forward, finding that “each of which as alleged independently satisfie[d] demand futility[.]”¹⁰² In addition to a substantial likelihood of liability for “knowingly failing to take action,” the court found a substantial likelihood of liability for “profiting on this information through insider trading that came at the Company’s and shareholder’s expense.”¹⁰³ The Draft never mentions that the insider trading allegations provided an independent basis.

The Draft’s mistaken quotation problem recurs here as well and obscures the second prong of the case. In describing the Wynn Resorts decision, the Draft presents the following, partially mistaken quotation:

The court held that plaintiffs satisfied demand futility requirements because they brought “particularized facts that show that directors could face liability for knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing to notify regulators of information material to Steve Wynn's suitability as a gaming licensee.”¹⁰⁴

But the Wynn Resorts decision actually states that:

Lead Plaintiffs sufficiently pleaded that a majority of the Board faces a substantial likelihood of liability for two reasons, each of which as alleged independently satisfies demand futility: 1) for knowingly failing to take action in the face of credible and

¹⁰¹ See, e.g. Wynn Resorts, Ltd., Current Report (Form 8-K) (Feb. 22, 2012), <https://www.sec.gov/Archives/edgar/data/1174922/000119312512071603/d304177d8k.htm> (revealing a complaint detailing board knowledge of gaming regulatory requirements).

¹⁰² Order Denying Defendants' Motion to Dismiss and Granting Lead Plaintiffs' Motion to Strike, In re Wynn Resorts, Ltd. Derivative Litigation, No. A-18-769630-B (Nev. Dist. Ct. Sept. 4, 2018).

¹⁰³ Order Denying Defendants' Motion to Dismiss and Granting Lead Plaintiffs' Motion to Strike, In re Wynn Resorts, Ltd. Derivative Litigation, No. A-18-769630-B, at 5 (Nev. Dist. Ct. Sept. 4, 2018).

¹⁰⁴ Draft, *supra* note 1, at 36.

corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing to notify regulators of information material to Steve Wynn’s suitability as a gaming licensee, and 2) for profiting on this information through insider trading that came at the Company’s and shareholder’s expense.

The Wynn Resorts order does use the term “particularized facts”—but in a different portion. Quoting from Delaware law, the order explained that, to show a “substantial risk of liability,” “plaintiffs need only make a threshold showing, through the allegation of particularized facts that their claims have some merit.”¹⁰⁵

Persons familiar with Nevada law and practice would know that, although the Wynn Resorts case offers a good example of a significant Nevada settlement, it is not the only example. There are multiple large settlements of shareholder litigation in Nevada, illustrating that informed stakeholders practicing in the state do not view it as a “liability-free zone.”

A. The Draft Does Not Discuss Cohen v. Mirage Resorts

The Draft also does not cite *Cohen v. Mirage Resorts, Inc.*, a notable Nevada Supreme Court case that allowed a shareholder claim to proceed past a motion to dismiss.¹⁰⁶ *Cohen* allowed a shareholder to challenge a merger with a direct claim if there was fraud or unlawful conduct in connection with a merger. The case was reaffirmed in 2022 by the Nevada Supreme Court which stated that *Cohen* addressed “when dissenting shareholders fall under” exceptions to Nevada’s dissenters’ rights statute.¹⁰⁷ The *Cohen* case is also discussed in a treatise on Nevada law available on Lexis.¹⁰⁸ The Draft contains no citations to this treatise, or to any prior Nevada-specific treatise.¹⁰⁹

¹⁰⁵ Order Denying Defendants' Motion to Dismiss and Granting Lead Plaintiffs' Motion to Strike, *In re Wynn Resorts, Ltd. Derivative Litigation*, No. A-18-769630-B, at 4 (Nev. Dist. Ct. Sept. 4, 2018) (cleaned up).

¹⁰⁶ 119 Nev. 1, 7 (2003).

¹⁰⁷ *Aerogrow Int'l v. Eighth Judicial Dist. Court of Nev.*, 2022 Nev. Unpub. Lexis 487, at *4 (Nev. 2022).

¹⁰⁸ BENJAMIN P. EDWARDS & LORI D. JOHNSON, *NEVADA BUSINESS AND COMMERCIAL LAW* § 6.25 (2026).

¹⁰⁹ The draft contains no citations to KEITH PAUL BISHOP & JEFFREY P. ZUCKER, *BISHOP AND ZUCKER ON NEVADA CORPORATIONS AND LIMITED LIABILITY COMPANIES* (2011).

Further, a recent case proceeding on a theory under *Cohen* now has a settlement approval hearing set for April 30, 2026 where the proposed settlement “will result in a cash settlement fund of \$15,978,202.50.”¹¹⁰ The case survived a motion to dismiss.¹¹¹ The case involved factual allegations about alleged “breaches of fiduciary duty with respect to both an unfair price and the timing of [a] Merger.”¹¹²

B. Nevada Shareholder Derivative Claims Sometimes Succeed at Trial

Additionally, the Draft fails to cite to a recent case in which a jury found liability against a Nevada corporation’s directors in a shareholder derivative action.

In *In re Franklin Wireless Corp. Derivative Litigation*, claims against the directors of a Nevada corporation went to trial, and the plaintiffs prevailed.¹¹³ The jury instructions explained that the directors of Nevada corporations owe fiduciary duties of care, loyalty, and disclosure.¹¹⁴ Although the jury returned only nominal damages, this recent case serves to again illustrate that *Wynn Resorts* does not stand alone.

C. Nevada Shareholder Claims Have Secured Substantial Damages or Attorney’s Fees

The Draft dismisses *Wynn Resorts* and argues that the case is an exception that somehow proves that liability is near impossible under Nevada law. The argument only works if you ignore other substantial settlements and decisions involving Nevada corporations that were publicly available prior to the recent republication and promotion of the Draft. For example,

¹¹⁰ *Overbrook Capital LLC v. AeroGrow Int’l, Inc.*, No. A-21-827665-B, Settlement Website, <https://aerogrowshareholderlitigation.com/> (last visited Apr. 18, 2026).

¹¹¹ Order Denying Defendants’ Motion to Dismiss First Amended Consolidated Complaint, *Overbrook Capital LLC v. AeroGrow Int’l, Inc.*, No. A-21-827665-B (8th Jud. Dist. Ct. Clark Cnty., Nev. Oct. 21, 2025).

¹¹² *Id.* at 6.

¹¹³ *In re Franklin Wireless Corp. Derivative Litig.*, No. 3:21-cv-01837-BEN-MSB (S.D. Cal. Dec. 19, 2024); see also *In re Franklin Wireless Corp. Derivative Litig.*, No. 21-CV-1837-BEN-MSB, 2025 WL 1638316, at *1 (S.D. Cal. June 9, 2025).

¹¹⁴ Jury Instructions, *In re Franklin Wireless Corp. Derivative Litig.*, No. 3:21-cv-01837-BEN-MSB (S.D. Cal. Dec. 19, 2024), ECF No. 159.

information about the following settlements was available on EDGAR prior to the recent republication and promotion of the Draft.

In the interest of efficiency, we do not attempt to identify every settlement that the Draft ignores, but to show that it fails to cover significant, publicly available settlements that, in our experience, are common knowledge among Nevada practitioners.

1. The Draft Does Not Discuss
LQR House's \$13 Million Settlement

A recent 10-Q for LQR House Inc. explains a recent shareholder settlement as follows:

The complaint alleged, among other things, breach of fiduciary duty and related claims arising from corporate governance matters. . . the Company and other defendants entered into settlement agreements . . . to resolve all matters in the litigation. The settlements provide for mutual releases and a total cash payment obligation of approximately \$13 million from the Nevada Defendants. . .¹¹⁵

The Draft does not discuss this settlement. Notably, the settlement consideration reached over 50% of LQR House's market capitalization.

2. The Draft Does Not Discuss
Workhorse's \$12.5 Million Settlement

The Draft does not discuss Workhorse Group's \$12.5 million settlement of shareholder derivative claims. This is how a 10-K described the settlement:

Under the terms of the settlement, the Company will receive \$12.5 million of the \$15.0 million described above from the Company's directors and officers insurers and will, in turn, deliver the \$12.5 million in connection with the settlement of the Securities Litigation. The Company has also agreed to adopt various corporate governance changes. The parties agreed to a

¹¹⁵ LQR House Inc., Quarterly Report (Form 10-Q) (filed Nov. 14, 2025), https://www.sec.gov/Archives/edgar/data/0001843165/000121390025111071/ea0263705-10q_lqrhouse.htm, at 27.

\$4.0 million fee to the derivative plaintiffs’ attorneys,
\$3.5 million of which is payable by the D&O insurers and
\$0.5 million of which was payable by the Company.¹¹⁶

3. The Draft Does Not Discuss the Paysign Settlement

Paysign settled four different stockholder derivative actions in exchange for governance reforms and the payment of “\$607,500 in attorneys’ fees.”¹¹⁷

4. The Draft Does Not Discuss the Blink Charging Settlement

The Blink Charging Company, a Nevada corporation, recently agreed to settle shareholder derivative litigation in exchange for governance reforms.¹¹⁸ This is how Blink Charging described the settlement:

[T]he Proposed Settlement involves the Company implementing certain corporate governance reforms and for attorneys’ fees and expenses in the amount of \$553,750 to be paid to plaintiffs’ counsel, which includes payments of up to \$2,000 to each named plaintiff. The Company expects the entire amount, including all attorneys’ fees, expenses and named plaintiff payments, to be paid by the Company’s insurer.¹¹⁹

V. Conclusion

In evaluating Nevada corporate law, professional advisers, institutional investors, and stockholders need access to a complete picture. The widely-circulated version of Professor Barzuza’s Draft unfortunately does not yet provide a complete picture. Instead, it paints an incorrect picture of Nevada law and history.

¹¹⁶ Workhorse Group Inc., Annual Report (Form 10-K) (filed Mar. 31, 2025) at F-40, <https://www.sec.gov/Archives/edgar/data/1425287/000142528725000024/wkhs-20241231.htm>.

¹¹⁷ Paysign, Inc., Quarterly Report (Form 10-Q), at 14-15 (filed Nov. 6, 2024), at 14-15, https://www.sec.gov/Archives/edgar/data/1496443/000168316824007637/paysign_i10q-093024.htm.

¹¹⁸ Blink Charging Co., Current Report (Form 8-K) (filed Sept. 2, 2025), <https://www.sec.gov/Archives/edgar/data/1429764/000164117225026230/form8-k.htm>.

¹¹⁹ *Id.*

This Response does not attempt to identify every error or omission in the Draft. We have pointed out some significant gaps in an effort to help Professor Barzuza make her own work more complete.

Signatories¹²⁰

Note: The persons listed as joining this response do not necessarily agree with every statement in the foregoing response or that every case or settlement identified reached the correct outcome. They also do not speak on behalf of their employers. All persons joining do agree that Professor Barzuza's Draft does not accurately present Nevada corporate law.

Benjamin P. Edwards¹²¹

Associate Dean for Faculty Research & Development
William S. Boyd School of Law
University of Nevada, Las Vegas

Nevada Elected Officials

Governor Joe Lombardo
State of Nevada

Francisco V. Aguilar
Secretary of State
State of Nevada

Zachary Conine
Treasurer
State of Nevada

¹²⁰ This list of signatories was last updated on Friday, April 24, 2026.

¹²¹ I drafted this response in my personal capacity. In addition to my role as Associate Dean for Faculty Research and Development at the William S. Boyd School of Law, I have other affiliations and relationships that readers may wish to consider in evaluating this Response. Although these are generally well known, I disclose them here as well. This Response was not prepared on behalf of, at the direction of, or in any way approved by any of these other affiliations. I have written about Nevada law for some time and write for the Business Law Professor Blog and am a co-author of a treatise on Nevada business and commercial law. I currently serve on Nevada's Board of Finance, the American Bar Association's Corporate Laws Committee, and I served as an expert witness for the plaintiff side in two of the cases disclosed here, the *Franklin Wireless* and *Aerogrow* cases. I also recently accepted a part-time role with Wilson Sonsini Goodrich & Rosati as Senior of Counsel to provide assistance on questions of Nevada law. I also have an interest in promoting the development of Nevada as a jurisdiction so that my students at the William S. Boyd School of Law will have meaningful opportunities to practice business law.

Joe Dalia
Assemblyman, District 29
Sponsor of AJR 8 and AB 239 (2025)

Nevada Attorneys and Law Faculty

Gian Brown
Holland & Hart

Ravi Chanderraj
Paul Padda Law

Chris Connell
Connell Law

John S. Delikanakis
Snell & Wilmer

Glenn Gavin
Gavin & Brown

Jonah Gavish
McDonald Carano LLP

Ryan Gile
Gile Law Group

Mark Goldstein

Rew R. Goodenow
Parsons Behle & Latimer

Aaron Hegji
Harrison LLP

Mark H. Hutchings
Hutchings Law Group

James M. Jimmerson
The Jimmerson Law Firm

Lori D. Johnson
Terry Pollman Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

Christopher Kircher
The Kircher Law Firm, PLLC

Shawn McNulty
Roitman Legal

John Netto
Unit of Risk Legal Advisors

Nancy B. Rapoport
UNLV Distinguished Professor
Garman Turner Gordon Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

James B. Robertson
McDonald Carano LLP

Michael Roitman
Roitman Legal

Amandine Marie Ruiz
Roitman Legal

Nick Shook
Neon Law

Brian H. Schusterman
McDonald Carano LLP

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Nevada v. Delaware
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NEVADA V. DELAWARE

Michal Barzuza*

ABSTRACT

Nevada corporate law has become a central focus in corporate America. Nevada has emerged as Delaware's principal competitor, now second only to Delaware in attracting out-of-state incorporations and dominating reincorporations out of Delaware. The competitive pressure is evident: Delaware reduced scrutiny of self-dealing transactions, and Texas incorporated elements of Nevada's broad exculpation for directors and officers.

This Article demonstrates that Nevada corporate law effectively forecloses shareholder litigation, contradicting claims by Nevada officials and commentators that differences from Delaware are modest. Through the first comprehensive analysis of Nevada's legislative amendments, legislative history, and case law, it shows that plaintiff shareholders must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records necessary to meet this burden. As a result, Nevada fundamentally eliminates the shareholder rights and management accountability that have long characterized American corporate law.

The Article analyzes the fragile market for corporate law and the risk of cascading degradation. As Delaware moves closer to Nevada's standards to retain incorporations, barriers to leaving Delaware fall, and the competitive advantage erodes. Other states, like Texas, are already joining, potentially accelerating a race to the bottom.

While scholars debate Delaware's S.B. 21, Nevada has gone far beyond—eliminating judicial scrutiny of self-dealing, replacing *Unocal* and *Revlon* with the business judgment rule, and extending its broad exculpation to controlling shareholders. These findings require a reassessment of the costs and benefits of different forms of federal intervention in corporate law, including novel approaches such as adopting Delaware's fiduciary duty standards as federal minimums or requiring majority-of-the-minority shareholder approval for reincorporations.

* Nicholas E. Chimicles Research Professor of Business, Law & Regulation at the University of Virginia School of Law. I am grateful to Liam O. Zeya and for his invaluable research assistance. For helpful comments and suggestions, I thank participants at the faculty workshop at UVA Law School, the Fisher Center Corporate Workshop at Tel-Aviv University, the Competitive Company Law Conference at Oxford University, and the Annual Meeting of the Corporate Section of the American Bar Association.

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“The absurdity of this race for the bottom, with Delaware in the lead...should arrest the conscience of the American bar...”

Bill Carey, *Federalism and Corporate Law: Reflections upon Delaware*, YLJ (1974)

I. INTRODUCTION

Nevada corporate law has become a central focus in corporate America. Nevada has emerged as Delaware's principal competitor, now second only to Delaware in attracting out-of-state incorporations while dominating reincorporations out of Delaware.¹ Firms cite reduced litigation exposure as a key advantage of incorporating in Nevada.² The competitive pressure from Nevada is evident: Delaware amended its law to reduce scrutiny of self-dealing transactions, moving closer to Nevada's approach,³ and Texas has incorporated elements of Nevada's statutory scheme.⁴

¹ See e.g., Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593, 3599-3601 & Tbl. 2 (2014) (finding that Nevada is second to Delaware in attracting out of state incorporations); Stephen M. Bainbridge, *Dexit Drivers: Is Delaware's Dominance Threatened*, 50 J. CORP. L. 823, at 825 (2025) (stating that “Today, Nevada emerges as a notable challenger, actively promoting “DExit” – a push for companies to leave Delaware,” and finding that between 2012-2024 Nevada was “by far the leading choice” for reincorporations out of Delaware.); Benjamin P. Edwards, *Final 2025 Nevada and Texas Reincorporation Lists*, BLPB (Feb. 3 2026) reporting that in 2026, 28 companies attempted to reincorporate to Nevada, and 8 companies attempted to reincorporate to Texas). <https://www.businesslawprofessors.com/2026/02/final-2025-nevada-and-texas-reincorporation-lists/>

² See e.g., Datadog Inc., PROXY STATEMENT (SCHEDULE 14A), at 15-16 (2026) (“Nevada courts follow a more statute-based approach to director and officer duties that is less dependent on judicial interpretation,” and that reincorporating to Nevada “Will Reduce the Risk of Unmeritorious and Costly Litigation”) https://www.sec.gov/Archives/edgar/data/1561550/000119312526043680/d700416dpre14a.htm#toc700416_3;

The Trade Desk Inc., PROXY STATEMENT (SCHEDULE 14A), at 13-14 (2024) (“We believe that Nevada can offer more predictability and certainty in decision-making because of its statutory regime...We believe the Nevada Reincorporation will result in less unmeritorious litigation against the corporation and our directors and officers, which in turn would better allow our directors and officers to focus on the business and save the Company the costs of such litigation.”) https://www.sec.gov/Archives/edgar/data/1671933/000119312524223756/d854378dpre14a.htm#toc854378_11

³ Senate Bill 21, 153RD GEN. ASSEMB. (DEL. 2025).

⁴ Texas amended its law to include Nevada exculpation as an opt-in liability limitation. See Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).

Nevada's rise has sparked renewed debate. A decade ago, this author found that Nevada's exculpation statute uniquely extends to duty of loyalty breaches and argued that Nevada was creating a no-liability regime.⁵ Nevada Secretary of State Francisco V. Aguilar, UNLV law professor Benjamin Edwards, and several prominent commentators have challenged this characterization.⁶ Aguilar recently filed an amicus brief in the Delaware Supreme Court defending Nevada's law.⁷ Aguilar and others contend that the differences from Delaware in Nevada's exculpation statute are not material, that Nevada is not a no-liability regime, and that academic arguments exaggerate and misrepresent the laxity of Nevada law.⁸ Nevada merely makes different policy choices, they argue, protecting directors from liability for mistakes without fundamentally altering the balance between management and shareholders.⁹

In contrast, this Article shows that Nevada corporate law effectively forecloses shareholder litigation, fundamentally eliminating the shareholder rights and management accountability that have long characterized American corporate law. Nevada applies no judicial scrutiny to self-dealing transactions—the very transactions that trigger Delaware's highest standard of review. The consequences are severe, as insiders can extract value at shareholders' expense with virtual immunity, eliminating the core constraint on management and controlling shareholder self-interest that has defined corporate fiduciary law.

The Article provides the first comprehensive analysis of Nevada's statutory amendments, legislative history, and case law. It reveals how

⁵ See Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability Free Jurisdiction*, 98 VA. L. REV. 935 (2012) (arguing that Nevada changed its law to protect directors and officers).

⁶ See Francisco V. Aguilar & Benjamin P. Edwards, *Why Public Companies Are Leaving Delaware for Nevada*, WALL ST. J. (June 9, 2024); Steven D. Solomon, *The Trade Desk Inc., PROXY STATEMENT, (SCHEDULE 14A) (EXHIBIT E) (2024)*.

⁷ See Brief of the State of Nevada, ex rel. Francisco V. Aguilar, Secretary of State of Nevada, in his Official Capacity, as Amicus Curiae, Supporting Appellant and Reversal *Maffei v. Palkon*, C.A. NO. 125, 2024.

⁸ See *id.*, at 7 (“The description of Nevada as a “no liability” regime, while colorful, remains academic exaggeration”); Solomon, *supra* note 6, at E13-E14 (arguing that “commentators have mischaracterized the scope and effect of Nevada law,” and that “in many cases, Nevada law and particularly its approach to director fiduciary duties and exculpation is misrepresented.”)

⁹ See e.g., Aguilar & Edwards, *supra* note 6 (“Nevada law makes directors liable when they know that they have done something wrong. It doesn’t impose liability for innocent mistakes.”)

plaintiff shareholders face an impossible bind: they must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records necessary to meet this burden. Nevada law constructs this barrier, the Article shows, through its exculpation statute, the absence of shareholder information rights, and how Nevada courts apply these provisions.

First, Nevada's exculpation statute departs significantly from Delaware and other states. Most states limit exculpation to duty of care violations, but Nevada extends it to duty of loyalty breaches—including self-dealing—unless the conduct constitutes “intentional misconduct, fraud, or knowing violation of law.”¹⁰ Nevada's Secretary of State contends that, nevertheless, the exculpation rarely shields directors from liability for breaches of the duty of loyalty because “Of Course, most violations of the duty of loyalty, such as self-dealing, are intentional.”¹¹ This Article, however, demonstrates otherwise. Nevada courts, it finds, require shareholders to plead particularized facts of intentional wrongfulness, a standard Delaware does not impose for conflict of interest claims.¹²

Second, Nevada—unlike all other states—does not allow shareholder access to a firm's internal documents, including board minutes.¹³ Given the structure of shareholder lawsuits, this access is essential to survive a motion to dismiss. Even in Delaware, where shareholders can access board minutes, proving intent presents significant challenges. Doing so with no access to board minutes is virtually impossible.

Nevada courts routinely dismiss cases involving clear conflicts of interest, even those with extreme and outrageous facts. In *MacFarland v. Long*, two executives each wrote his own compensation contract, which the other signed, for ten years.¹⁴ They increased their combined ownership from 5% to 50% by awarding themselves stock. The trial court found that the executives “milked” the company and that the remaining director had “completely relinquished his duty.”¹⁵ Despite these findings, the court dismissed the case for failure to plead particularized facts of intentional wrongdoing—directly contradicting the Secretary of State's contention that “most violations of the duty of loyalty, such as self-dealing, are not exculpated.”¹⁶

¹⁰ See NEV. REV. STAT. § 78.138(7) (2023)

¹¹ See Aguilar, *supra* note 7, at 9.

¹² See *Infra* Part III.C.

¹³ See *Infra* Part III.D.

¹⁴ *McFarland v. Long*, No. 216CV00930RFBPAL, 2017 WL 4582268 (D. NEV. OCT. 7, 2017).

¹⁵ See *id.*, at 2.

¹⁶ *Id.*, at 6.

Third, analyzing Nevada legislative history, the Article finds that Nevada corporate law does not reflect “different policy choices”, rather, it was shaped solely by what Delaware doesn't provide. The Nevada legislature repeatedly amended the law to provide greater protections against liability than Delaware, and the legislative history makes this intent clear. Nevada seized each Delaware judicial scrutiny standard as an opportunity to differentiate with less scrutiny.¹⁷

Fourth, commentators repeatedly cite *Wynn Resorts* as a counterexample showing that Nevada is not liability-free.¹⁸ This Article demonstrates that *Wynn Resorts* actually supports the opposite conclusion.¹⁹ The case survived dismissal only because of extraordinary circumstances: a public fight between Steve Wynn and his ex-wife, board member Elaine Wynn, led to press disclosures and company admissions that directors knew of Wynn's sexual harassment, and their legal obligation to report to gaming regulators.²⁰ These public disclosures gave shareholders the particularized facts needed to plead a knowing violation of law—facts they could never have obtained through Nevada's nonexistent books and records access. Without the public battle forcing information into the open, the case would have been dismissed like others. Far from disproving barriers to shareholder litigation, *Wynn Resorts* illustrates how extraordinary the circumstances must be for shareholders to prevail in Nevada.

Fifth, the Article also shows that Nevada gives directors near-absolute latitude to use defensive tactics. Nevada replaces Delaware's *Unocal* and *Revlon* standards with the business judgment rule.²¹ As a result, managers may sell the company to the lowest bidder simply because that bidder keeps them in office, with no intervention from Nevada courts. This effectively blocks the market for corporate control—the primary market force that disciplines managers. When shareholder litigation is foreclosed and the threat of takeover is neutralized, managers face virtually no constraint on self-interested behavior. The combination

¹⁷ See *Infra* Part III.B.

¹⁸ See e.g., Aguilar, *supra* note 7, at 7 (“Even Professor Michal Barzuza, a critic on whom Plaintiff relies, implicitly concedes as much in her recent paper describing a derivative lawsuit against the directors of Wynn Resorts, Ltd., that survived a motion to dismiss in Nevada state court.”); Solomon, *supra* note 6, at E23-E24 (noting that the litigation against Wynn Resorts that survived a motion to dismiss, and settled for \$41 million cash payment and corporate governance reforms, shows that there are also large settlements in Nevada, which may “render many of the distinctions in Delaware and Nevada law less relevant.”)

¹⁹ See *Infra* Part III.F.

²⁰ See *In re Wynn Resorts, Ltd. Derivative Litig.*, NO. A-18-769630-B, 2018 WL 11252194 (NEV. DIST. CT. SEPT. 6, 2018).

²¹ See *Infra* Part III.G.

eliminates both internal accountability mechanisms (litigation) and external discipline (the takeover market).

Finally, the Article shows that Nevada's own marketing materials contradict official claims about the state's framework. The legal section titled "*Why Nevada?*" on the Secretary of State's portal, *Silverflume*, explicitly promotes Nevada's liability protections as advantages for directors and officers.²² These materials explain that in Nevada, unlike in Delaware, directors are liable for duty of loyalty breaches only if there is also intentional misconduct, fraud, or knowing violation of law—precisely the broad exculpation that Aguilar publicly claims does not exist.²³ The contradiction is striking: on his own office's website, the Secretary of State markets the very protections he elsewhere characterizes as exaggerated misrepresentations of Nevada law.

The stakes for corporate law, corporations, capital markets, and the economy are significant. As more firms incorporate in Nevada, more will be governed by this framework. Furthermore, Nevada's law is also prompting changes in other states. Delaware faces pressure to relax legal constraints on managers and has begun responding. Delaware recently enacted S.B. 21, narrowing judicial scrutiny of self-dealing transactions.²⁴ Texas amended its law to include Nevada exculpation as an opt-in liability limitation.²⁵ Whether or not firms leave Delaware, Nevada law is changing American corporate law.²⁶

The findings of this Article have implications for the race-to-the-top/race-to-the-bottom debate.²⁷ Decades ago, Bill Cary warned that Delaware was leading a race to the bottom. Nevada's emergence marks a fundamental shift: Nevada, not Delaware, now drives the competitive dynamic.²⁸ This matters because Nevada's incentives and institutional factors are less constrained than Delaware's.²⁹ Delaware faces significant

²² See *Why Nevada? Legal Advantages: A Comparison with Delaware and California*, Lionel Sawyer & Collins and Parsons Behle & Latimer Law Firms (August 15, 2012) (providing reasons to incorporate in Nevada including “director immunity from lawsuits” and “stronger personal liability protections”).

<https://www.nvsilverflume.gov/documents/CorporateLawComparison.pdf>

²³ See *Infra* Part III.H.

²⁴ See S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).

²⁵ Texas amended its law to include Nevada exculpation as an opt-in liability limitation. See Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).

²⁶ See *Infra* Part IV.A.

²⁷ See *Infra* Part IV.B.

²⁸ William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

²⁹ See *Infra* Part IV.A.

pressure to respond – and is responding.³⁰ The danger is greater than in Cary's era: the market is fragile and at risk of cascading degradation.³¹ Nevada has already responded to Delaware's changes by extending its exculpation to controlling shareholders.³² Furthermore, as Delaware adjusts its standards to compete, it erodes its own advantages and accelerates the race to the bottom.³³

The study also has welfare implications. First, studies on the effect of the Nevada 2001 and 2017 amendments found that they had a negative effect on the value of Nevada firms.³⁴ Second, while some argue that differentiation in corporate law could lead to efficient self-selection, the evidence suggests otherwise. In prior work, David Smith and I found that Nevada attracts firms that use aggressive accounting methods and frequently restate earnings – suggesting relatively high agency costs.³⁵

The Article's findings have policy implications. Given the risk of continued degradation, it suggests reassessing the costs and benefits of federal intervention and exploring different forms such intervention could take. The Article proposes to consider a novel approach: adopting Delaware's fiduciary duties, standards of review, and exculpation statute as federally mandated minimums. This approach would limit the race to the bottom while minimizing the typical costs of federal intervention. Adopting Delaware law as the floor would benefit from Delaware's accumulated expertise and responsiveness while removing the competitive pressure that is pushing Delaware toward Nevada's lax standards. Finally, the Article suggests that since reincorporations statutorily requires a shareholder vote, courts or federal law should require a supporting votes from a majority-of-the-minority (“MOM”) shareholders as a condition for reincorporation.³⁶

The Article proceeds as follows. Part II reviews the debate over Nevada corporate law. Part III provides a comprehensive analysis of Nevada's statutory amendments, legislative history, and case law, demonstrating how Nevada forecloses shareholder litigation. Part IV discusses

³⁰ See S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).

³¹ See *Infra* Part IV.B.

³² See ASSEMB. B. 239, 83RD SESS. § 5.5 (Nev. 2025) (enacted).

³³ See *Infra* Part IV.B.

³⁴ See *Infra* Part III.G.

³⁵ See Barzuza & Smith, *supra* note 1.

³⁶ See Lawrence Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77(2) Bus.L 321 (2022). (advocating applying MFW requirements - a supporting vote by Majority of Minority, and by an independent board committee - “when a statute requires the approval of both the board and the stockholders.”)

implications for American corporate law, the race-to-the-top/race-to-the-bottom debate, welfare, and policy. Part V concludes.

II. NEVADA RISE AND INFLUENCE

A. Nevada Rise

For decades, Delaware has been the favored legal domicile for America's largest corporations, facing little competition as half of all publicly traded companies chose it for incorporation, with most others incorporating in their home states.³⁷ Recently, however, Delaware's position has been seriously contested. After a Delaware judge's 2024 ruling against Elon Musk's \$56 billion compensation package,³⁸ Musk criticized Delaware on Twitter³⁹ and moved his companies, including X (formerly Twitter), Neuralink, and X.AI to Nevada,⁴⁰ and Xspace, and Tesla to Texas. TripAdvisor, a major player in online booking, has become another high-profile case, with shareholders suing in Delaware to prevent the company's move to Nevada.⁴¹ The backlash against Delaware has drawn substantial media attention⁴² and prompted commentary from the Chief

³⁷ See, e.g., 2022 Annual Report, DEL. DIV. OF CORP. (2022), <https://corp.delaware.gov/stats/> (noting that 68.7% of Fortune 500 companies are incorporated in Delaware); See also Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002) (arguing that no state competes with Delaware); Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Re-considering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002) (arguing that Delaware's dominant position imposes insurmountable barriers to entry).

³⁸ *Tornetta v. Musk*, No. 2018-0408-KSJM (Jan. 30, 2024).

³⁹ See Elon Musk, @elonmusk, X, (Jan. 30, 2024, 5:14 PM).

<https://x.com/elonmusk/status/1752455348106166598>

⁴⁰ See e.g., Tom Krisher, Elon Musk's Neuralink moves legal home to Nevada after Delaware judge invalidates his Tesla pay deal, *Business*, Associate Press (February 10, 2024)

<https://apnews.com/article/elon-musk-neuralink-brain-implant-corporate-move-nevada-delaware-09c2eee269beebccf9a701f21ea2b9f7>

⁴¹ *Palkon v. Maffei*, C.A. NO. 2023-0449-JTL (Feb. 20, 2024).

⁴² See e.g., Theo Francis & Erin Mulvaney, *Elon Musk Isn't the Only Billionaire Fighting Delaware*, WALL ST.J. (Feb. 11, 2024) <https://www.wsj.com/business/elon-musk-isnt-the-only-billionaire-fighting-delawares-grip-on-u-s-business-e9fe299a?>; Akiko Fujita, *Elon Musk threatens Delaware hold on corporations*, YAHOO FINANCE (February 13, 2024)

<https://finance.yahoo.com/video/elon-musk-threatens-delaware-hold-173430661.html>; Lydia Moynihan, *Why CEOs are Rolling the Dice on a Move to Nevada*, NYPOST, Business (April 27, 2023) <https://nypost.com/2023/04/27/why-ceos-are-rolling-the-dice-on-a-move-to-nevada/>; Sarah McBride, *Musk's Neuralink Ditches Delaware, Reincorporates in Nevada*, BLOOMBERG NEWS (Feb. 9, 2024) [bloomberg.com/news/articles/2024-02-09/musk-s-neuralink-ditches-delaware-reincorporates-in-nevada](https://www.bloomberg.com/news/articles/2024-02-09/musk-s-neuralink-ditches-delaware-reincorporates-in-nevada); Andrew Ross Sorkin et al., *Elon Musk Extends His Anywhere-but-Delaware Campaign*, DEALBOOK, N.Y.TIMES (Feb. 15, 2024) <https://www.nytimes.com/2024/02/15/business/dealbook/musk-spacex-delaware-tesla.html>

Justice of the Delaware Supreme Court.⁴³ Delaware dominance was a central topic at the 2024 Tulane Law School Corporate Law Institute in New Orleans.⁴⁴ Participants were contemplating whether Nevada or Texas might be a favorable domicile for some firms.⁴⁵ The Economist columnist visited Nevada to have a first impression of the state's prospects as a corporate domicile.⁴⁶

Against this background, Nevada emerges as the dominant alternative to Delaware. Reincorporations from Delaware to Nevada are on the rise, and Nevada is clearly the top destination for firms that leave Delaware.⁴⁷ In recent years, Nevada attracted known names, including TripAdvisor, Roblox, Dropbox, AMC Network, DraftKings, and the 45.7 Billion cloud observability y firm DataDog.⁴⁸ To be sure, there are still a few reincorporations, and primarily by firms with controlling shareholders who hold a large fraction of the votes.⁴⁹ Yet, Nevada's share of IPO firms

⁴³ Chief Justice Collins J. Seitz, Jr., *Presentation for the Judiciary*, Joint Finance Committee of the 152nd General Assembly, (Del. 2024) ("as you've probably read in the newspaper - there's a lot of competition for corporate business across the United States. Nevada has tried, through enacting what might be called fairly liberal laws that maybe do not require as much supervision over companies, and then Texas has started its own business court.")

⁴⁴ See Rose Krebs, *Delaware's Corp. Law Dominance A Hot Topic At Tulane Conference*, LAW360.COM (Mar. 7, 2024).

⁴⁵ See e.g., Ellen Bardash, *A Legal 'Doomsday'?: Delaware Faces Criticism at Tulane Conference*, LAW.COM (March 8, 2024) <https://www.law.com/delbizcourt/2024/03/08/a-legal-doomsday-delaware-faces-criticism-at-tulane-conference/>

⁴⁶ See *Elon Musk is Not Alone in Having Delaware in his Sights*, The Economist (March 14, 2024) <https://www.economist.com/business/2024/03/14/elon-musk-is-not-alone-in-having-delaware-in-his-sights>

⁴⁷ See e.g., Benjamin P. Edwards, *Final 2025 Nevada and Texas Reincorporation Lists*, BLPB (Feb, 3 2026) (reporting that in 2026, 28 compnies attempted to reincorporate to Nevada, and 8 companies attemptted to reincoproate to Texas) <https://www.businesslawprofessors.com/2026/02/final-2025-nevada-and-texas-reincorporation-lists/>; Bainbridge, *supra* note 1, at 825 (stating that "Today, Nevada emerges as a notable challenger, actively promoting "DEXit" - a push for companies to leave Delaware," and finding that between 2012-2024 Nevada was "by far the leading choice" for reincorporations out of Delaware); Solomon, *supra* note 6, at E-5 ("My analysis of recent reincorporations shows that 41 percent of U.S. domestic reincorporations since 2021 have been to Nevada").

⁴⁸ See e.g., Leave Delaware, @leavedelaware, X, (Feb. 10, 2026, 12:19 PM). <https://x.com/LeaveDelaware/status/2021272895012393364>

⁴⁹ See e.g., Sam Nollo do at al., *The State of US Reincorporation in 2025: The Growing Threat and Reality of "DEXIT"*, GLASS LEWIS (October 9, 2025) (reporting that "55% of reincorporation proposals this proxy season involved companies with significant or controlling shareholders.") <https://www.glasslewis.com/article/state-of-us-reincorporation-2025-growing-threat-reality-dexit>

also shows signs of a potential rise.⁵⁰ Furthermore, as shown below, the current equilibrium is unstable; the flow to Nevada may rise and expand beyond the controlling shareholders.⁵¹

Most importantly, Nevada's rising power is demonstrated by the competitive pressures it exerts on Delaware and other states, and by its influence on their corporate law. Recently, Delaware changed its law to become closer to Nevada by adopting SB21.⁵² Texas adopted Nevada's broad exculpation statute as an opt-in liability limitation.⁵³ Thus, *whether or not Delaware loses its dominance, Nevada's rise is already transforming American corporate law.*

B. Debate over Nevada v. Delaware

With the rising criticism of Delaware and high-profile reincorporations, Nevada law has assumed center stage. Practitioners compare Delaware and Nevada as incorporation destinations.⁵⁴ Firms that reincorporate to Nevada point to increased uncertainty in Delaware corporate law and lower litigation costs in Nevada.⁵⁵ Shareholders are less enthusiastic. In TripAdvisor's migration to Nevada, only 5% of public shareholders voted in support of the reincorporation.⁵⁶ Asking the Delaware courts to

⁵⁰ See Benjamin P. Edwards, *PLI Panel – Reincorporations and Redomestication*, BLPB (Feb. 11, 2026). (whereas in the past Delaware used to attract 80% of IPO, during 2025 it attracted 62% and Nevada attracted 17%).

⁵¹ See *Infra* Part IV.B.

⁵² Senate Bill 21, 153RD GEN. ASSEMB. (DEL. 2025).

⁵³ Act of May 14, 2025, 89TH LEG., R.S., S.B. 29 (to be codified at TEX. BUS. ORGS. CODE ANN. § 21.419).

⁵⁴ See e.g., Wendy Gerwick Couture, *Nevadaware Divergence in Corporate Law*, 19(2) VA. L. & BUS. REV. 145 (2024) (“The differences between Nevada and Delaware corporate law—which I call “Nevadaware divergence”—are the subject of media attention, scholarly critique, and current litigation”); Josh Bloom, *The Grass Isn't Necessarily Greener: Carefully Considering the Risks of Corporate Redomiciling*, Latest News, NEW YORK STATE BAR ASSOCIATION (July 15, 2024).

<https://nysba.org/the-grass-isnt-necessarily-greener-carefully-considering-the-risks-of-corporate-redomiciling/?srsltid=>

⁵⁵ See e.g., Datadog Inc., PROXY STATEMENT (SCHEDULE 14A), at 15-16 (2026) (“Nevada courts follow a more statute-based approach to director and officer duties that is less dependent on judicial interpretation,” and that reincorporating to Nevada “Will Reduce the Risk of Unmeritorious and Costly Litigation”) https://www.sec.gov/Archives/edgar/data/1561550/000119312526043680/d700416dpre14a.htm#toc700416_3; The Trade Desk Inc., PROXY STATEMENT (SCHEDULE 14A), at 13-14 (2024) (“We believe that Nevada can offer more predictability and certainty in decision-making because of its statutory regime...We believe the Nevada Reincorporation will result in less unmeritorious litigation against the corporation and our directors and officers, which in turn would better allow our directors and officers to focus on the business and save the Company the costs of such litigation.”)

⁵⁶ See *Palkon v. Maffei*, C.A. No. 2023-0449-JTL (Feb. 20, 2024).

block the reincorporation, shareholders argued that Nevada law would deprive them of their litigation rights.⁵⁷ Several commentators have indeed criticized the laxity of Nevada corporate law. This author, in particular, previously argued that Nevada is a "no liability regime."⁵⁸

Importantly, on June 7, 2024, Nevada Secretary of State Francisco V. Aguilar weighed in by submitting an amicus curiae brief to the Delaware Supreme Court in support of TripAdvisor's reincorporation attempt.⁵⁹ Aguilar contends that Nevada law is not significantly different from Delaware law and that a move to Nevada will not materially harm shareholders' litigation rights.⁶⁰ Aguilar encourages the court not to listen to mere "academic statements."⁶¹ In an expert opinion to The Trade Desk's board regarding reincorporation from Delaware to Nevada, Steven Davidoff raises similar observations, arguing that descriptions of the Nevada legal system are exaggerated and misrepresent Nevada law.⁶²

Aguilar and the legal commentators present several arguments to support their position. First, Aguilar argues that Nevada and Delaware merely reach different conclusions in balancing policy considerations.⁶³ Davidoff similarly argued that "the differences between Nevada and Delaware law...stem from each state's policy choices."⁶⁴ To be sure, even if the differences merely reflect different policy choices, they could still be significant for shareholder interests. Yet, these statements, the Article shows, are not aligned with the legislative history of Nevada corporate law. As shown below, the legislative amendments and the legislative history documents, Nevada legislators were guided primarily by the following principle: In order to attract more firms, we should offer more protection from liability than Delaware does.⁶⁵

Second, Aguilar asserts that the Nevada exculpation statute does not protect directors in most cases involving breaches of the duty of loyalty. Intentional misconduct, he argues, also covers self-dealing transactions,

⁵⁷ See *Id.*, at 11.

⁵⁸ See Barzuza, Market Segmentation, *supra* note 5.

⁵⁹ See Aguilar, *supra* note 6.

⁶⁰ See *id.*, at 3. ("Redomestication from Delaware to Nevada does not constitute a non-ratable benefit for corporate directors").

⁶¹ *Id.*, at 7 ("The description of Nevada as a "no liability" regime, while colorful, remains academic exaggeration").

⁶² See Solomon, *supra* note 6 (arguing that "commentators have mischaracterized" Nevada law).

⁶³ See Aguilar, *supra* note 6.

⁶⁴ See Solomon, *supra* note 6; Couture similarly argues that these differences are about "each state's balance of the competing policies underlying corporate law."

⁶⁵ See *Infra* Part III.B.

the core of breaches of duty of loyalty in Delaware.⁶⁶ Accordingly, he contends, Nevada law protects directors only from good-faith errors in judgment. In an op-ed in the Wall Street Journal, Aguilar similarly argues that “Nevada law holds directors accountable when they know they have done something wrong. It does not impose liability for innocent mistakes.”⁶⁷ Yet, while the Secretary's interpretation could have been true theoretically, this Article shows that it is not valid in Nevada. As shown below, Nevada courts applied the term intentional misconduct in a narrow way, which is aligned with the legislative intent. Particularly, for an act to be non-exculpated, the Nevada court required the plaintiff to show particularized facts that demonstrate intention for wrongful acts, which is a high burden in the pre-discovery motion to dismiss stage. Furthermore, Nevada does not provide shareholders with access to books and records, which is necessary even for meeting lower burdens such as in Delaware.⁶⁸

Finally, Aguilar and Davidoff point to the *Wynn Resorts* case as an example that Nevada is not a liability-free jurisdiction.⁶⁹ In *Wynn Resorts*, the court did not dismiss a case against the board of Wynn Resorts, for knowing violation of the law, since the board did not report to the SEC the series of sexual harassment allegations against Steve Wynn.⁷⁰ *Wynn Resorts*, however, the Article shows, is an outlier case that involved a public fight and leaks of information to the press. The court relied on this information in deciding not to dismiss the case. Thus, the case demonstrates how impossible it is for shareholders to sue in Nevada.⁷¹

The following Part analyzes Nevada law and shows that, contrary to Aguilar's, Davidoff's, and Couture's statements, Nevada law differs significantly from Delaware's. In Nevada, many breaches of the duty of loyalty are protected, whereas Delaware law does not afford the same protections. With a few exceptions, shareholders in Nevada have no inspection rights. Nevada cases demonstrate that these differences create substantial hurdles for shareholder litigation. Finally, as the following sections show, Nevada's legislative history indicates a clear intent and consistent actions to diverge from Delaware by restricting shareholder litigation.

⁶⁶ *Id.*, at 9 (“Of course, most violations of the duty of loyalty, such as self-dealing, are intentional.”)

⁶⁷ *Id.*, at 9-10; See also Aguilar & Edwards, *supra* note 6.

⁶⁸ See *Infra* Parts III.C-D

⁶⁹ See *Infra* Part III.F.

⁷⁰ See

⁷¹ See *Infra* Part III.F

III. NEVADA CORPORATE LAW AND STRATEGY

A. How Lax is Nevada Corporate Law?

Despite the general recognition of Nevada's lax regime, the specific details of how Nevada law shields management from liability compared to Delaware were not well understood. Legal scholarship and education primarily focus on Delaware, neglecting Nevada's distinct approach. This oversight persisted for decades, with many incorrectly believing that Nevada merely *mimicked* Delaware's statutes and case law.⁷² A decade ago, this author published an article in the *Virginia Law Review* that exposed Nevada's strategy to diverge from Delaware with a broader exculpation statute.⁷³ The Article shifted the conventional assumption, yet academics, jurists, and even corporate attorneys did not fully recognize the exact contours of Nevada law. As demonstrated above, currently, scholars and policy-makers have debated the extent to which it diverges from Delaware Law.⁷⁴

This Article conducts the first comprehensive analysis of Nevada law, legislative history, and cases. The analysis shows that Nevada law poses insurmountable impediments to shareholder litigation. In contrast to the Secretary of State' and prominent commentators' opinions, it finds that Nevada law differs from Delaware significantly and materially.

Part A will show that Nevada legislative intent has clearly been to offer greater protection from liability than Delaware. Part B will show Nevada courts interpret the exculpation statute broadly, in line with the

⁷² See, e.g., *Hilton Hotels Corp. v. ITT Corp.*, 978 F. SUPP. 1342, 1346 (D. Nev. 1997) (noting in dicta that Nevada follows Delaware's standards); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1067 (2000); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1911 (1998) ("Nevada adopted Delaware law wholesale and yet failed to make significant inroads into Delaware's market share"); Kresimir Pirsli, *Trends, Developments, and Mutual Influences between United States Corporate Law(s) and European Community Company Law*, 14 COLUM. J. EUR. L. 277, 317 (2008) ("Nevada was the only state that actively tried to take incorporation business from Delaware, copying the Delaware General Corporation Code almost to the letter"); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 277 n.41 (1990) ("Nevada has attempted to duplicate Delaware's doctrine").

⁷³ See Barzuza, *Market Segmentation*, *supra* note 5; See also Melissa Castro Wyatt, *Professor Saw Elon Musk and TripAdvisor Moves to Nevada Coming - 11 Years Ago*, UVATODAY (June 13, 2023)

⁷⁴ See e.g., Jens Dammann, *How Lax Is Nevada Corporate Law? A Response to Professor Barzuza*, 99 VA. L. REV. IN BRIEF 1, 10 (2013); Keith Paul Bishop, *Scholars Ask "Just How Lax Is Nevada Corporate Law?"* C.A. CORP. & SEC. L. (Feb 7, 2013) <https://www.calcorporatelaw.com/2013/02/just-how-lax-is-nevada-corporate-law>

legislative intent. In particular, they require plaintiff shareholders to bring particularized facts showing wrongful intent or knowing violation of the law. Part C will show that, unlike Delaware and other states, Nevada does not allow access to books and records. The combination of showing intent with no access to board minutes makes the task close to impossible. Part D will show that the Wynn Resorts case demonstrates the opposite: shareholders can't sue in Nevada. Part E will show that even the Secretary of State website includes marketing materials that present Nevada as a no-liability regime. Part F will show that Nevada also differentiates from Delaware in replacing Unocal and Revlon cases with the high deference Business Judgment Rule.

B. Nevada Legislative History-Laxer than Delaware

This part reviews Nevada legislative history, which shows that Nevada legislature was motivated by one central consideration – to provide more bars from litigation than Delaware does. Thus, in contrast to commentators' and officials' assertions that Nevada reached a different policy balance, Nevada law was not derived through a careful process of balancing policy consideration. Rather, over the years, Nevada lawmakers have explicitly and consistently amended their statute to assure that it provides higher bars to litigation and lower accountability than Delaware law. These amendments encompass several specific goals, including adding more liability protections, facilitating incorporation tax raises, and ensuring courts' enforcement of the legislative intent by codifying the internal affairs doctrine.

Nevada's first clear deviation from Delaware occurred in 1987, with the enactment of its expansive exculpation statute for corporate directors and officers.⁷⁵ Delaware exculpation statute, enacted in 1986, allows firms to amend their charter to protect directors from liability for gross negligence. The statute provided protection for breaches of duty of care *but not* for breaches of duty of loyalty or good faith.⁷⁶ Furthermore, the statute allowed firms to implement exculpation only with shareholder approval. The enactment attracted firms to Delaware.⁷⁷ Other states followed with similar statutes.⁷⁸

⁷⁵ See NRS 78.037

⁷⁶ See DGCL 102(b)(7).

⁷⁷ See Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AMER. L. ECON. REV. 369 (2022).

⁷⁸ Texas, for example, followed Delaware by adopting Nevada exculpation as an opt-in provision.

Adopted in 1987, NRS §78.138(7) was significantly broader than Delaware's §102(b)(7) and from other states' exculpation statutes.⁷⁹ In contrast to Delaware and other states, Nevada's exculpation statute allowed firms to waive liability for the duty of loyalty and the duty of good faith, except for acts that amount to "intentional misconduct, fraud, or knowing violation of the law."⁸⁰ The legislative history relating to this bill couldn't be clearer on the legislative intent: Nevada state officials directly contemplated these liability protections as a strategy to attract corporations.⁸¹ Senator William Raggio, in his testimony, "reminded the committee that Nevada has, for many years, been trying to make the state attractive for incorporation."⁸² The Senator advised the committee that, to that end:

*"[The proposed bill] broadens the immunity of directors to include the breach of duty of loyalty to the corporation or its shareholders, ... this matter is ...essential for the State of Nevada if it continues to be a leading state for incorporation."*⁸³

The senator stated his belief that these broader protections would "...go a long way in making Nevada competitive with Delaware."⁸⁴ The fact that the bill was exceptionally broad is evident also from the response of those who opposed it. For example, Senator Wagner warned that the bill is "very far-reaching" and "goes farther than any other bill in the nation in this area."⁸⁵ The Nevada Secretary of State, however, urged the committee to approve the amendment as it was incumbent on the state to "do as much as [it] can to out Delaware."⁸⁶

Over the years, Nevada's exculpation statute was amended to further differentiate it from Delaware's. Similar to Delaware and other states, Nevada's initial provision required shareholder approval. In 2001, however, Nevada made its exculpation statute mandatory. In 2003, the state converted it to a default rule.⁸⁷ Nevada's protections, thus, apply automatically unless both managers and shareholders affirmatively opt out of them. This amendment also was not justified by policy considerations. No one explained why Nevada should deprive

⁷⁹ See discussion *infra* Section II.C.

⁸⁰ See NRS 78.037(7)

⁸¹ *Hearing on S.B. 46 Before the S. Comm. on Judiciary, 1987 LEG., 64TH SESS. (Nev. 1987).*

⁸² *Id.* (Testimony of Senator William Raggio).

⁸³ *Hearing on S.B. 46 Before the S. Comm. on Judiciary, 1987 LEG., 64TH SESS. (Nev. 1987).*

⁸⁴ *Id.* (Testimony of of Sec. of State Frankie Sue Del Papa).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Barzuza, *supra* note 5, at 953 (in fact it was even amended as a mandatory rule, and then in 2003, was relaxed a bit to become the default).

shareholders of the opt-in authority they retain in every other state. Quite the contrary, the bill was motivated by one reason: to cover a budget deficit with incorporation fees.

Senator James opened the hearings before the Assembly Committee on Judiciary by revealing that the state budget was underfunded by more than \$120 million.⁸⁸ Instead of cutting the budget, S.B. 577 would increase Nevada's incorporation tax fees for domestic companies. Higher fees could harm Nevada's competitiveness, but removing the requirements of shareholder approval for exculpation could compensate for that. Since "Directors are the ones who decide where to incorporate," Senator James explained, applying the Nevada exculpation statute to all firms, even without a shareholder vote, "will be a major incentive."⁸⁹ The Assembly committee received a letter from S. Craig Tompkins, a director of several public companies, similarly stating that the amendment "would increase the attractiveness of Nevada as a state of incorporation for major public companies" and would "mitigate the negative impact of increasing the fees assessed against companies choosing to incorporate in Nevada."⁹⁰ Thus, minutes from the legislative sessions of this 2001 amendment show how the Nevada legislative body took another step up in promoting the goal of increasing Nevada's revenues from incorporations, by further differentiating Nevada's law from Delaware.

The efforts to differentiate from Delaware were not limited to the exculpation statute. In 1999, for example, Nevada amended its corporate code to apply the highly deferential *business judgment rule* to management's use of defensive tactics, giving managers wide latitude to block hostile bids. The legislative history clarifies that this amendment as well was enacted with a clear purpose: to reject two landmark Delaware cases – *Unocal*⁹¹ and *Revlon*⁹² – which applied a higher level of scrutiny to managers' use of defensive tactics.

The goal of differentiation from Delaware with less liability was so central that the Nevada legislature also acted to ensure that Nevada judges follow this legislative intent. In 2017, Nevada codified the legislative intent to differentiate itself from Delaware. NRS § 78.012 determines that Nevada law governs the internal affairs of domestic corporations, including "the rights, privileges, powers, duties, and

⁸⁸ *Hearing on S.B. 577 Before the A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001).

⁸⁹ *Id.*

⁹⁰ Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577, *Hearing on S.B. 577 Before A. Comm. on Judiciary*, 2001 LEG., 71TH SESS. (Nev. 2001) (Exhibit J).

⁹¹ *Unocal Corporation v. Mesa Petroleum Co.*, 493 A.2D 946 (Del. 1985).

⁹² *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2D 173 (Del. 1986).

liabilities, if any, of its directors, officers, and stockholders...”.⁹³ And if that wasn’t sufficiently clear, the legislature added that the liability of directors and officers in Nevada “...must not be supplanted or modified by-laws or judicial decisions from any other jurisdiction.”⁹⁴

And once again, the legislative history bears this interpretation: lawmakers explained that the language indicates that Nevada statutes should control business disputes in the state and that “Delaware cases that reflect a different law” should not be applied.⁹⁵ With the adoption of § 78.012, Nevada ensured enforcement of its conscious differentiation from Delaware. As shown below, Nevada courts heard the message and, citing the 2017 amendment, Nevada courts applied the protections to directors and officers even more vigorously than before.⁹⁶

To sum up, despite comments from the Nevada Secretary of State and from commentators, there is no evidence that Nevada law reflects a different balance of policy considerations. Quite the contrary, all the evidence points at one direction: Nevada legislature designed its law to apply more protection from liability than Delaware does. Finally, a snapshot of Nevada corporate law confirms the view that the state designed its law vis-à-vis Delaware. Delaware applies judicial scrutiny in three contexts: conflicted transactions, antitakeover defenses, and conscious disregard of duties. In all of these contexts Nevada law applies none or very little scrutiny.

After analyzing the legislative history, to further assess the stakes of Nevada’s increasingly competitive profile as a destination for incorporation, the following parts will discuss Nevada’s corporate law, focusing on core corporate law doctrines and analyzing where it differs from Delaware’s and other state laws. As it finds, Nevada’s corporate law is an outlier: It is significantly laxer than Delaware and other states’ corporate law. Firms that choose to incorporate in Nevada law will be governed by law that protects directors, officers, and controlling shareholders, even in the context of the most critical corporate transactions involving conflicts of interest. In this way, Nevada’s law directly deviates from many – perhaps most – of the fundamental pillars that have emerged in Delaware corporate law over the past several decades.

⁹³ NRS 78.012 (2)

⁹⁴ NRS 78.012 (3)

⁹⁵ *Proposed Amendment to S.B. 203, Hearing on S.B. 203 Before the S. Comm. on Judiciary, 2017 LEG., 79TH SESS. (Nev. 2017)* (testimony of Lorne Malkiewech).

⁹⁶ See discussion *infra* Section III.D.

C. Broad Exculpation Statute – Duty of Loyalty

Nevada Exculpation statute has particular importance, since it does not include the exceptions that Delaware and other states apply to exculpation – Duty of Loyalty and Duty of Good Faith. These duties are in fact mandatory in Delaware, and there are good reasons why Delaware law mandates them. As shown below, the duty of loyalty is distinct in its importance and consequence.

The Business Judgment Rule

Starting with some background, both Nevada and Delaware apply the business judgment rule (“BJR”) to management decisions. The rule is 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 company's best interests.”⁹⁷ The rule allows directors to make informed business decisions with an expectation of deference from courts. Namely, if directors were diligent and disinterested the court will not judge their decision with a hindsight. Even if it is clear that the decision was mistaken.

The rationale for this principle has been spelled out extensively in case law and academic commentary. One fundamental justification flows from a posture of judicial humility: courts recognize that their expertise lies in ruling on the proper process surrounding business decisions and not the substance of those decisions themselves.⁹⁸ Another rationale (reflected throughout Delaware’s approach to corporate law) involves efficiency. Proceeding with a broad, deferential default like the business judgment rule means avoiding costly and lengthy litigation. Third, it is intended to protect directors decisions from potential chilling effect. Thus, it also allows boards – and their shareholders – to make business planning decisions with predictability.

Accordingly, Delaware courts apply the rule consistently, even in cases where managerial decisions are wrong. For example, in *Kamin v. American Express*, the board of American Express made a relatively straightforward accounting error that resulted in the company having to pay an additional \$6 million in taxes that could have been saved.⁹⁹ When shareholder plaintiffs brought suit seeking damages for a breach of the

⁹⁷ *Aronson v. Lewis*, 473 A.2D 805, 812 (Del. 1984).

⁹⁸ See, e.g., *Dodge v. Ford Motor Co.*, 204 MICH. 459, 500 (Mich. 1919) (“The discretion of the directors will not be interfered with by the courts unless there has been bad faith, wilful neglect, or abuse of discretion.”).

⁹⁹ 86 MISC. 2D 809, 812 (N.Y. Sup. Ct. 1976).

duty of care, the court disposed of the action by applying the business judgment rule. In its opinion, the court held that “[i]t is not enough to allege, as plaintiffs do here, that the directors made an imprudent decision... [m]ore than imprudence or mistaken judgment must be shown.”¹⁰⁰ Because the American Express directors considered the potential tax consequences of the decision, and because elements like fraud or conflicts were not present, the court deferred to the board's action even though It recognized that it might be “unwise” in hindsight.¹⁰¹

To refute the business judgement rule - both in Nevada and in Delaware, the plaintiff has the burden to prove that either directors breached their duty of care (were grossly negligent) or that directors breached their duty of loyalty (i.e., acted in a conflicted way).

Duty of Care & Duty of Loyalty

In Delaware and in Nevada directors owe two core fiduciary duties to the firm and its shareholders – the duty of care and the duty of loyalty (the duty of good faith is embedded in the duty of loyalty).¹⁰² The duty of care – an obligation to make deliberative and informed decisions – and duty of loyalty – a responsibility to act on behalf of the best interests of the company and its shareholders – together make up the heart of much of corporate law doctrine, as they both serve as vehicles for courts to review challenged corporate conduct.

The Duty of Care is tied to “concepts of gross negligence.”¹⁰³ Directors have to make good faith attempts to be informed and dilligent. For example, directors under the duty of care are obligated “to inform themselves, before making a business decision, of all material information reasonably available to them.”¹⁰⁴

The duty of loyalty is tied to “conflicts of interest”. It applies primarily to self dealing - ituations in which the director or officers are on both sides of the deal, and thus have a conflict of interest with the shareholders. It also applies to situations in which the directors did not make good faith efforts to fulfill their duties, but rather consciously disregarded their duties.¹⁰⁵

¹⁰⁰ *Id.* at 813.

¹⁰¹ *Id.* (quoting *Pollitz v Wabash R.R. Co.*, 207 N.Y. 113, 124.).

¹⁰² See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006)

¹⁰³ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

¹⁰⁴ *Id.*

¹⁰⁵ Conciouss disregard results in a breach of the duty of good faith which susumed in within the duty of loyalty. See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006)

Conflicts can arise in all sorts of corporate transactions. For example, a board member who provides consulting services to a company and is paid for these services is interested in receiving a high pay. If she participates in the corporation's decision to hire her consulting services, that decision is affected by self-interest.¹⁰⁶ Another example might arise when a controlling shareholder wants the company he controls to buy another company he owns (a company in which he has a higher share).¹⁰⁷ In such a scenario, the controlling shareholder would be interested in receiving a higher price. A controlling shareholder who wants to take the company she controls private would face a similar conflict, except with interest being in the opposite direction – minimizing what she pays for the other outstanding shares to execute the transaction.¹⁰⁸

Delaware courts have maintained their focus on protecting shareholders from breaches of the duty of loyalty. To review these forms of dealing, the courts have generally proceeded by application of the demanding entire fairness test.¹⁰⁹ The test involves a far more scrutinizing level of review, assessing both “fair dealing and fair price” in the context of the challenged transactions.¹¹⁰ This test is generally seen as the highest form of scrutiny that Delaware courts apply and starkly contrasts with the highly deferential business judgment rule discussed above.

Managers and controlling shareholders, however, can use cleansing mechanisms in order to avoid the high scrutiny of entire fairness. Recently, in response to the backlash, Delaware passed Senate Bill 21, which limits the scrutiny on self-dealing transactions.¹¹¹ This amendment reduces scrutiny of self-dealing transactions but doesn't release them from scrutiny, as Nevada does. In particular, post S.B. 21 managers and controlling shareholders could replace the high scrutiny of entire fairness with the high deference of the business judgment rule if they use one of the following cleansing mechanisms: (1) a committee of independent directors (2) a supporting vote of the majority of the shareholders who are not self-interested. If they didn't meet any of these mechanism, entire fairness would apply.

(a) Delaware's Exculpation Statute: D.G.C.L §102(b)(7)

¹⁰⁶ See, e.g., *In re Ezcorp Inc.*, C.A. No. 9962-VCL, 24 (Del. Ch. Jan. 25, 2016).

¹⁰⁷ See, e.g., *In re Southern Peru Copper Corp.. S'holder Derivative Litig.*, 30 A.3D 60, 90 (Del. Ch. 2011) (describing “deficiencies in the substance of the special committee's negotiations” in finding an unfair transaction).

¹⁰⁸ *Kahn v. M&F Worldwide Corp. (MFW)*, 88 A.3D 635, 647 (Del. 2014).

¹⁰⁹ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

¹¹⁰ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

¹¹¹ See S.B. 21, 153RD GEN. ASSEMB., REG. SESS. (Del. 2025).

In 1986 Delaware legislature passed D.G.C.L §102(b)(7). The amendment allows directors and officers to be exculpated from monetary liability for breaches of duty of care (but does not allow exculpation for breach of duty of loyalty or good faith).

The passage of §102(b)(7) is traceable to a single case. In *Smith v. Van Gorkom*, decided in 1985, the Delaware Supreme Court declined to give the directors of an acquired company business judgment deference, even though they had accepted an offer that offered a 30% premium to shareholders.¹¹² The court took issue with the directors' process regarding the deal, holding that they had not kept themselves adequately informed and the significant failures in process constituted gross negligence and thus a breach of the duty of care.¹¹³

The holding was met with fierce criticism from the business and academic community.¹¹⁴ Director and officer insurance rates in Delaware increased with this new risk.¹¹⁵ One well-regarded corporate law scholar even called *Van Gorkom* "surely one of the worst decisions in the history of corporate law."¹¹⁶

The reaction and correction from Delaware lawmakers was swift: it adopted D.G.C.L §102(b)(7), which allowed Delaware firms to exculpate directors from monetary liability for breaches of the duty of care, with shareholder approval.¹¹⁷ In the decades since, most firms have adopted such a provision.¹¹⁸ More recently, in 2022, Delaware amended §102(b)(7) again to extend its optional exculpation provisions to senior officers.¹¹⁹

Delaware's intent with this provision was, in part, to cultivate an environment where directors would not be deterred from serving on the boards of Delaware corporations. Furthermore, allowing personal liability to attach to risky business calls could incentivize directors to

¹¹² 488 A.2d 858 (Del. 1985).

¹¹³ *Id.*

¹¹⁴ Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 113, 1143 (2006) ("As of late 1985, pressure was mounting on Delaware's legislature to intervene.")

¹¹⁵ Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1440 (1985).

¹¹⁶ *Id.* at 1455.

¹¹⁷ See D.G.C.L § 102(b)(7).

¹¹⁸ Sean Sheely & Mark Reindheart, *Delaware's 102(b)(7) Exculpation of Senior Officers - One Year Later*, Jenner & Block (September 2023)

<https://www.jenner.com/en/news-insights/publications/delawares-102b7-exculpation-of-senior-officers-one-year-later>.

¹¹⁹ *Id.*

prefer low-risk decisions, which would hurt the long-term returns of shareholders. Finally, it avoided the problem of allowing directors to constantly be judged by hindsight if decisions they made in good faith turned out to be wrong. In the decades since most Delaware firms have opted into the §102(b)(7) exculpation protections.¹²⁰ Delaware recently amended §102(b)(7) to include exculpation for senior officers, and firms have been similarly enthusiastic.¹²¹ These devices can only enter a firm's charter with shareholder approval.

The other side of §102(b)(7) is also essential: it lists exceptions to which Delaware firms are prohibited from exculpating their directors from personal liability.¹²² These include breaches of the duty of loyalty and the duty of good faith, intentional misconduct, and knowing violation of law.¹²³ Delaware thus, create a clear dichotomy between the duty of care and the duty of loyalty (and the duty of good faith which is subsumed in the duty of loyalty). The duty of care is waivable, but the duty of loyalty is mandatory.

The dichotomy is understandable because the rationale that applies to the duty of care exculpation does not apply to the duty of loyalty. Firms can waive liability to gross negligence, since such liability might chill directors from undertaking profitable risky investments. The duty of loyalty however, applies to transactions involving a conflict of interest. When conflicts of interest arise, directors, controlling shareholders, or managers could extract private benefits, sometimes significant ones, that put their self-interests at odds with the company's interests.¹²⁴ Judicial deference could foster opportunistic behavior, potentially causing substantial harm to firms and shareholders. Because of that, Delaware law does not allow directors and officers to be exculpated from liability for self-dealing transactions (breaches of the duty of loyalty).¹²⁵ It also does not shield these transactions from judicial scrutiny through a consistent presumption of business judgment deference. Instead, Delaware courts apply an exceptionally high level of judicial review to these types of conflicted transactions - the Entire Fairness standard, which, as described above, assesses both fair dealing and fair price.¹²⁶

¹²⁰ Sheely & Reindheart, *supra* note 99.

¹²¹ *Id.*

¹²² D.G.C.L § 102(B)(7)(i)-(v).

¹²³ *See* D.G.C.L §102(B)(7)(i)-(ii)

¹²⁴ *See Kahn v. Lynch Communication Systems*, 638 A.2d 1110, 1117 (Del. 1994).

¹²⁵ DGCL § 102(B)(7). In fact the duty of loyalty and the duty of good faith are part of only a few mandatory standards under Delaware law.

¹²⁶ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

Following the passage of 102(b)(7) many other states adopted exculpation statutes, some modeled exactly after Delaware models, and some with have minor differences. All states however, included an exception for the duty of loyalty or duty of good faith, except for Nevada.

(b) Nevada's Exculpation Statute: N.R.S. §78.138

Nevada exculpation statute deviates sharply from the approach taken by Delaware or any other state. Nevada exculpation statute does not have an exception for the duty of loyalty or the duty of good faith. Instead, Nevada statute replaced these exceptions with "fraud". As a result, in Nevada, breaches of duty of care and loyalty are exculpated, unless the acts also tamount o intentional misconduct, fraud, or knowing violation of law. Under Nevada's exculpation statute, thus, directors and officers are subject to personal liability only if their breach of a duty involves "intentional misconduct, fraud or a knowing violation of law."¹²⁷

As discussed above, Nevada Scretary of State argues that this difference is not significant. In a WSJ co-ed Aguilar and Professor Ben Edwards argue that the difference is merely that Nevada "doesn't impose liability for innocent mistakes."¹²⁸ Nevada statute exclude intetional misconduct and "of course, most violations of the duty of loyalty, such as self-dealing, are intentional.¹²⁹ Nevada law, they argue "makes directors liable when they know that they have done something wrong."¹³⁰

Yet, this interpretation is not in line with the legislative history to broaden protection to duty of loyalty breaches. In Delaware, directors are protected from liability for mere mistakes, and Nevada intended to adopt broader exculpation than Delaware.¹³¹ This intent was further manifested in changing the exculpation form an "opt-in" mechanism firms to adopt director and officer exculpation only with shareholder approval, to operate as a default.¹³²

Second ,and importantly, the "intentional" and "knowing" requirements of the Nevada exculpation statute have been interpreted by courts to confer an extremely high degree of protection. Nevada courts applied the exculpation statute in accordance with the legislative intent to protect self-dealing transactions. Thus, for example, in *McFarland v. Long*, the

¹²⁷ NRS 78.138(7)(B)(2).

¹²⁸ *Id.*, at 9.

¹²⁹ *Id.*, at 9.

¹³⁰ *Id.*, at 9.

¹³¹ See *Infra* Section II.A.

¹³² NRS 78.138(7).

court explicitly decided that showing self-interest is not sufficient since it does not release the plaintiff from the requirement to claim “intentional misconduct, fraud or knowing violation of the law.” The plaintiff’s motion was dismissed since he did not raise particularized facts for knowledge of wrongfulness.¹³³ Other cases in Nevada follow this approach.¹³⁴ Consequently, for the court to even start scrutinizing self-dealing transactions, Nevada law requires a showing of knowledge of wrongfulness with particularized facts.

Conversely, in Delaware, alleging self-dealing does not require the plaintiff to allege an intentional wrongful act. Rather, when a fiduciary self deals with the company, “the entire fairness standard of review applies in the first instance”.¹³⁵ As a result, this fiduciary, “despite acting in subjective good faith, may be found liable for acting disloyally.”¹³⁶ Intention is not required in Delaware since “even a subjectively well-motivated fiduciary might deal with himself less aggressively than he would with a third party.”¹³⁷

This difference is significant: showing knowledge of wrongfulness is a high bar at the pre-discovery pleading stage. Nevada’s expansive approach to exculpating directors and officers poses an obstacle for plaintiffs in shareholder derivative litigation, also due to the early dismissal stage of these proceedings. As a part of a pleading, shareholder derivative lawsuits traditionally require establishing “demand futility,” which effectively shows that a board of directors is compromised in some way to proceed with the lawsuit.¹³⁸ In Delaware, to adequately plead to demand futility, plaintiffs must plead with particularity that at least half of the board would not “be able to bring their impartial business judgment to bear on a litigation demand.”¹³⁹ Directors may not be able to

¹³³ See *supra* Part II.C.4.

¹³⁴ See e.g., *In re Parametric Sound Corp. Shareholders’ Litig.*, 140 NEV. ADV. OP. 36 (2024) (referring to the plaintiffs’ allegation, the court states that “Even if this allegation shows self-interest, Plaintiffs do not allege that this constituted “intentional misconduct, fraud, or a knowing violation of law”)

¹³⁵ *Id.*, at

¹³⁶ Leo E. Strine, Jr., Lawrence A. Hammermesh, R. Franklin Balotti, Jeffrey M. Gorris, *Loyalty’s Core Demand: The Defining Role of Good Faith in Corporate law*, 93 GEORGETOWN LAW JOURNAL, 629 (2010)

¹³⁷ *Id.*, at

¹³⁸ *United Food & Commercial Workers Union & Participating Food Indus. Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3D 1034, 1074 (Del. Sept. 23, 2021) (“The purpose of the demand- futility analysis is to assess whether the board should be deprived of its decision-making authority because there is reason to doubt that the directors would be able to bring their impartial business judgment to bear on a litigation demand. ”).

¹³⁹ *Id.* In *Zuckerberg*, the court held that the following three questions should be asked of each director: “(i) whether the director received a material, personal benefit from the

decide on demand if they face the likelihood of liability, are self-interested, or are beholden to a third party that faces liability risk. Importantly, to show risk for liability both in Delaware and in Nevada, the plaintiff cannot rely on exculpated claims “because they do not expose directors to a substantial likelihood of liability.”¹⁴⁰

The process has similar contours under Nevada law. Still, the state’s broad exculpation statute makes this stage of litigation much more difficult for plaintiffs seeking to bring a derivative lawsuit.¹⁴¹ As one observer has noted, the Nevada exculpation provisions “make it exceedingly difficult to convince judges that a substantial likelihood of personal liability exists for purposes of establishing demand futility.”¹⁴²

Indeed, the Nevada Supreme Court clarified this requirement in the 2006 case, *Shoen v. SAC Holding Corp.*,¹⁴³ explaining what plaintiffs must show to successfully plead to demand futility in a derivative lawsuit against a Nevada corporation. The Supreme Court held that in Nevada, “directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law. Accordingly, interestedness through potential liability is a difficult threshold to meet.”¹⁴⁴ An immediate effect of the *Shoen* holding was to curtail an essential pathway to pleading demand futility.

Similarly, in *Chur v. Eighth Judicial District Court*, the Commissioner of Insurance for the State of Nevada argued that directors of an insurance company did not keep themselves informed about the firm's status and

alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.” Demand is to be excused if the answer to any of the questions is yes for at least half of the directors. *Id.* at 1075.

¹⁴⁰ *Id.* at 1039.

¹⁴¹ *City of Warren Police & Fire Ret. Sys. v. Tenet Healthcare Corp.*, No. 05-19-00260-CV, 10 (Tex. App. Sep. 28, 2020) (citing *Shoen v. SAC Holding Corp.*, 137 P.3D 1171, 1179–80 (Nev. 2006)) (“In analyzing demand futility, Nevada courts generally follow the approach and reasoning of Delaware law.”).

¹⁴² Kieth Bishop, *Nevada's Director Liability Standard Defeats Another Derivative Suit*, C.A. CORP. L. (Oct 26, 2020) <https://www.corporatesecuritieslawblog.com/2016/07/tenth-circuit-upholds-nevada-law-by-denying-stockholders-standing-to-bring-claims-on-behalf-of-nevada-corporation/>.

¹⁴³ 122 NEV. 621, 137 P.3D 1171 (Nev. 2006).

¹⁴⁴ *Id.*

that this lack of oversight contributed to the firm's eventual insolvency.¹⁴⁵ On appeal, the Nevada Supreme Court upheld the lower court's dismissal of the claim.¹⁴⁶ The court refers to the complaint allegations that "the Board knew that reliance on the information presented to it ... could not be relied on..."¹⁴⁷ Nevertheless, the court decided that the commissioner did not allege facts that constituted a breach that was not already exculpated by NRS 78.138(7), which "provides the sole avenue to hold directors and officers individually liable for damages arising from official conduct."¹⁴⁸ As a result the court dismissed the case on the basis that demand futility had not been adequately pled.

In another case, the plaintiffs were the *City of Warren Police & Fire Ret. Sys. v. Tenet Healthcare Corp.* ran into a similar outcome in 2020.¹⁴⁹ Here, plaintiffs attempting to bring a derivative lawsuit against a board of directors alleged that board members had continued to violate the law through a "bribes-for-referrals scheme."¹⁵⁰ The case was litigated in Texas under Nevada law and again was dismissed for failing to properly plead non-exculpated claims.¹⁵¹

Demand futility is an integral part of shareholder derivative litigation. Nevada's exculpation statute provides an exceptionally high bar for shareholder plaintiffs to pass the demand futility stage. As the following part shows, the high bar turns close to impossible to meet since, on top of its broad exculpation, Nevada does not provide shareholders with access to books and records. Shareholdersments.

Nevada's exculpation for this kind of conflicted activity may have far-reaching implications, as the difference in how a challenge to an allegedly conflicted transaction might play out in Nevada courts versus Delaware courts is stark. Self-dealing is generally reviewed under the entire fairness standard in Delaware, where the court looks to both process and price in determining fairness.¹⁵² This standard of review is widely seen as the highest level of scrutiny that Delaware courts apply to corporate conduct. On top of that, Delaware law does *not* allow firms to exculpate directors or officers for breaches of the duty of loyalty.¹⁵³

¹⁴⁵ *Chur v. Eighth Judicial Dist. Court*, 458 P.3d 336 (Nev. 2020).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at 342.

¹⁴⁸ *Id.*

¹⁴⁹ Texas App. LEXIS 7792 (2020).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (1983).

¹⁵³ DGCL §102(B)(7).

As the following sections show, Nevada corporate law imposes additional impediments to shareholder litigation, which underscores the importance and the implications of the differences in the states' exculpation statutes. These impediments make it difficult to succeed even when the defendants acted with wrongful intention.

D. Inspection Rights – No Access to Books and Records

Another critical difference between Nevada and Delaware concerns shareholders' rights to inspect corporate books and records. This right is essential to a shareholder's broader litigation rights. Plaintiffs can access materials that could help them bring a case and pass the demand futility requirement that they have to argue with particular facts. Due to its preliminary stage of the initial motion to dismiss, plaintiff have to meet the demand futility requirement pre-discovery. To assist plaintiffs with meeting this bar Delaware and other states provide them with access to bookes and records, which includes access to board minutes.

Since the motion to dismiss is decided pre-discovery, inspection rights can easily determine the fate of a case.¹⁵⁴ Access to board meeting minutes, for example, could help the plaintiff in bringing particularized facts that show lack of independence in board decision-making, a lack of oversight, or conflicts of interest.¹⁵⁵ Inspection rights thus are considered an integral part of American corporate law and accordingly are offered to shareholders under Delaware law, the Revised Business Model Act, and all other states' laws.¹⁵⁶

In Delaware, under D.G.C.L. § 220 which covers inspection rights,¹⁵⁷ Shareholders must articulate a "proper purpose" under § 220 to get inspection rights; a shareholder seeking to investigate misconduct must show a "credible basis" for a court to infer such wrongdoing.¹⁵⁸ The Delaware Supreme Court has called the credible basis standard in the preliminary § 220 analysis the "lowest possible burden of proof."¹⁵⁹ In

¹⁵⁴ See generally, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021)

¹⁵⁵ See *id.*, at 1981 (describing how access to board minutes in Marchand assisted plaintiffs to fight dismissal)

¹⁵⁶ See Lynn Bai, *Shareholder Inspection Rights: From Credible Basis to Rational Belief*, 10 EMORY CORP. GOV. & ACC. REV. 193 (2023) (findings that some states require only rational belief).

¹⁵⁷ DGCL § 220(c)(3).

¹⁵⁸ *Amerisourcebergen Corp. v. Lebanon County Emps.' Retirement Fund*, 243 A.3d 417, 425 (Del. 2020).

¹⁵⁹ See *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2D 117, 123–24 (DEL. 2006)

short, the barrier to receiving books and records for Delaware shareholders looking into potential wrongdoing is relatively low. Other states similarly allow shareholder access to firms' books, records, board, and committee minutes, and other actions taken by the board, based on a proper purpose.¹⁶⁰ Some states adopt even a lower burden than Delaware, replacing the “proper purpose” with a “rational belief.”¹⁶¹

Furthermore, in recent years, Delaware courts have broadened the definition of proper purpose.¹⁶² Delaware also broadened the scope of the materials that shareholders can view as part of their inspection. While in the past, shareholders could access books and records, recently they could also access emails and electronic messages.¹⁶³ The broadening of Delaware 220 to emails and electronic communication assisted plaintiffs in arguing a lack of independence.¹⁶⁴

Nevada turns this posture of permissiveness on its head. It does offer its provision covering the rights of stockholders to inspect company records, which includes procedural requirements¹⁶⁵ for the request and a roughly analogous provision to Delaware, suggestive of a “purpose” requirement.¹⁶⁶ However, the Nevada provision also contains a powerful catch-all. Critically, under NRS 78.257(7) Nevada inspection rights do not apply to any corporation that furnishes its stockholders with a detailed, annual financial statement.¹⁶⁷ In other words, this provision *excuses the vast majority of publicly traded Nevada corporations from respecting*

¹⁶⁰ See Gail Weinstein, *Section 220 Decisions Amplify Stockholders' Rights to Inspect Books and Records*, HARV. L. SCH. FORUM CORP. GOV. (Oct. 3, 2022), <https://shorturl.at/hsL02> (exploring recent § 220 holdings in Delaware and how they reflect a more permissive approach to books and records demands).

¹⁶¹ See e.g., MODEL BUS. CORP. ACT § 16.02 (AM. BAR ASS'N 2021); See also Lynn Bai, *Shareholder Inspection Rights: From Credible Basis to Rational Belief*, 10 EMORY CORP. GOV. & ACC. REV. 193 (2023) (surveying shareholder inspection rights in many states, and findings that some states have boarden inspection rights than Delaware).

¹⁶² See generally, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021)

¹⁶³ See e.g., *Amalgamated Bank v. Yahoo! Inc.*, C.A. No. 10774-VCL, slip op. at 52 (DEL. CH. FEB. 2, 2016); See also, Roy Shapira, *The New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857 (2021).

¹⁶⁴ See Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARD. L. REV. 1949 (2021). Yet, as discussed below, this expansion was cut back by SB21. See discussion *Infra* Part IV.B.

¹⁶⁵ NRS 78.257(1).

¹⁶⁶ NRS 78.257(2) (requiring that the stockholder submit an “affidavit to the corporation stating that the inspection... is not desired for any purpose not related to his or her interest as a stockholder.”).

¹⁶⁷ NRS 78.257(7). The rights might still apply in a narrow case in which the company “shares are not listed or traded on any recognized stock exchange”, and the shareholder who request to inspect has 15% of the voting power. *id.*

stockholder inspection rights. So long as the firm furnishes its shareholders with the bare minimum required by federal law, it cannot be forced to share internal corporate records.¹⁶⁸

The Nevada exception allows firms to withhold one trove of vital information—board minutes and communication—from stockholders, even when there may be suspected wrongdoing. This enormously protective policy is almost the polar opposite of Delaware’s rather expansive approach, and it presents yet another barrier to shareholders of Nevada firms who might otherwise seek to exercise their litigation rights in court.

Furthermore, given the high requirement that Nevada poses to the plaintiff in the motion to dismiss stage – to argue with particularized facts that directors' or executives' acts amount to intentional misconduct, fraud, or knowing violation of law, the lack of inspection rights is especially damaging. Thus, for example, *In re Zagg*, the court dismissed the lawsuit since the plaintiff did not argue with particular facts that directors knew that disclosure is required by law. Had the plaintiffs had access to the board minutes of the relevant filings, they might have sufficient information to argue that the directors were familiar with securities laws that require disclosure.

The following part will demonstrate how Nevada’s broad exculpation statute, the demand futility requirement to allege non-explicated claims with particularized facts, and the lack of inspection rights result in the dismissal of cases with extreme facts of directors’ and officers’ misbehavior.

E. McFarland v. Long – The Executives Who Paid Themselves

The MacFarland case illustrates how Nevada's pleading requirements and lack of shareholder inspection rights foreclose shareholder litigation even in cases of egregious self-dealing. The facts were extreme. For ten years, the company's CEO and COO each drafted his own compensation contract, which the other executive signed. Through these self-authored agreements, the executives increased their combined stock ownership from 5% to 50%. The trial court found that the executives "milked" the company and that the remaining director had "completely relinquished his duty" to monitor executive compensation. Despite acknowledging

¹⁶⁸ Over the years Nevada again and again further narrowed its limited inspection rights. For example, in the last legislative session, held in 2023, Nevada allowed firms to limit inspection rights in the charter for a broader categories.

this wrongdoing, the court dismissed the shareholder complaint. The court held that shareholders failed to plead particularized facts showing intentional wrongdoing, as required by Nevada exculpation statute.

The plaintiff was a minority shareholder in Payment Data Systems, a company that provides processing services for payment transactions.¹⁶⁹ Following the resignation of four board members in 2004, and up to 2015, the company board included only the following three members – Long, the company CEO; Hoch, the company president; and Kirby, which the court described as a “supposedly independent director”. Between 2004 and 2007, Kirby was the only member of the compensation committee, which had the authority to set the compensation of the firm’s executives. Beginning 2007, however, Kirby “utterly relinquishing his duties”, in fact, “Kirby simply allowed the executive officers themselves to decide how they would be paid.”¹⁷⁰

Thus, from February 2007 till 2015, Long and Hoch set their own compensation, each of them signing the other’s employment contract. The court found that “With Kirby failing to exercise any oversight, between 2007 and 2012 Long and Hoch paid themselves excessive salaries and cash bonuses”¹⁷¹ In particular, the court finds that Hoch and Long were “awarding themselves most of Payment Data's gross profits as compensation,” in addition to tens of millions of shares, which combined resulted in them holding 54% of the stock and the voting rights.¹⁷² Nevertheless, the court dismissed the case.

The court first rejected all claims that pertain to compensation before April 2013, due to the Nevada statute of limitations, which, unlike Delaware’s, applies as is to fiduciary duty claims. Turning to the 2014-2015 compensation packages, the court first rejected the plaintiff’s argument that entire fairness applies, since “the plain language of the text of the Nevada statute governs the claims in this case.”¹⁷³ The court refers to two different rules that override entire fairness in this case. First, citing *Churr*, the court determines that due to the plain language of N.R.S. 78.138.7(b), a higher requirement, “intentional misconduct” applies to all officer and director claims.”¹⁷⁴ Second, with respect to the stock award

¹⁶⁹ *McFarland v. Long*, No. 216CV00930RFBPAL, 2017 WL 4582268 (D. NEV. OCT. 7, 2017).

¹⁷⁰ *Id.*, at 2.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*, at 6.

¹⁷⁴ *Id.* (“Plaintiff argues that Delaware's “entire fairness” doctrine applies to the compensation awards. However, the plain language of N.R.S. 78.138.7(b) states that a higher, “intentional misconduct” standard applies to all officer and director claims. Furthermore, as to the December 2014 stock disbursement, N.R.S. 78.211(1) states the

component, the court decides that entire fairness doesn't apply also because "N.R.S. 78.211(1) states the "judgment of the board of directors as to the consideration received for" shares issued by the Company "is conclusive in the absence of *actual fraud* in the transaction."¹⁷⁵ Namely, with respect to stock-based compensation awards, the threshold in Nevada is even higher: the plaintiff has to argue with particularized facts that the board's actions in awarding the stock amounted to actual fraud.¹⁷⁶

Deciding on the facts alleged, the court determined that the plaintiff did not meet Nevada's "heightened pleading requirement."¹⁷⁷ Demand futility requires the plaintiff to show that a majority of the board is not qualified to decide on the demand requirement when the complaint was filed, and the board had five directors. Thus, to meet the majority requirement, plaintiffs had to file allegations against Kirby in addition to Long and Hoch. With respect to the plaintiff's claim that Kirby faces the likelihood of liability since he failed to implement adequate internal controls, the court decided that since the "plaintiff must allege intentional misconduct, fraud, or a knowing violation of the law... plaintiff's allegations that Kirby failed to implement adequate internal controls do not amount to an adequate showing for demand futility."¹⁷⁸

Thus, Nevada court here decides that Nevada exculpation statute protects from Delaware *Caremark* liability, namely liability of failure to oversight. Failure to implement internal controls, is not sufficient to plead intentional misconduct.

Furthermore, this failure is not considered intentional misconduct even though Kirby received a stock award himself, which the plaintiff argued was a "*quid pro quo*". Since the plaintiff "fails to plead any other specific facts related to the alleged "*quid pro quo*,"¹⁷⁹ His allegations, the court decided "do not amount to "knowledge of wrongfulness" or "intentional misconduct" sufficient to overcome the strict Nevada statutory bar to liability."¹⁸⁰ Finally, these allegations are also not sufficient to show that Kirby was interested since, given the Nevada exculpation statute,

"the judgment of the board of directors as to the consideration received for" shares issued by the Company "is conclusive in the absence of actual fraud in the transaction." The Court therefore finds that the plain language of the text of the Nevada statute governs the claims in this case.")

¹⁷⁵ *Id.*, at 6; NRS 78.211(1).

¹⁷⁶ *Id.*, at 6.

¹⁷⁷ *Id.*, at 6.

¹⁷⁸ *Id.*, at 6.

¹⁷⁹ *Id.*, at 6.

¹⁸⁰ *Id.*

“interestedness through potential liability is a difficult threshold to meet.”¹⁸¹

Finally, the court also dismissed the direct claims against the executives since the allegations “do not show that the challenged awards were illegal, nor does Plaintiff allege that the awards were prohibited by the Company's charter or bylaws or other formation documents, nor that there were any intentional wrongdoings or fraudulent activities.”¹⁸²

Thus, the Court finds that the derivative claim fails because the plaintiff, who lacked access to books and records, did not adequately plead particularized facts demonstrating knowledge of wrongfulness.¹⁸³ The result speaks volumes. There is no compensation committee, and executives have set their own compensation for years. They extracted the firm's assets and gained control over the company. When their ownership declined, they award themselves and the only independent director additional stock. Nevertheless, the Nevada court found that, due to the lack of particular facts that demonstrate intentional misconduct, the case should not proceed.

In Delaware, in *Tornetta v. Musk*, Chancellor MacCormick rescinded Elon Musk's compensation package of \$56 billion, which the Tesla board awarded him.¹⁸⁴ The compensation was performance-based and approved by shareholder vote. The case that triggered Musk's attacks on Delaware applied the Delaware approach to self-dealing transactions. The Chancellor found that the Tesla board was not independent of Musk, the shareholder vote was not sufficiently informed, and the transaction and the price (the compensation amount) were not fair.¹⁸⁵

The result of this case stands in stark contrast not only to *Tornetta v. Musk* but also to any straightforward application of Delaware and other states' corporate law. To start, in Delaware, conscious disregard of duties is considered bad faith and thus is not protected by 102(b)(7).¹⁸⁶ Thus, Kirby would have faced liability risk for the purpose of demand futility. Second, since Kirby acted in a controlled mindset, and since he himself was awarded stock, and also since the court found that he did not have any other source of compensation, he would be considered interested or

¹⁸¹*Id.*.

¹⁸² *Id.*, at 4. With respect to the stock award “Plaintiff has not pled fraud, and therefore, the Board's judgment is conclusive that the Company received adequate consideration for the December 2014 stock grant.”*Id.*

¹⁸³ *Id.*

¹⁸⁴ *Tornetta v. Musk*, No. 2018-0408-KSJM (Jan. 30, 2024).

¹⁸⁵*Id.*

¹⁸⁶ *In re Walt Disney Derivative Litigation*, 907 A 2D 693 (2005).

beholden to Long and Hoch, who are self-interested, which is sufficient for the demand futility requirement.

Finally, Long and Hoch's self-dealing was not approved by an independent committee, nor by a vote of disinterested shareholders. Since the process was close to horrific and the judge found that the executives paid themselves most of the company's profits, the transactions are unlikely to pass the entire fairness test, which requires the defendant to prove fair process and fair price.

MacFarland directly contradicts Nevada Secretary of State Aguilar's assertion that "most violations of the duty of loyalty, such as self-dealing, are intentional." If executives writing their own compensation contracts, awarding themselves stock to increase their ownership tenfold, and milk company profits, while a complicit director abandons oversight does not constitute intentional misconduct under Nevada law, it is difficult to imagine what facts would suffice.

The case also demonstrates the impossibility of Nevada's pleading burden without books and records access. To plead "intentional wrongdoing" with the particularity Nevada courts require, shareholders would need access to board minutes, internal communications, and other corporate documents showing the executives' subjective intent. Nevada provides no such access. Shareholders are expected to plead facts they cannot possibly obtain.

F. *Wynn Resorts* – The Exception That Proves the Rule

Commentators frequently cite *Wynn Resorts* as evidence that Nevada is not liability-free. The Secretary of State and Professor Solomon argue that the case demonstrates that Nevada courts do allow shareholder litigation to proceed when directors engage in serious misconduct. This characterization is misleading. *Wynn Resorts* does not disprove Nevada's barriers to shareholder litigation—it illustrates precisely how insurmountable those barriers are under normal circumstances.

Facts

The *Wynn Resorts* litigation arose from allegations that Steve Wynn, the company's founder and CEO, had engaged in a pattern of sexual harassment and assault of company employees. In early 2018, the *Wall Street Journal* reported that dozens of people, among them employees, recounted patterns of sexual harassment and misconduct by Steve Wynn

over several decades.¹⁸⁷ In response to the article, Wynn Resort's stock declined more than ten percent in one day and continued to fall in the following days.¹⁸⁸ Less than two weeks after the report, Steve Wynn resigned as CEO and Chairman of the board of Wynn Resorts.¹⁸⁹ In 2005, Wynn paid a multimillion-dollar settlement to a former employee who alleged sexual misconduct. The Board of Directors allegedly knew of both the settlement and Wynn's pattern of misconduct but failed to disclose this information to gaming regulators or shareholders. Nevada gaming law requires companies to report information material to a key executive's suitability as a licensee. The Board's failure to report potentially constituted a knowing violation of law – one of the narrow categories under which Nevada's exculpation statute permits director liability.

Why Wynn Resorts survived dismissal?

Wynn Resorts survived the motion to dismiss not because Nevada provides adequate mechanisms for shareholder enforcement, but because extraordinary circumstances allowed shareholders to obtain information they would otherwise never access. The case involved a bitter public fight between Steve Wynn and his wife, Elaine Wynn, who was both a director and significant shareholder. This conflict led to extensive press coverage in outlets including the Wall Street Journal. Information normally locked away in board minutes and internal documents leaked to the press. Critically, the company itself made public admissions that established the directors' knowledge. In a March 28, 2016 press release, the company stated:

"[a]s a leader in a highly regulated industry, Wynn Resorts prides itself on transparency and full disclosure to regulators and shareholders. Allegations made by Ms. Wynn that the company would hide any relevant activities from our regulators are patently false."¹⁹⁰

¹⁸⁷ Alexandra Berzon, Chris Kirkham, Elizabeth Bernstein & Kate O'Keeffe, *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, WALL ST. J. (Jan. 27, 2018),

<https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953>.

¹⁸⁸ Lucinda Shen, *Wynn Resorts Loses \$3.5 Billion After Sexual Harassment Allegations Surface About Steve Wynn*, FORTUNE (Jan. 29, 2018),

<https://fortune.com/2018/01/29/steve-wynn-stock-net-worth-sexual-misconduct/>.

¹⁸⁹ Maggie Astor & Jullie Creswell, *Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*, N.Y. TIMES (Feb. 6, 2018),

<https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html>.

¹⁹⁰ *In re Wynn Resorts, Ltd. Derivative Litig.*, No. A-18-769630-B, 2018 WL 11252194 (NEV. DIST. CT. SEPT. 6, 2018).

This press release demonstrated that: (1) the Board knew of the settlement; (2) the Board knew of Steve Wynn's pattern of sexual misconduct; and (3) the Board understood its legal obligation to report such conduct to gaming regulators.

These public admissions gave shareholders the particularized facts necessary to plead a knowing violation of law. The court held that plaintiffs satisfied demand futility requirements because they brought "particularized facts that show that directors could face liability for knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees, including failing to notify regulators of information material to Steve Wynn's suitability as a gaming licensee."

Impossible Without Public Disclosure

The key point is what made *Wynn Resorts possible*. To plead a knowing violation of law under Nevada's exculpation statute, shareholders must demonstrate not only that directors violated the law, but that directors knew they were violating it.¹⁹¹ This requires access to evidence of directors' subjective knowledge—board minutes, internal emails, memoranda from counsel, and other documents showing what directors knew and when they knew it.

Nevada provides no books and records access. In a typical case, shareholders have no means to obtain evidence of directors' knowledge. They cannot access board minutes discussing the misconduct. They cannot review internal legal advice about reporting obligations. They cannot examine communications showing directors' awareness of their duties. Without this access, shareholders cannot plead the particularized facts Nevada courts require.

Wynn Resorts survived only because the public battle between Steve and Elaine Wynn forced information into the open that would normally remain hidden. The company's own press release—issued in the context of a public relations battle—provided the smoking gun evidence of knowledge that shareholders could never have obtained through formal legal channels. This is not a model for shareholder enforcement. It is a demonstration of how dependent Nevada shareholders are on extraordinary luck: a marital dispute, a media frenzy, and corporate admissions made for public relations purposes.

¹⁹¹ *Id.*

Wynn Resorts Confirms Nevada's Barriers

Far from contradicting this Article's thesis, *Wynn Resorts* confirms it. The case shows that even with egregious facts—a pattern of sexual harassment, a multimillion-dollar settlement, and failure to comply with gaming regulations—shareholders can proceed only when unusual circumstances force information into public view. The fact that commentators must point to this single, highly unusual case as Nevada's counterexample actually proves the rule: absent a public spectacle that generates press coverage and corporate admissions, Nevada shareholders cannot overcome the pleading barriers.

G. Business Judgement Rule for Takeover Defenses

Nevada is different from Delaware also in the standards that it applies to management use of defensive tactics.

(a) Delaware's Intermediate Standards

Delaware courts apply an intermediate standard of review to managers' use of defensive tactics in the face of takeovers. This has long been a challenging area of conduct to adjudicate: as Professors Ronald J. Gilson and Reinier Kraakman wrote in 1989:

“The courts have long struggled with a standard for reviewing management's efforts to deter or defeat hostile takeovers... Because evaluating a sale of the company is a complex business decision, management's response to a takeover bid resembles the normal business decisions that the business judgment rule largely insulates from judicial review. At the same time, however, a hostile takeover creates a potential conflict of interest, no matter what response it evokes from management.”¹⁹²

Over time, Delaware courts have developed three enhanced standards of scrutiny to review different kinds of corporate conduct resulting from defensive, antitakeover tactics.

In *Unocal v. Mesa Petroleum Co.*, the Delaware Supreme Court held that directors can take defensive actions in the case of a threatened takeover if “they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed” and that the defensive measures taken

¹⁹² Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review*, 44 BUS. L. 247, 247 (1989).

by the board were “reasonable in relation to the threat posed.”¹⁹³ The *Unocal* standard aimed to balance a tradition of deference for business decisions and the dangers inherent in conflicted decision-making: as the court described, the approach was “designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders.”¹⁹⁴ Another critical concern often discussed by courts here is the concept of “entrenchment:” the idea that boards would take steps to entrench themselves in their positions at the expense of shareholders or the company itself. *Unocal* is still good law and applies where directors attempt to fend off hostile takeovers and threats from activist investors.¹⁹⁵

Next, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court held that, in situations where a company’s sale or dissolution becomes inevitable, directors are charged with getting the best price possible for shareholders.¹⁹⁶ As the court described, once a change of control was guaranteed, the board’s role shifts “from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”¹⁹⁷ Where *Unocal* applies to boards that still have the opportunity to maintain control, courts apply *Revlon* to review the conduct of boards that engage in the sale process. *Revlon* explicitly contemplates the dangers of boards “playing favorites” in the auction or sale process as the chief danger the test is trying to defend against.¹⁹⁸

Finally, in *Blasius Indus. v. Atlas Corp.*, the Court of Chancery held that boards must demonstrate a “compelling justification” for any acts interfering with shareholder votes.¹⁹⁹ Protecting the shareholder vote was the critical focus of *Blasius*: as the court held, “[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.”²⁰⁰ Delaware courts’ particular sensitivity to intrusions on the shareholder franchise has drawn out a test for enhanced scrutiny that deals with these inclusions. Indeed, it applies both in the

¹⁹³ *Id.* at 955, 949.

¹⁹⁴ *Id.* at 955.

¹⁹⁵ See, e.g., *In re Ebix, Inc. Stockholder Litigation*, C.A. No. 8526-VCN, 2016 WL 208402 (Del. Ch. Jan. 15, 2016) (holding that *Unocal* enhanced scrutiny applies to a board that adopted certain defensive bylaw amendments in the face of a threat from an activist investor).

¹⁹⁶ 506 A.2D 173, 182 (Del. 1986).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 184.

¹⁹⁹ 564 A.2D 651, 661 (Del. Ch. 1988).

²⁰⁰ *Id.* at 659.

takeover context and outside of it.²⁰¹ *Blasius* is important enough that the Delaware Supreme Court has held it is distinguished from the stringent entire fairness standard in the scope of protection it affords, characterizing *Blasius* as a “different and necessary [type] of judicial review.”²⁰²

These three cases—*Unocal*, *Revlon*, and *Blasius*—form the basis for “enhanced scrutiny” of director and manager actions taken in the face of threats to corporate control. None of them adopts strict, per se, rules as standards. However, they allow courts in Delaware to balance the business judgment decisions of boards and officers while holding up some protection for shareholders.

(b) Nevada and NRS 78.139

Nevada has taken a sharply different approach to reviewing anti-takeover actions by directors and officers. In 1999, the legislature adopted NRS 78.139 concerning the duties, presumptions, and powers of officers and directors confronted with a potential change of control.²⁰³ These provisions developed out of an intent to differentiate from Delaware: they were adopted two years after the decision in *Hilton Hotels Corp. v. ITT Corp.*, in which the District Court of Nevada held that Nevada law was governed by Delaware caselaw (namely, *Unocal* and *Blasius*) in the antitakeover context.²⁰⁴ In considering the 1999 change, Nevada legislators expressly contemplated the implications of the *Hilton Hotels* decision for their law: “The Executive Committee believes the [*Hilton Hotels*] decision contained language which could be interpreted too broadly and wish[es] to clarify Nevada law by changing NRS 78.138.”²⁰⁵

NRS 78.139 effectuated several changes in Nevada law, which can be understood by referencing *Unocal*, *Revlon*, and *Blasius* in Delaware. First, the Nevada legislature replaced both the *Unocal* and *Revlon* enhanced

²⁰¹ See, e.g., *Coster v. UIP Cos.*, 2020 WL 429906 (Del. Ch. Jan. 28, 2020).

²⁰² Id. at *17. See also *Marion Coster v. UIP Companies, Inc.*, NO. 49, 2020 (Del. June 28, 2021); Jason M. Halper, Jared Stanisci & Victor Bieger, *Delaware Supreme Court’s Response to Chancery for Turning Away Stockholder’s Claims*, HARV. L. SCH. FORUM CORP. GOV (July 29, 2021)

<https://corp.gov.law.harvard.edu/2021/07/29/delaware-supreme-courts-response-to-chancery-for-turning-away-stockholders-claims/>

²⁰³ NRS 78.139.

²⁰⁴ *Hilton Hotels Corp. v. ITT Corp* 9718 F. Supp. 1342 (D. Nev. 1997); see also Keith Paul Bishop, *Nevada Legislature Ponders Rejection Of Unocal And Revlon Standards*, C.A. CORP. LAW (March 23, 2017) <https://natlawreview.com/article/nevada-legislature-ponders-rejection-unocal-and-revlon-standards?amp>

²⁰⁵ Memorandum from John P. Fowler, Chair, Exec. Comm., BUS. LAW SECTION, STATE BAR OF NEV. TO S. JUDICIARY COMM., STATE OF NEV. 5 (Feb. 3, 1999).

standards of scrutiny with simple business judgment deference.²⁰⁶ This means that directors who engage in defensive tactics receive deference from the court in Nevada, and the balancing analysis set out in *Unocal* for Delaware corporations is wholly set aside. Similarly, even when a sale is inevitable, Nevada directors will still receive business judgment deference, which abrogates any *Revlon*-style obligation to get the best price for shareholders in the state.

Second, it adopted the *Unocal* standard that was applied to the use of defensive tactics by boards in Delaware and was applied to interference in the shareholder franchise in Nevada. In other words, Nevada directors are permitted to impede shareholders' right to vote on corporate matters if they i) reasonably perceive a threat to corporate policy and ii) the imposition on the shareholder franchise is "reasonable in relation to the threat."²⁰⁷ In other words, the Nevada legislature replaced the higher *Blasius* standard with the lower *Unocal* standard in situations where shareholders allege that their franchise has been impeded.

H. Nevada *Silverflum* Portal – Marketing the State's "No Liability" Law

Strikingly, Aguilar's statements are also not consistent with the position the state has taken on Nevada Secretary of State portal – *Silverflume*.²⁰⁸ The memo, which is titled "Why Nevada?", illustrates the advantages of reincorporating in Nevada relative to Delaware and California. Among these advantages, the legal memo counts as "Director Immunity from Lawsuits."²⁰⁹ It explains that "Nevada Provides Stronger Personal Liability Protection To Officers And Directors."²¹⁰

The memo further elaborates that in contrast to Nevada, "under Delaware and California law, a director may be held liable for a breach of a fiduciary duty absent intentional misconduct, fraud or a knowing violation of the law."²¹¹ The memo further explains that unlike Nevada,

²⁰⁶ See NRS 78.138(3) ("Except as otherwise provided in subsection 1 of NRS 78.139 [concerning board actions that impede the stockholder franchise], 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.")

²⁰⁷ NRS 78.139(1)(a)-(b).

²⁰⁸ See *Why Nevada? Legal Advantages: A Comparison with Delaware and California*, Lionel Sawyer & Collins and Parsons Behle & Latimer Law Firms (August 15, 2012) (providing reasons to incorporate in Nevada including "director immunity from lawsuits" and "stronger personal liability protections").

<https://www.nvsilverflume.gov/documents/CorporateLawComparison.pdf>

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

Delaware and California require a shareholder vote for the protections to apply.²¹²

IV. Implications

A. Implications to Race to the Top/Bottom Debate – Snowballing to the Bottom

This Part demonstrates that for several reasons, the current equilibrium is particularly unstable. The fragility of the market could result in a snowballing decline, degrading American corporate law to zero accountability. In the current dynamic, Section 1 argues, since Nevada is leading a race to bottom, and Nevada is less restrained than Delaware, the pull to bottom is stronger. Section 2 demonstrates that Delaware responding by getting closer to Nevada, could backfire by further facilitating reincorporations to Nevada.

1. Race to the Bottom – Nevada Leads, Delaware Dragged

Fifty years have passed since Bill Cary published his seminal article in the Yale Law Journal, where he argued that the state of Delaware was *leading* a race to the bottom in the market for corporate law.²¹³ The article initiated a central debate in corporate law involving top scholarship by top corporate law scholars. Chicago School scholars Ralph K. Winter, Jr., Frank H. Easterbrook, and Daniel R. Fischel criticized Cary's argument for not considering market forces that penalize firms that choose inferior law and, in turn, Delaware for offering such a law.²¹⁴ Roberta Romano argued that Delaware is racing to the top, and Rob Daines found that Delaware firms are traded at a premium.²¹⁵ On the other hand, Lucian Bebchuk and others have pointed to the limitations market forces have in disciplining managers.²¹⁶

²¹² *Id.*

²¹³ William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

²¹⁴ See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977); Frank H. Easterbrook & Daniel R. Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW*, 212–27 (1991).

²¹⁵ See Roberta Romano, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–31 (1993); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 225–32 (1985); Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. Fin. Econ. 525 (2001).

²¹⁶ See e.g., Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90

More recent literature challenged the assumption that competition even exists.²¹⁷ Most states, these studies argued, did not establish business courts; their courts decide cases with juries and seldom publish their cases.²¹⁸ Similarly, from as far as Delaware, no state charges a significant incorporation tax,²¹⁹ and even if some states did, for the vast majority of them, that would not constitute a significant portion of their budget.²²⁰ Furthermore, Delaware's high incorporation tax indicates its market power and the barriers to entry it poses for other states.²²¹

The combination of Nevada's lax laws and the backlash against Delaware created a new dynamic: *Nevada leads a race to the bottom*, and Delaware is dragged along. This difference is significant. *Race to the Bottom* critiques argued that Delaware incentives are not aligned with the concept of "racing to the bottom". The argument is less valid in Nevada. Nevada faces fewer restraints and holds more credibility to commit to racing toward the bottom. The Nevada brand is already lax; thus, racing to the bottom could only contribute to its brand. Nevada's internal politics, as indicated by the state's overall laxity, also supports laxity with respect to corporate law. Lastly, Nevada's competitive advantage is its commitment to lax law.

Since Nevada lacks Delaware's restraints, it is expected to race to the bottom further than any other state. In turn, other states might follow in order to stay in the game. The current race to the bottom could end up much lower than when Delaware was the leader. This race, thus, is significantly more consequential than the one described by Bill Carry.

2. The Risk of Snowballing to the Bottom

CAL. L. REV. 1775 (2002), Lucian A. Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race To Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999) ; Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001); Oren Bar-Gill, Michal Barzuza & Lucian A. Bebchuk, *The Market for Corporate Law*, 162 J. INSTIT. & THEORETICAL ECON. 134, 134-38 (2006).

²¹⁷ See Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 563-64 (2002) (arguing that Delaware's dominant position imposes insurmountable barriers to entry); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684-85 (2002) (arguing that no state competes with Delaware).

²¹⁸ See Kahan & Kamar, *supra* note 37, at 712-13.

²¹⁹ See Kahan & Kamar, *supra* note 37, at 687-92.

²²⁰ Since Delaware is a small state, incorporation taxes constitute a considerable portion of its annual budget. See Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2429 TBL.1 (1998)

²²¹ See Bebchuk & Hamdani, *supra* note 37.

The fragility of the market, combined with Nevada law, this Section argues, invokes a risk of snowballing to the Bottom. When Delaware chooses to respond, it is difficult to control the extent of the response.

Should Delaware amend its law or apply its cases to match Nevada protections, or even get closer to Nevada, the first-order effect will, of course, be to establish a much more hospitable environment for directors, officers and controlling shareholders. Delaware, however, may also face second-order risks from this amendment: the bill could potentially create a “snowball effect” by making it *easier* for other Delaware firms to move to Nevada.

Delaware moving in Nevada's direction could have two consequences that would ease reincorporations to Nevada: (a) eroding the value of Delaware's advantages, namely the experienced judiciary and body of case law, and (b) reducing the barriers to reincorporation. With lower constraints and lower costs for the Nevada disadvantage, Delaware may face pressure to move further toward Nevada.

(a) Eroding Delaware’s Advantages

Moving toward Nevada could have a costly secondary effect—eroding Delaware's advantages over Nevada. Delaware's superiority is highly tied to the value of its courts and specialized judiciary. Another key benefit associated with Delaware, the fact that there are network benefits because most firms are incorporated there, would also decline if more firms move to Nevada.

Yet, Nevada law, by limiting liability to “intentional misconduct, fraud or knowing violation of law,” renders the need for judicial expertise to apply directors' fiduciary duties. It will also erode the value of Delaware's other, related advantages – a rich body of case law, and network and learning externalities. These are not mere speculations. In fact, Delaware's recent amendment has been criticized for diminishing the significance of the state’s judiciary.²²² diminish the significance of Delaware’s judiciary; if, for example, the only way to impose liability on a director or officer is through intentional misconduct, the need for a bench with business-specific expertise is reduced.

²²² See Charles Elson, *Delaware is Jettisoning its Traditional Approach of Protecting Investors*, FINANCIAL TIMES (July 10, 2024) <https://www.ft.com/content/727c3850-335b-4a30-b59b-399e611aec07>

Thus, while such changes might stop some firms from reincorporating in Nevada, other firms might find that there are fewer reasons to stay in Delaware and pay Delaware a significantly higher incorporation tax.

(b) Lowering Reincorporation's Barriers

Second, and counterintuitively, amending Delaware law to align more closely with Nevada law could *facilitate* reincorporations into Nevada. Most recent reincorporations in Nevada were enabled by the votes of the firms' controlling shareholders. Yet, if Delaware law degrades toward Nevada law, shareholders might feel less reluctant to support such a move. Indeed, given the impediments it poses to shareholder litigation, shareholders were not inclined to vote in favor of reincorporating from Delaware to Nevada. In fact, index funds' voting guidelines regarding reincorporations specifically require comparison between shareholder protection in both states. For example, BlackRock voting guidelines for reincorporation state that:

"We will evaluate the economic and strategic rationale behind the company's proposal to reincorporate on a case-by-case basis. In all instances, we will evaluate the changes to shareholder protections under the new charter/articles/bylaws to assess whether the move increases or decreases shareholder protections. Where we find that shareholder protections are diminished, we may support reincorporation if we determine that the overall benefits outweigh the diminished rights." ²²³

Based on these guidelines, index funds vote against reincorporation in Nevada. If, however, Delaware changes its law significantly, funds might conclude that the differences between the states are not material, and thus reduce their reluctance to support the reincorporation. With low barriers, more firms might move to Nevada. This, in turn, could pressure

²²³ See BlackRock Voting Guidelines (January 2025) <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>; See also Reincorporation Proposals, ISS Voting Guidelines at p.33. 2025 <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf> ("Reincorporation Proposals General Recommendation: Management or shareholder proposals to change a company's state of incorporation should be evaluated case-by-case, giving consideration to both financial and corporate governance concerns including the following: Reasons for reincorporation; Comparison of company's governance practices and provisions prior to and following the reincorporation; and Comparison of corporation laws of original state and destination state. Vote for reincorporation when the economic factors outweigh any neutral or negative governance changes")

Delaware to further relax its corporate laws to discourage reincorporations from the state.

Furthermore, so far, shareholder approval has been a significant impediment to reincorporating in Nevada. So much so that most of the firms that reincorporated relied on the votes of a large controlling shareholder. The group of firms that are controlled by shareholders with high voting rights is limited, and so is the reincorporation to Nevada. If, however, index funds start voting in favor of reincorporation, the threat of mass migration from Delaware could become real, and the pressure on Delaware could mount.

3. Pressure on Delaware to Further Degrade its Law

Suppose that following an amendment to its law, Delaware could find itself in such a situation, with the barriers to reincorporation lowered and the risk of corporate exodus heightened. If more firms reincorporate out of Delaware, officials might be pressured to incorporate additional changes in their corporate law. This sort of degradation could diminish the significance of Delaware's judiciary; if, for example, the only way to impose liability on a director or officer is through intentional misconduct, the need for a bench with business-specific expertise is reduced.

In other words, high standards are difficult to maintain, and the current fragility of the corporate law market makes them even more difficult. Not reacting may result in corporate migrations, but reacting is also not safe, as long as Delaware does not effectively match Nevada protection, as it did with the Paramount decision in response to other states' passage of antitakeover statutes.

B. Implications For American Corporate Law

1. Erosion of Delaware Law

Despite Delaware's dominance, the state's officials have long been aware of and responsive to the threat of losing corporations to other states. They have responded to it more than once by issuing management-protective decisions and amending its corporate law. Delaware has responded swiftly and vigorously to the current pressure, passing S.B. 21, which relaxed the scrutiny of self-dealing transactions.

History of Responding

For example, the Delaware Chancery Court attracted harsh criticism when, amid a hostile takeover wave, Chancellor Allen issued a decision that limited management's use of the poison pill.²²⁴ In *City Capital Associates v. Interco Inc.*, Allen held that managers could use the pill for a limited time and only to solicit a better offer for shareholders or to prove that their long-term plan for the company was superior to the premium the hostile bidder offered.²²⁵ The decision caused Martin Lipton, the inventor of the poison pill, to publish a client memorandum arguing that it was time to consider moving out of Delaware to other states that would better empower managers to defend against hostile bidders.²²⁶ Importantly, in the background, other states have passed antitakeover rules that give management the power to defend against and even block hostile takeovers. The Delaware Supreme Court responded quickly, reversing *Interco* and allowing managers to use the poison pill to "just say no" to hostile bidders and remain independent at all costs.²²⁷ By applying a just-say-no approach, Delaware's response was sufficiently strong to basically match the protection that antitakeover statutes provided.²²⁸

A similar dynamic took place in Delaware after *Smith v. Van Gorkom*.²²⁹ In this case, the Delaware Supreme Court declined to give the directors of a target company business judgment deference after they accepted an acquisition that offered a premium of 60% to shareholders.²³⁰ The decision that exposed directors to personal liability in selling their firm at a significant premium was met with fierce criticism from the business and academic community: one preeminent corporate law scholar called Van Gorkom, "surely one of the worst decisions in the history of

²²⁴ *City Capital Associates v. Interco Inc.*, 551 A.2D 787 (DEL. CH. 1988).

²²⁵ *Id.* at 802.

²²⁶ Martin Lipton, *Client Memorandum: The Interco Case*, Wachtell, Lipton, Rosen & Katz (Nov. 3, 1988) <https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf>

²²⁷ See *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2D 1140 (DEL. 1989) (holding that the court would defer to managers who genuinely believe that their long-term plan is superior to an outside bid, regardless of the size of the premium it offers to shareholders above the current market price); Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J. L. ECON. & ORG. 32, 52 (2004) (discussing Delaware's "just say no" doctrine); *Airgas, Inc. v. Air Products and Chemicals, Inc.*, No. 649, 2010 (Del. 2010) (holding that Delaware courts may not intervene in the use of a poison pill even when its used by an entrenched, staggered board and thus provides a potent defensive tactic).

²²⁸ See e.g., Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629 638-639 (2016) (arguing that following Paramount antitakeover statutes did not add additional protection over the poison pill).

²²⁹ 488 A.2D 858 (DEL. 1985).

²³⁰ *Id.*

corporate law.”²³¹ This time, the reaction and correction from the legislature was swift: Delaware adopted D.G.C.L §102(b)(7), which allowed Delaware firms to exculpate directors from personal liability for breaches of the duty of care, with shareholder approval.²³² In the decades since, most firms have adopted such a provision.²³³ More recently, in 2022, Delaware amended §102(b)(7) again to extend its optional exculpation provisions to senior officers, mirroring the protections that Nevada law provides to corporate officers.²³⁴

Indeed, the Delaware legislature has already acted to reverse one of the cases that drew the current wave of criticism. In *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co* Delaware Chancery Court invalidated provisions in an agreement between Moelis & Company and Ken Moelis, the company founder, CEO, and president.²³⁵ The agreement provided Moelis with sweeping powers over board composition and actions. The court decided that all provisions except for three, violate section 141(a) of the DGCL,²³⁶ which provides that “the business and affairs of every corporation... shall be managed by or under the direction of a board of directors...”²³⁷ However, the court also noted that many of the governance provisions could have been legitimately by incorporating them into the company's charter.²³⁸ The decision triggered a wave of criticism. Opponents argued that the decision would invalidate stockholder agreements that were adopted by many firms and, as a result, would also infuse excessive uncertainty for future corporate decisions and actions.²³⁹ The response of the Delaware Bar was vigorous

²³¹ Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. L. 1437, 1455 (1985).

²³² See D.G.C.L §102(b)(7).

²³³ Sean Sheely & Mark Reindheart, *Delaware’s 102(b)(7) Exculpation of Senior Officers - One Year Later*, Jenner & Block (September 2023). <https://www.jenner.com/en/news-insights/publications/delawares-102b7-exculpation-of-senior-officers-one-year-later>

²³⁴ *Id.*

²³⁵ *West Palm Beach Firefighters’ Pension Fund v. Moelis & Co.*, NO. 2023-0309-JTL (DEL. CH. FEB. 23, 2024).

²³⁶ *Id.*

²³⁷ D.G.C.L § 141.

²³⁸ *Id.*

²³⁹ See e.g., Katie Tabelaing, *House Sends Corporate Law Amendments to Governor*, DELAWARE BUSINESS TIMES (June 20, 2024). (“Investors have invested millions of dollars in corporations and they don't know if the rights they have are valid,” Srinivas Raju, a Delaware corporate lawyer who helped draft the bill, told lawmakers.”) <https://delawarebusinesstimes.com/news/corporate-law-amendments-governor/>;

Tom Hals, *Delaware Law to Allow Big Investors Greater Sway Over US Boards*, REUTERS (June 25, 2024) <https://www.reuters.com/markets/us/delaware-law-allow-big-investors-greater-sway-over-us-corporate-boards-2024-06-25/> (“William Chandler, a former chancellor on the court and now with the Wilson Sonsini law firm, urged Delaware House members to ignore academics and judges and follow the state bar,

and swift. On July 21, 2024, the Delaware governor signed a highly controversial amendment to Delaware corporate law. S.B.313 added § 122(18) to the DGCL, allowing corporations to contract with shareholders around Delaware law, including terms that would limit the board's powers to manage the corporation. The swift amendment preempted, for the first time in history, a response to the cases from the Delaware Supreme Court. The legislative process and the content of the amendments have sparked considerable discussion and dissent, reflecting concerns about the speed of the legislative process and the potential effects of allowing contracting around Delaware law.²⁴⁰

Recent Reaction – S.B.21

Delaware Response to the Current Backlash and Competition has been significant and notable. Chancellor McCormick's January 2024 decision voiding Elon Musk's \$56 billion Tesla compensation package²⁴¹ prompted Musk to threaten corporate exodus and incorporate new ventures in Nevada and Texas.²⁴² The other controlling shareholder contemplated or even moved from Delaware to Nevada. Governor Matt Meyer convened urgent February 2025 meetings with corporate lawyers who had represented both Musk and Zuckerberg, resulting in SB21 legislation crafted with remarkable speed.²⁴³ The bill passed March 26, 2025, with Governor Meyer thanking lawmakers for "swift passage of this critical update to Delaware's corporate law, aimed at ensuring the state remains the premier home for U.S. and global businesses."²⁴⁴

S.B.21 abandoned the dual-cleansing framework: controlling stockholder transactions (excluding going-private transactions) now escape entire

which drafted the bill. "At the moment the corporate market is not feeling too good about Delaware because of the uncertainty and unpredictability of a few decisions by just two judges," Chandler told lawmakers on June 20. "Judges don't need to intrude upon the process of making law.")

²⁴⁰ See e.g., Cydney Posner, *Delaware SB 313, Controversial Proposed Corporate Law Amendments, Heads to Governor for Signature*, COOLEY PUBCO, (June 25, 2024) <https://cooleypubco.com/2024/06/25/delaware-sb-313-to-governor/>

²⁴¹ *Tornetta v. Musk*, NO. 2018-0408-KSJM (JAN. 30, 2024).

²⁴² See Elon Musk, @elonmusk, X, (Jan. 30, 2024, 5:14 PM).

<https://x.com/elonmusk/status/1752455348106166598>

²⁴³ Competitive pressure was not the sole driver of SB21. See Marcel Kahan & Edward Rock, *The New Political Economy of Delaware Corporate Lawmaking* (2025) (arguing that prominent law firms accumulated lobbying power in Delaware, which they use for the interests of their clients).

²⁴⁴ See Office of the Governor, *Governor Meyer Signs SB21 Strengthening Delaware Corporate Law*, DELWARE NEWS (March 26, 2025).

<https://news.delaware.gov/2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law/>

fairness review through *either* special committee approval or majority-of-the-minority ratification, not both. The practical effect is stark. Where *Match* required both procedural safeguards and demanded all committee members be independent, SB21 permits committee approval alone with relaxed independence standards. Controllers gain flexibility previously unavailable: negotiate the deal, then choose your cleansing path.

Furthermore, the amendment eased the requirement for these directors to be independent when approving self-dealing transactions. Under the new law, public company directors who satisfy exchange listing standards are presumed disinterested; rebuttal requires substantial and particularized facts showing a material interest or material relationship. This is significant. Delaware courts had developed nuanced, fact-intensive independence inquiries. S.B.21 replaces judicial discretion with mechanical reliance on NYSE/NASDAQ rules, which focus primarily on the presence of a financial relationship of the director with the company. The structural bias argument—that controllers' hand-picked directors cannot negotiate at arm's length—has no bite.

The amendment also narrowed the definition of controlling shareholder by replacing Delaware's contextual control inquiry with bright lines: below one-third voting power cannot establish effective control regardless of circumstances. Between one-third and the majority, control requires also showing that the controlling shareholder possessed power to exercise managerial authority.

S.B.21 made another change that moved Delaware closer to Nevada. Reversing Delaware decisions that recently broadened the access to include electronic communication, the section excluded emails and texts from the sources that shareholders may have access to. Board minutes however are sanitized. Real deliberation—conflicts, doubts, pressure—shows up in emails and texts. The amendment also increased the procedural requirements for accessing books and records. Previously, courts required only a credible basis to suspect wrongdoing for investigating possible mismanagement. A credible basis was deliberately modest—Delaware courts wanted pre-litigation fact-finding to screen weak claims before filing. Under the amendment shareholders must describe the purpose and records with "reasonable particularity," and records must be "specifically related" to the proper purpose.

2. Further Degradation of Nevada Law- an Arms Race to the Bottom

Nevada didn't let the Delaware amendment pass with no reaction. Rather, Nevada just codified controlling shareholder duties in A.B. 239, which took effect May 2025. The move matters because Nevada had

virtually nothing on the books about controllers before—courts just borrowed Delaware law when these cases came up. Now, Nevada's put down a marker: we're not Delaware, and we're not pretending to be.

Under A.B. 239, the controllers' fiduciary duty is highly limited. The controller's only duty is to avoid pressuring directors or officers into breaching their non-exculpated fiduciary obligations. The controller's duty only triggers when three things happen: the controller pressures a fiduciary, that fiduciary breaches a duty badly enough to face personal liability under Nevada's exculpation statute, and the controller walks away with something the other shareholders don't get. transaction.

Nevada already protects directors from liability unless they commit intentional misconduct, fraud, or knowing law violations. The new controller provision ties into that same framework. Thus, with this amendment, Nevada practically extended its exculpation statute to also protect controlling shareholders. The implications are substantial. In Delaware and in other states, exculpation applies only to directors and officers. Extending Nevada exculpation to controlling shareholders results in minimal judicial scrutiny of self-dealing transactions.

3. Texas (and potentially other states') Law

Recently, Texas has entered the market by proactively catering to firms. Texas established a new system of specialized business courts and publicized them extensively.²⁴⁵ The business courts have several features designed to attract incorporations: concurrent civil jurisdiction over matters exceeding \$5 million in controversy, including derivative proceedings, corporate governance actions, self-dealing claims, and other corporate disputes, with both injunctive and remedial powers.²⁴⁶

Texas has attracted only a few corporations so far, but the state has acted swiftly to amend its corporate law. To attract incorporations, Texas moved closer to Nevada's approach. Texas adopted Nevada's exculpatory statute as an opt-in limitation on liability.

Furthermore, the state also introduced new provisions, including eligibility requirements for derivative litigation that further restrict shareholder enforcement.²⁴⁷ Thus, Texas is not only piggybacking on

²⁴⁵ TEX. GOV'T CODE § 25A.

²⁴⁶ TEX. GOV'T CODE §25A.008(A)(4).

²⁴⁷ *Id.*

Nevada but also promotes other innovations that could further degrade corporate law and accountability.

4. The Elimination of American Corporate Law

The recent dynamics have fundamental implications for American corporate law. Scholars, practitioners, and policymakers are debating the desirability of SB 21, with many raising concerns about Delaware's reduced scrutiny of self-dealing transactions. Yet Nevada offers far more dramatic limitations on such scrutiny.

As demonstrated above, Nevada law results in zero judicial scrutiny of most self-dealing transactions. Also in self-dealing transactions, plaintiff shareholders must plead particularized facts showing intentional wrongfulness, with no inspection rights to obtain the necessary evidence.

Nevada also replaced Delaware's *Unocal* and *Revlon* standards with the business judgment rule, eliminating scrutiny of management's use of defensive tactics. The implications are striking: Nevada managers could sell the company to the lowest bidder simply because that bidder retains them in office, and shareholders could not obtain an injunction to block the sale.

Finally, Nevada applies its exculpation statute to directors' oversight duties. Conscious disregard – which Delaware treats as a breach of the duty of good faith and therefore a breach of the duty of loyalty – receives protection under Nevada's exculpation statute. In sum, all of Delaware's enhanced and intermediate scrutiny standards are replaced by either the business judgment rule or Nevada's exculpation statute.

Historically, when Delaware faces competitive pressure, it adjusts its law to match other states' standards. If history repeats itself, SB 21 will not be the end of changes to Delaware law. The benchmark Delaware may move toward, however – Nevada law – has practically eliminated causes of action for breaches of fiduciary duties. Firms leaving Delaware may cite increased uncertainty as their motivation, but Nevada law offers a problematic solution that eliminates accountability rather than providing clarity.

C. Welfare Implications

1. Value of Nevada Firms

Comparison of Nevada and Non-Nevada Firms

The question of whether Nevada firms have a different value than non-Nevada firms remains inconclusive in empirical literature. Daines's seminal work identified a significant incorporation premium for Delaware firms, suggesting that sophisticated corporate law regimes generate measurable shareholder value.²⁴⁸ Subramanian's subsequent reexamination, however, challenged this finding, demonstrating that the Delaware premium largely disappears in subsequent years.²⁴⁹ Against this backdrop, Barzuza and Smith's investigation of Nevada incorporation found no statistically significant premium or discount, suggesting that Nevada's distinctive legal regime—despite its notable departures from Delaware law—produces neutral valuation effects.²⁵⁰ More recently, Eldar has enriched this picture further, identifying a premium for certain subsets of Nevada firms, though the heterogeneity of these effects raises questions about their generalizability.²⁵¹

Yet the entire enterprise of testing for incorporation value through market valuation studies confronts several fundamental methodological obstacles that may render the results unreliable or, at a minimum, require substantial interpretive caution. First, survivorship bias presents a particularly acute problem in the Nevada context. Nevada-incorporated firms exhibit exceptionally high failure and delisting rates compared to their Delaware and domestic-state counterparts.²⁵² Thus, when one measures firm value using existing publicly traded companies, one necessarily examines a selected sample—those firms that survived long enough to appear in the dataset. This creates a systematic upward bias in measured valuations: we observe only the "winners," while the numerous failed Nevada incorporations are entirely absent from our

²⁴⁸ Robert Daines, *Does Delaware Law Improve Firm Value?* 62(3) J. FIN. ECON. 525 (2001).

²⁴⁹ Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32 (2004) (showing that this effect (1) existed only for small firms (2) decreases and disappears in subsequent years).

²⁵⁰ See Barzuza & Smith, *supra* note 1, at 3598, 3618-20 & Tbl 11 (finding no statistically significant effect for the valuation of NV firms and stating that "Overall, our valuation findings are inconclusive and make it difficult to draw strong conclusions regarding the efficiency of the decision to incorporate in Nevada.").

²⁵¹ See Ofer Eldar, *Can Lax Corporate Law Increase Shareholder Value? Evidence from Nevada*, 61(4) J.L. & ECON 555 (2018)

²⁵² See Barzuza & Smith, *supra* note 1, at 3599-3601 & Tbl. 2 (Nevada firms account "for roughly 10% of all Compustat exits from 2007 to 2011").

sample. The resulting estimates, therefore, may tell us more about the characteristics of surviving firms than about the causal effect of Nevada law itself. This selection problem is not merely technical; it fundamentally undermines the ability to make inferences about Nevada's value proposition for the average incorporating firm.

Second, the distinctive size characteristics of Nevada firms amplify measurement sensitivity to an unusual degree. Nevada attracts predominantly small-cap and micro-cap companies—firms whose market capitalizations place them in the lowest quintiles of publicly traded entities.²⁵³ For such firms, even modest absolute changes in market value translate into large percentage movements in valuation metrics. This size effect becomes particularly problematic when employing Tobin's Q as a valuation measure, as is standard in the incorporation premium literature. Tobin's Q (the ratio of market value to replacement cost of assets) is notoriously sensitive to measurement error in small firms, where both the numerator (market capitalization) and denominator (asset values) may be subject to considerable noise. Small denominators amplify any imprecision in the numerator, potentially generating large swings in the Q ratio that reflect measurement artifacts rather than genuine economic differences. This statistical property means that Nevada studies face inherently greater variance in their dependent variable, reducing statistical power and increasing the likelihood of both false positives and false negatives.

Third, Nevada firms exhibit distinctive financial reporting patterns that complicate valuation comparisons. Empirical evidence suggests that Nevada-incorporated companies demonstrate significantly higher rates of accounting restatements.²⁵⁴ The high rate of restatements means that measured market values for Nevada firms may not be directly comparable to those of Delaware or domestic-state incorporations, as the information environment itself differs systematically across incorporation regimes. Put differently, restatement typically correct mistatments, where firms report excessively good performance.

Affects of Legal Amendments – Natural Experiments

These cumulative methodological challenges suggest that a more promising empirical strategy would focus not on aggregate valuation effects but rather on the changes to Nevada law, as an exogenous shock on firms value. Rather than asking whether Nevada incorporation correlates with higher or lower Tobin's Q—a question beset by selection,

²⁵³ See Barzuza & Smith, *supra* note 1.

²⁵⁴ See *id.*

measurement, and comparability problems – we should instead examine how particular Nevada legal provisions affected identifiable corporate behaviors and outcomes. Event studies on the adoption of specific Nevada provisions, difference-in-differences designs that exploit variation in firms' exposure to particular rules, offer more methodologically sound approaches to understanding Nevada's value proposition.

Two studies have done exactly that. Studying the effect of the 2001 amendment that applies the Nevada exculpation statute to all firms,²⁵⁵ Donelson and Yust found a decline in shareholder value and in the operating performance of Nevada firms.²⁵⁶ Applying a similar research design to study the effect of the 2017 amendment, which codified the internal affairs doctrine,²⁵⁷ finds a significant decline in the value of Nevada firms in response to the passage of the law, as well as long-term underperformance. Nevada firms underperformed for two years following the reform.²⁵⁸

Finally, as discussed above, in 2025 Nevada amended its law to extend exculpation to controlling shareholders. This amendment which most likely will impact Nevada firms, is not factored yet in assessments of Nevada firms value.

2. Types of Firms that Nevada Attracts

Nevada firms are different in other measures of corporate governance. A study by David Smith and this author studied the reporting practices of Nevada firms.²⁵⁹ The study finds that Nevada firms have a significantly high frequency of accounting restatements. That is, Nevada firms are more inclined to amend their reported performance figures retroactively, typically to admit that they performed worse than they originally reported. We also find that Nevada firms ranked as aggressive on an accounting metric derived from individual firms' audit integrity.

Nevada firms' increased incidence of financial restatements relative to firms in other states is consistent with the theory that Nevada attracts firms with higher agency costs. Two recent studies also support this

²⁵⁵ See *supra* Part III.B.

²⁵⁶ Dain Donelson and Christopher G Yust, *Litigation Risk and Agency Costs: Evidence from Nevada Corporate Law*, 57 J. OF L. & ECON. 747.

²⁵⁷ See *supra* Part III.B.

²⁵⁸ Benjamin Bennet, Rene M. Stulz and Zexi Wang, *What are the Costs of Weakening Shareholder Primacy? Evidence from a U.S. Quasi-Natural Experiment*, working paper (2025). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5252884

²⁵⁹ See Barzuza & Smith, *supra* note 1.

theory. In the first study, researchers found that a disproportionately high number of Nevada firms were subjected to SEC trading suspensions in 2013 and SEC trading suspensions of marijuana stock at the beginning of 2014.²⁶⁰ In the second, Professor Jordan Siegel examined cross-mergers of foreign companies into U.S. shells. Siegel found that “[a]doption of Nevada’s corporate law is associated with some of the most serious restatements involving real corporate governance and data manipulation problems.”²⁶¹ Overall, the evidence is consistent with the hypothesis that Nevada’s lax laws attract at least some questionable firms.

It is frequently argued that variations in corporate law are desirable since “one size does not fit all”. Yet, this assertion assumes that firms will self select efficiently. The evidence seems to suggest otherwise. Firms that need constraints are more likely to opt for lax law.²⁶²

D. Policy Implications

1. Implications for the Desirability and Potential Form of Federal Intervention

(a) Reconsidering Federal Intervention

Federal intervention has been proposed before as a measure to restrain a race to the bottom, but it comes with well-known costs.²⁶³ Federal standards reduce the information generated by state experimentation. They eliminate the flexibility states have to respond to changing business conditions. They also lack states' incentives to invest in their legal system

²⁶⁰ A.J. Cataldo II, Thomas Miller, Lori Fuller & Brian J. Halsey, *The U.S. State of Nevada Consumes a Disproportionate Share of U.S. Securities and Exchange Commission Regulatory Resources*, 5(8) INT. RES. J. OF APP. FIN. 1222 (2014).

²⁶¹ Siegel, J.L., & Wang, Y. (2012). “Cross-border reverse mergers: Causes and consequences.” Harvard Business School Strategy Unit Working Paper No. 12-089, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192472.

²⁶² See Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HAR. BUS. L. REV. 131-181 (2018) (developing a theory and discusses evidence of inefficient self-selection.)

²⁶³ See, e.g., Ralph K. Jr. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. OF LEG. STUD. 270, 291 (1977) (“Because federal legislation does not face direct competition with other legal systems, the behavior of investors under differing rules cannot be observed and we can only theorize about which rules optimize the underlying economic relationships.”)

to attract and retain corporations, potentially diminishing the benefits of regulatory competition.²⁶⁴

The analysis in this Article however, exposes a significant risk of continued degradation in corporate law. Nevada's framework forecloses shareholder litigation, and the competitive pressure it creates threatens to drag Delaware and other states toward lax standards. The market shows no mechanism for self-correction or even to restrain a potential snowballing to the bottom.

Thus, the analysis here requires an investigation into the costs and benefits of federal intervention compared to the costs and benefits of the recent changes to American Corporate law.

(b) Considering Federal Minimum Standards Based on Delaware Law

In addition, this Article proposes for consideration a novel approach for federal intervention in corporate law: adopting Delaware's current fiduciary duties and exculpation standards as federal minimums. Specifically, Delaware law—including the standards governing self-dealing transactions under enhanced scrutiny, *Unocal* and *Revlon* for takeover, and exculpation statute—should serve as the floor. States would remain free to provide greater protections for shareholders but could not fall below Delaware's baseline.

This approach maintains the advantages of the current system. By piggybacking on Delaware law, it benefits from Delaware's accumulated case law, institutional expertise, and responsiveness to corporate developments. States can still experiment and differentiate, but only in a way that strengthens, not weakens, shareholder protections.

Second, minimum standards identical to Delaware law could boost shareholder protections. Delaware currently faces pressure to degrade its standards to compete with Nevada and other states.²⁶⁵ A federal floor would remove this pressure. Delaware could continue to refine its law through judicial development without fear that maintaining rigorous standards will cost it incorporations. The competitive dynamic would

²⁶⁴ See Roberta Romano, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–31 (1993).

²⁶⁵ See, e.g., Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 *FORDHAM L. REV.* 843, 859–860, (“[I]t is arguable that Delaware would not have enacted any takeover legislation in the absence of state competition.”)

shift: states would compete by offering additional protections rather than by racing to the bottom. The recent enactment of S.B. 21 demonstrates this. Delaware narrowed judicial scrutiny of self-dealing transactions in response to competitive pressure. A federal floor set at Delaware's pre-or even post-S.B.21 standards would cap the potential degradation while preserving state flexibility to innovate in shareholder-protective directions.

This proposal is not without costs. It would constrain state autonomy and reduce experimentation and differentiation in lax directions. Some argue that such differentiation allows efficient sorting—firms with low agency costs can choose lax jurisdictions, while firms that need credible commitment choose stricter ones. But the evidence suggests otherwise. Nevada attracts firms with aggressive accounting practices and frequent restatements, indicating high rather than low agency costs.²⁶⁶ The market does not appear to be sorting efficiently.

To sum up, federal minimum standards based on Delaware law would limit degradation while preserving the core benefits of federalism in corporate law. It offers a middle path between the costs of comprehensive federal corporate law and the risks of unrestrained state competition.

2. The Standard of Review that Applies to Reincorporation

The analysis has implications for the standard of review that should apply to reincorporations. This question was at the center of the recent case regarding TripAdvisor reincorporation from Delaware to Nevada.

TripAdvisor Reincorporation

TripAdvisor is one of the world's largest travel websites, with online visitors reaching hundreds of millions annually.²⁶⁷ A Delaware corporation, it is owned and controlled by its Delaware parent company, Liberty TripAdvisor Holdings.²⁶⁸ Liberty, in turn, is controlled by its CEO and Chairman, Gregory Maffei, who controls 43% of its voting power.²⁶⁹ Maffei is thus the controlling shareholder of both Liberty and the TripAdvisor subsidiary. The decision to convert to a Nevada corporation followed several litigations against Maffei in Delaware courts. Late in

²⁶⁶ See, Barzuza & Smith, *supra* note 1 ; Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HAR. BUS. L. REV. 131–181 (2018).

²⁶⁷ TripAdvisor Inc., *Annual Report* (Form 10-K) (2023), U.S. SECURITIES AND EXCHANGE COMMISSION. (February 16, 2024).

²⁶⁸ *Palkon v. Maffei*, C.A. No. 2023-0449-JTL , at 7 (Feb. 20, 2024).

²⁶⁹ *Id.*

2022, TripAdvisor’s management presented to its board about a potential conversion to a Nevada corporation.²⁷⁰ Among the advantages discussed were the following: TripAdvisor’s management believed that “Nevada law generally provides greater protection from liability to the Company and its directors and officers, than Delaware law,” and also pointed to the fact that Delaware’s *Revlon* duties obligating boards to get the highest price available in a sale context did not exist in Nevada.²⁷¹ Also discussed was the extensive litigation that Maffei and Liberty had faced in Delaware in the preceding years, along with the “substantial time and expense” this litigation caused.²⁷²

TripAdvisor’s proxy materials to the shareholders who were asked to vote on the conversion similarly stated, “We believe, in general, Nevada law generally provides greater protection from liability to the Company and its directors and officers, than Delaware law.”²⁷³ It also disclosed that “[t]he Redomestication will result in the elimination of any liability of an officer or director for a breach of the duty of loyalty unless arising from intentional misconduct, fraud, or a knowing violation of law.”²⁷⁴ In June 2023, a majority of the stockholders approved the redomestications to Nevada. However, this result was driven by Maffei’s control of Liberty and Liberty’s control of TripAdvisor. Only about 5% of minority TripAdvisor shareholders (unaffiliated with Liberty) and about 30% of minority Liberty shareholders voted to approve the conversion.²⁷⁵

Chancery Court Decision

Plaintiff Shareholders filed a lawsuit in the Delaware Court of Chancery to challenge the conversion transaction, asserting that it was self-interested and failed to meet the scrutiny imposed by the *entire fairness review*.²⁷⁶ The plaintiffs sought an injunction of the transaction and damages.²⁷⁷ The plaintiffs argued that “Nevada law offers fewer litigation rights to stockholders and provides greater litigation protections to fiduciaries like the directors and the CEO/Chair.”²⁷⁸ Thus, they argued Maffie is using his control “to force the company and its minority investors to give up all of Delaware law’s protections, with the

²⁷⁰ *Id.*

²⁷¹ *Id.* at 10.

²⁷² *Id.* at 9. Liberty has dealt with at least eight stockholder lawsuits in Delaware since 2012.

²⁷³ *Id.* at 10.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 11.

²⁷⁶ Complaint at 3, *Palkon v. Maffei*, C.A. No. 2023-0449-JTL (Feb. 20, 2024).

²⁷⁷ *Id.* at 35.

²⁷⁸ *Palkon v. Maffei*, C.A. No. 2023-0449-JTL at (Feb. 20, 2024).

sole purpose being to insulate the conflicted controller and insiders from accountability.²⁷⁹

After a hearing on the motion to dismiss, Vice Chancellor Travis Laster issued an opinion on *Palkon v. Maffei* in February 2024.²⁸⁰ The court denied the injunction but allowed the damage claim to proceed.²⁸¹ Vice Chancellor Laster accepted the argument that material changes to litigation rights could constitute nontradable benefits to insiders. Since “[e]conomic rights and governance rights remain meaningful only to the extent that litigation rights back them up,”²⁸² Laster determined that “[f]rom the perspective of equity, Delaware law should be just as concerned about transactions that reduce stockholders’ litigation rights as it is about transactions that reduce their economic rights or governance rights.”²⁸³

With respect to whether Nevada law materially reduces litigation rights, based on statements from Tripadvisor management and the firm proxy materials, Laster decided that “at the pleading stage, it is reasonable to infer from the complaint’s allegations that Nevada law provides greater protection to fiduciaries and confers a material benefit on the defendants.”²⁸⁴ That is, that Nevada’s “litigation rights are inferably less than what Delaware provides”, was sufficient for the purpose of the pleading stage. If the case proceeds to hearings, and defendants still “wish to show that Delaware law and Nevada law are equivalent,” Laster decided, “they can attempt to make that showing at a later phase of the case.”²⁸⁵

Delaware Supreme Court Grants Interlocutory Review

On April 16, 2024, the Supreme Court of Delaware granted the defendant’s motion for an interlocutory appeal.²⁸⁶ In a five-page order, Justice Karen L. Valihura wrote that the Chancery decision “involves a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state.”²⁸⁷ Thus, and since “Certainty

²⁷⁹ *Id.* at 7.

²⁸⁰ *Palkon v. Maffei*, C.A. No. 2023-0449-JTL (Feb. 20, 2024).

²⁸¹ The opinion denied the plaintiff’s request for an injunction, effectively allowing the conversion to proceed *Id.* at 51–52 (stating that injunction is provided only when “other remedies are inadequate.”, and here monetary damages could provide “fully adequate remedy”).

²⁸² *Id.* at 46–47.

²⁸³ *Id.* at 47.

²⁸⁴ *Id.* at 47.

²⁸⁵ *Id.* at 47.

²⁸⁶ *Maffei v. Palkon*, C.A. No. 2023-0449 (2024)

²⁸⁷ *Id.*, at 6

regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial,” the “application for interlocutory review meets the strict standards for certification under Rule 42(b).”²⁸⁸ Delaware Supreme Court denies most requests for interlocutory appeals. The order reflects the Supreme Court's view that the questions require expedient review and clarity from Delaware courts. Furthermore, the court scheduled oral hearings *en banc* for October 2024. The court also allowed the Secretary of State of Nevada, Francisco V. Aguilar, to submit an amicus curiae in the case.

Delaware Supreme Court Applies the Business Judgement Rule to TripAdvisor Reincorporation

On February 4 2025, the Delaware Supreme Court issued its decision in *Maffei v. Palkon*. Reversing the Chancery Court decision, the court decided that TripAdvisor reincorporation to Nevada should be governed by the Business Judgement Rule. Yet, the court made no determination regarding the differences between Nevada and Delaware Corporate laws. Rather, the court adopted a temporal distinction between future and past liability. Reviewing Delaware precedents, the Delaware Supreme Court concludes that “temporality weighs heavily in determining materiality here and, ultimately, whether a non-ratable benefit exists that triggers entire fairness review.”²⁸⁹ Plaintiffs did not argue that TripAdvisor attempts to avoid liability for past acts but rather that it seeks bars from litigation with respect to future acts. Thus, that was sufficient for the Supreme Court to determine that in this case the reincorporation does not result in non-ratable benefits that are sufficient to trigger entire fairness.

Yet, if a firm reincorporates in Nevada in the face of a pending case, the question will arise again: What is the standard that should apply to reincorporation from Delaware to Nevada?

Implications for Reincorporations from Delaware to Nevada

The findings offered by this article suggest that when all is said and done—the differences in shareholder rights and managerial insulation between Nevada and Delaware are too vast to be immaterial. Nevada’s exculpation statute, as applied by Nevada courts, combined with its limited inspection rights, results in the dismissal of cases that could not be dismissed under Delaware law. Nevada antitakeover statute applies the business judgment rule, and explicitly rejects Delaware standards.

²⁸⁸ *Id.*, at 6

²⁸⁹ *Id.*

Shareholders' litigation rights are diminished as a result of reincorporation in Nevada. Thus, courts, at the very least, should apply the entire fairness standards to reincorporation to Nevada. To be sure, under S.B.21 it will be easier to pass this scrutiny, but even weaker scrutiny is better than nothing. Optimally, to avoid a result like in TripAdvisor that only the controlling shareholder supported the reincorporation, courts or federal law should require a supporting vote by a majority of the minority of the shareholders as a condition for reincorporation. In fact, the promoters of S.B.21 advocated a rule that requires an approval of a majority of minority ("MOM") when there is a statutory requirement for shareholder vote.²⁹⁰ Since reincorporation statutorily requires shareholder approval, requiring MOM for reincorporation is consistent with that approach.

V. Conclusion

This Article exposed the true content of Nevada corporate law. It provides the first systematic analysis of Nevada's statutory amendments, legislative history, and case law. The analysis shows that Nevada corporate law forecloses shareholder litigation. Plaintiff shareholders must plead intentional wrongdoing to survive dismissal, yet Nevada uniquely bars access to the books and records necessary to meet this burden. Nevada courts apply the exculpation statute broadly, even to extreme facts like insiders signing each other's self-written compensation contracts. The state also gives directors near-absolute latitude to use defensive tactics. Nevada law was shaped by what Delaware doesn't provide—the legislature repeatedly amended the law to ensure more protections from liability than Delaware, seizing each Delaware scrutiny standard as an opportunity to differentiate.

The Article's second contribution analyzes the market for corporate law in light of the current competitive pressure on Delaware. Nevada's rise creates a fragile market vulnerable to degradation. Nevada's incentives and institutional factors are less restrained than Delaware's. As Delaware faces pressure to retain incorporations, it may degrade its standards to approach Nevada's lax framework. Delaware's recent enactment of SB 21, narrowing judicial scrutiny of self-dealing transactions, demonstrates this risk. Other states like Texas are already copying Nevada's approach, potentially accelerating the race. The combination of Nevada's strategy

²⁹⁰ See Lawrence Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77(2) Bus.L 321 (2022). (advocating applying MFW requirements - a supporting vote by Majority of Minority, and by an independent board committee - "when a statute requires the approval of both the board and the stockholders.")

with competitive pressure on Delaware could result in a significant degradation of American corporate law.

The welfare implications are concerning. Nevada attracts firms with aggressive accounting practices that frequently restate earnings, suggesting high agency costs. The market does not appear to be sorting efficiently – instead, lax laws attract precisely the firms that most need oversight. With Nevada’s recent amendment, controlling shareholders will benefit from Nevada’s broad exculpation. This could lead to highly inefficient transactions driven by insiders’ private benefits.

Given these conditions, federal intervention may be warranted. This Article proposes assessing the costs and benefits of different forms of federal intervention, including a novel one: adopting Delaware's fiduciary duties, standards of review, and exculpation statute as federal minimums. This approach would limit degradation while preserving the core benefits of federalism in corporate law. By piggybacking on Delaware law, it would benefit from Delaware's institutional expertise and responsiveness. It would also remove the competitive pressure currently pushing Delaware toward lax standards.

Nevada's emergence marks a turning point for American corporate law. Without intervention, the market for corporate law may continue its descent, with consequences extending beyond corporate governance to capital markets and the broader economy. Understanding what Nevada law actually provides – and what that means for the future of corporate law – is essential to addressing this challenge.