EXHIBIT "8"

No. 51629

In The

SUPREME COURT OF THE STATE OF NEVADA

IN RE AMERCO DERIVATIVE LITIGATION

APPEAL FROM JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE
THE HONORABLE DISTRICT JUDGE BRENT ADAMS

NOMINAL DEFENDANT/RESPONDENT AMERCO'S ANSWERING BRIEF

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I. INTRODUCTORY STATEMENT

Respondents (1) AMERCO, (2) Directors Joe Shoen, James Shoen and Carty, (3) Directors Bayer, Brogan, Dodds, Grogan, Herrera, and Johnson, and (4) Mark Shoen and the SAC Entities have attempted to avoid duplication in their Answering Briefs. Respondents suggest that the Court read the Answering Briefs in the order set forth above.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Beginning in 1994, AMERCO, the parent of U-Haul, began selling some of its real estate properties to the SAC Entities in order to obtain cash that was critical to AMERCO's strategic plan to grow U-Haul's core rental and storage business. Under existing loan agreements that real estate could not be mortgaged, those sales generated cash that AMERCO would not otherwise have been able to access. Those properties, with a book value of about $330 million, were sold for more than $601 million. The transactions — including the fact that the SAC Entities were owned by Mark Shoen, brother of AMERCO's president — were disclosed to shareholders and the public through AMERCO's public SEC filings.

In 1995, in connection with a pending shareholder derivative action ("the *Goldwasser* Action"), shareholders and their counsel — including two of the same law firms who have represented the Plaintiffs in this case — questioned the SAC transactions. AMERCO responded to those concerns and entered into a settlement that included a release by AMERCO of AMERCO's claims regarding the SAC transactions that extended into the future. The United States District Court for the District of Arizona ("Arizona Federal Court") approved the settlement, including AMERCO's release; found the "settlement is, in all respects, fair, just, reasonable and adequate to AMERCO;" entered judgment; and enjoined AMERCO (and the plaintiffs) from asserting any of the released claims against any of the released parties in that or any other forum. There was no appeal from the judgment, and it became final long ago.

In 2002, Paul Shoen initiated this action as part of his long-standing family feud against his brothers. Although Paul Shoen knew about the SAC Transactions from their inception, knew about the settlement, the release, the judgment and the injunction in the *Goldwasser* Action, and indeed was himself a member of AMERCO's Board of Directors in 1997 and 1998, he filed this action ostensibly on behalf of AMERCO against his brothers and his former fellow board members arguing that *they* had breached *their* fiduciary duties to AMERCO by allowing any of the SAC Transactions to occur.

The court below correctly concluded that shareholders are precluded from now bringing those claims on behalf of AMERCO.

First, Plaintiffs ignore AMERCO's release, and argue only that the *Goldwasser* judgment should not be given res judicata effect. But the defense of a release by AMERCO is distinct from res judicata arising from dismissal of derivative claims. A corporation does not have to give notice to shareholders before it enters into a release agreement. Likewise, parties, including corporations, can enforceably release future claims — as AMERCO did here. The Arizona Federal Court found AMERCO's release to be fair, and shareholders cannot mount a collateral attack on that Court's finding here.

Second, the *Goldwasser* judgment is res judicata. Federal Rule of Civil Procedure 23.1 provides that "[a] derivative action may be settled . . . only with the court's approval. Notice of the proposed dismissal or compromise shall be given to shareholders or members *in such manner as the court directs.*" Here, the Arizona Federal Court approved the settlement but did not direct that notice be sent to each AMERCO shareholder. Plaintiffs have not cited any authority — and AMERCO is aware of none — where a federal court-approved settlement of a derivative action was not given preclusive effect where the federal court expressly approved the settlement as fair to the corporation and did not direct notice to be sent to all shareholders.

As an alternate, independent ground for affirmance of the judgment against Plaintiffs, AMERCO's motion to dismiss should have been granted pursuant to the standards for the requirement of a demand on a corporation's board of directors that this

Court announced in *Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006) ("*Shoen*"). The trial court apparently viewed this Court's prior reversal and remand as an indication that this Court disagreed with the trial court's substantive decision to dismiss due to Plaintiffs' failure to allege with particularity that demand would be futile. But *Shoen* makes clear that this Court reversed only because it had clarified the pleading tests under Nevada law and wanted to afford every opportunity to Plaintiffs to try to meet those tests. Plaintiffs have not alleged particularized facts showing that four of the board members either (1) "face a substantial threat of personal liability" on the claims asserted, or (2) are dominated and controlled by a board member who is interested.

III. STATEMENT OF ISSUES

(1) In connection with the *Goldwasser* Action against AMERCO's directors, shareholders, represented by the same lawyers representing shareholders in this action, raised the same concerns about the SAC Transactions that shareholders raise here. As part of the settlement of that action, AMERCO agreed to enact certain board resolutions governing such transactions in the future and *AMERCO itself* released the AMERCO board from all claims related to those transactions. In October 1995, the Arizona Federal Court found the settlement and the release to be fair and in the best interests of AMERCO, entered judgment, and enjoined the releasees (expressly including AMERCO) from asserting the released claims against the released parties. Can shareholders now assert those same claims derivatively on behalf of AMERCO in this jurisdiction notwithstanding AMERCO's release, the federal court judgment, and the federal court injunction?

(2) The terms of the settlement and the release that AMERCO gave in 1995 make clear that they concerned *future* transactions between AMERCO and the SAC Entities. AMERCO and the released parties agree that the release covers claims arising out of such future transactions. Are the release and judgment improperly interpreted to apply to SAC Transactions after 1995?

(3) The court below previously dismissed Plaintiffs' claims on the ground that Plaintiffs had not alleged facts with particularity showing that demand on AMERCO's

board of directors would have been futile. In *Shoen*, this Court adopted Delaware law regarding demand futility, and reversed and remanded for further proceedings in light of that ruling. Although Plaintiffs realleged the same facts to show demand futility, the trial court reversed itself, apparently based on the incorrect assumption that this Court's standards for the demand requirement were a mandate for denial of the motion to dismiss. The trial court concluded that a majority of the AMERCO board was interested in the SAC Transactions, although Plaintiffs have never contended that a majority of the AMERCO Board was interested in the SAC Transactions. Should the judgment below be affirmed based on the Plaintiffs' failure adequately to allege that demand would be futile?

IV. STATEMENT OF THE CASE

A. The Nature Of The Case

Plaintiffs' Amended Consolidated Complaint ("Complaint") alleges that certain AMERCO officers and directors committed breach of fiduciary duty, wrongful interference with prospective economic advantage, unjust enrichment, "abuse of control," constructive fraud, and waste of corporate assets by allowing the SAC Transactions to occur. (2 J.A. 265.) Those causes of action belong to AMERCO. Plaintiffs are AMERCO shareholders who seek to assert those causes of action derivatively on behalf of AMERCO.

B. The Course Of Proceedings

1. The District Court's Initial Dismissal For Failure To Make A Demand Or Show That The Demand Would Be Futile

A shareholder may bring suit on behalf of the corporation *only* by pleading particularized facts showing either that (i) the shareholder made demand on the corporation to initiate litigation, or (ii) demand on the corporation's board should be excused because the board lacks a majority of independent and disinterested directors who would be able objectively to evaluate a demand. Nev. R. Civ. P. 23.1.

In 2002 and 2003, seven separate complaints were filed, ostensibly on behalf of AMERCO, each of which alleged that demand on AMERCO's board would be futile. (1 J.A. 1-203.) Paul Shoen, represented by Latham & Watkins, filed the first such

complaint. (*Id.* at 1-18.) Ron Belec, a shareholder who owns 8 shares of AMERCO stock and is a front for Sam Shoen, another Shoen family member, filed another. (*Id.* at 19-50.) AMERCO moved to dismiss each of those complaints on the ground that Plaintiffs had not alleged particularized facts showing that demand had been made or would be futile. (2 J.A. 385.) Because Nevada generally follows Delaware law on matters of corporate law, AMERCO and Plaintiffs relied on Delaware's more extensive case law regarding the demand requirement.

On May 8, 2003, the trial court found that Plaintiffs had not satisfied Rule 23.1 and dismissed these consolidated actions. (2 J.A. 261-62.) The lower court likewise applied Delaware law, notwithstanding that the only Nevada Supreme Court decision on demand, *Johnson v. Steel, Inc.*, 100 Nev. 181, 184 (1984), did not exactly track Delaware demand law. (3 J.A. 430-33.)

On appeal, Plaintiffs again relied on Delaware law, acknowledged that Nevada follows Delaware law on matters of corporate law, and asserted that *Johnson* adopted a test similar to that used in Delaware at the time. (3 J.A. 475.) In their Reply Brief, however, Plaintiffs argued for the first time that Delaware law was not controlling, and that, under *Johnson*, they had adequately alleged demand futility. (*Id.* at 498.)

This Court's opinion thoroughly discussed the nature of shareholder derivative actions, the demand requirement, and a shareholder's need to allege particularized facts to show why demand should be excused. *Shoen*, 122 Nev. 621. The Court explicitly adopted the Delaware tests for demand futility, and overruled *Johnson* to the extent it suggested the more lenient standard that Plaintiffs had sought. *Id.* This Court reversed, not because it determined that the court below had erred, but because the Court had clarified the demand requirement under Rule 23.1. *Id.* at 645 ("As the parties and the district court have not had the opportunity to address the demand requirement in light of this opinion, we reverse the district court's dismissal order and remand this matter for further proceedings regarding demand futility.").

2. On Remand, The Trial Court Denied AMERCO's Motion To Dismiss For Failure To Make A Demand

After Plaintiffs filed an Amended Complaint, AMERCO moved to dismiss on the grounds that Plaintiffs had not alleged particularized facts showing that demand would be futile, and that the court should not reconsider its prior dismissal order because the court and the parties had previously considered the adequacy of Plaintiffs' allegations under the Delaware standards that this Court adopted. (2 J.A. 385.)

The trial court denied AMERCO's motion, concluding that "Plaintiffs have satisfied the heightened pleading requirements of demand futility by showing a majority of the members of the AMERCO Board of Directors were interested parties in the transactions." (7 J.A. 1395.) The court scheduled argument on the other Defendants' Motions to Dismiss but instructed that it would not hear argument on AMERCO's Motion. (*Id.* at 1396.)

3. The Court Entered Judgment Based on the *Goldwasser* Action

At the argument, the court asked for further briefing on the effect of the *Goldwasser* Action. (8 J.A. 1614-15.) The parties complied. (11 J.A. 1970-2156, 2176-82.) On April 7, 2008, the court entered judgment against Plaintiffs, finding that they were "preclude[d] from bringing those claims" due to the *Goldwasser* Action. (14 J.A. 2720.)

V. STATEMENT OF FACTS

A. U-Haul's Early History And Its Strategic Plan In 1987 To Reinvest In And Grow Its Core Business

AMERCO is the parent of U-Haul, the company that created and continues to lead the truck and trailer rental and self storage management industry. (2 J.A. 273-74.) U-Haul was founded in 1945 by L.S. Shoen, the father of Plaintiff Paul Shoen, and Defendants Joe, James, and Mark Shoen. (*Id.* at 274.) Initially, U-Haul rented trailers and trucks on a one-way and in-town basis through independent dealers. (*Id.*) In 1974, U-Haul began to develop a network of company-owned rental centers and expanded its network of independent dealers. (*Id.*)

U-Haul also entered into various other lines of business that were related to its rental and storage business. (4 J.A. 561.) About 30 years after U-Haul began operations renting trailers and trucks to do-it-yourself movers, it began to offer some self storage facilities near its company owned outlets. (2 J.A. 274.)

B. The SAC Entities Were Established So U-Haul Could Grow Its Rental and Storage Business

In 1987, U-Haul began implementing a strategic plan designed to emphasize reinvestment in its core do-it-yourself rental, moving and storage business. (4 J.A. 561.) To that end, the company reduced its ownership of real estate used for the storage business as well as debt on that property. (*Id.*) In 1993, Joe, James and Mark Shoen formed the SAC Self-Storage Corporation to help implement that strategic plan. (2 J.A. 275.) Later, other SAC Corporations and SAC Partnerships were formed ("the SAC Entities"). (*Id.*) Joe and James sold their interests in the SAC Entities in December 1994. (*Id.*) Plaintiffs' speculation on "information and belief" that "Joe and James Shoen have retained an undisclosed pecuniary interest in the SAC Entities" (*id.*) must be disregarded because Rule 23.1 requires that "particularized" facts be alleged.

Many of the company's credit facilities that existed before 2004 contained restrictive covenants that prohibited U-Haul from mortgaging its assets, which prevented U-Haul from obtaining significant mortgage financing as a means to implement its strategic business plan. (12 J.A. 2235.) By selling property to the SAC Entities, AMERCO was able to obtain and use borrowed money to finance growth in its truck and trailer rental and self storage management business without violating restrictive lender covenants. (*Id.*)

Between 1994 and 2002, AMERCO's subsidiary, Amerco Real Estate Company ("AREC") sold to the SAC Entities self-storage properties with a book value of $330 million for approximately $601 million. (12 J.A. 2236.) *All of the sales were disclosed to shareholders and the public in AMERCO's public filings.* (3 J.A. 536-37, 564-65, 575, 600, 616, 641, 664-65.) Plaintiffs allege that the sales prices of the properties were "unfairly low" because some prices were calculated at "acquisition cost plus capitalized expenses."

(2 J.A. 279; AOB 9:2-9.) In Appellants' Opening Brief, Plaintiffs further assert that the terms of the sales were inherently "unfair" because the appraised value of the properties was approximately $616 million — that is, about 2% less than the sale amounts. (AOB 9:11-12.) Many of those appraisals, however, were conducted by lenders making loans to the SAC Entities *after* SAC had agreed to purchase the property. (12 J.A. 2236.) Of that $15 million difference, more than $12 million is attributable to the first sales to SAC that occurred in 1994 and 1995. (*Id.*)

In connection with those sales to the SAC Entities, AMERCO received cash and promissory notes that have accrued interest at a rate of at least 8% per annum. (2 J.A. 282.) Plaintiffs do not contend that those interest rates are unfavorable or below market, nor do Plaintiffs allege that the SAC Entities have not timely paid interest as due.

U-Haul operating entities also entered into management agreements with the SAC Entities whereby those entities provided certain services to the SAC Entities for a fee, generally, of 6% of the gross revenue generated from the self-storage facilities. (2 J.A. 284-85.) Those management agreements have generated fees of more than $111 million. (12 J.A. 2241.)

C. Shareholders Raised Concerns About The SAC Transactions

The *Goldwasser* Action was brought on November 16, 1994 by an AMERCO shareholder on behalf of AMERCO against Joe Shoen, Mark Shoen, James Shoen, John Dodds, Gary Klinefelter, Richard J. Herrera, William Carty, Charles Bayer, and Richard Amoroso. (11 J.A. 1972, 1990.) After the filing of the *Goldwasser* Action, Goldwasser's counsel — Milberg, Weiss, Bershad, Hynes & Lerach — expressed concerns about the SAC Transactions on the same grounds raised in this action — namely, that AMERCO had allegedly diverted corporate assets to Mark Shoen, an AMERCO insider. (*Id.* at 1971, 1991.)

During settlement negotiations, Milberg, Weiss demanded that AMERCO unwind the SAC Transactions and stated that absent settlement they would file an amended complaint attacking the SAC Transactions. (*Id.* at 1991.) AMERCO did not agree to

unwind them, but agreed (1) to provide a letter that would be attached to the settlement explaining in detail the terms of the SAC Transactions, and (2) to enact board resolutions implementing certain procedures where an officer or director had a conflict of interest. (*Id.* at 1972-73, 1992.)

The settlement stipulation recited that the settlement was "in the best interests of the Plaintiffs, *AMERCO and its shareholders*." (*Id.* at 2020.) It stated that the claims being settled and released belonged to AMERCO and that *AMERCO* itself was settling and releasing any claims involving the SAC transactions. (11 J.A. 2026 ("Plaintiffs *and AMERCO*, and each of them, release and discharge each and all of the Released Persons[1] of and from the Released Claims.").) "Released Claims" was broadly defined to include

> Claims that have been or that could have been asserted in the Litigation or in the securities actions with which the Litigation is consolidated by any of the Plaintiffs, either individually or derivatively on behalf of AMERCO, against the Released Persons arising out of, relating to or in connection with
>
> (a) any of the facts, circumstances, allegations, claims, causes of action, representations, statements, reports, disclosures, transactions, events, occurrences, acts, omissions or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing or omitting to perform the same, that have been or could have been alleged in any pleading, amended pleading, complaint, amended complaint, brief, motion, report or filing in the Litigation or the securities

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[1] "Released Persons" is defined as "each and all of the Defendants, Gary V. Klinefelter, Richard Amoroso, and their Related Parties." "Defendants" is defined as "Edward J. [Joe] Shoen, Mark V. Shoen, James P. Shoen, John M. Dodds, Richard J. Herrera, William E. Carty, Charles J. Bayer and nominal defendant AMERCO." "AMERCO" is defined as "nominal defendant AMERCO, a Nevada corporation, and all of its predecessors, successors, and all present and former parents, subsidiaries, divisions and related or affiliated entities." "Related Parties" is defined as "each of a Person's past or present officers, directors, employees, partners, principals, agents, underwriter, insurers, co-insurers, reinsurers, any entity in which the Person has a controlling interest, attorneys, accountants, auditors, advisors, personal or legal representatives, predecessors, successors, parents, subsidiaries, divisions, joint ventures, assigns, spouses, heirs, associates, related or affiliated entities, any members of their immediate families, or any trust of which the Person is the trustee, settler or which is for the benefit of the Person and/or member(s) of his or her family." (11 J.A. 2020-22.)

> actions with which it is consolidated, including without limitation, the *matters discussed in Exhibit 2 hereto*, or the settlement of the litigation.

(11 J.A. 2023; emphasis added.) Exhibit 2 was the letter describing AMERCO's sales of 84 separate properties to the SAC Entities, Mark Shoen's ownership interests in the SAC Entities, AMERCO's loans to the SAC Entities, the sale price of those properties, and how the sale prices were calculated. (*Id.* at 2042-2045.) That letter also expressly contemplated future transactions. (*Id.* at 2044.) In short, the letter disclosed all of the attributes of the SAC Transactions that Plaintiffs now complain about.

Pursuant to the settlement, AMERCO enacted board resolutions that put into place procedures to be followed if an officer, director or employee of AMERCO were *in the future* to engage in "transactions in which actual or potential conflicts of interest may exist." (*Id.* at 2036.) However, AMERCO stated in Exhibit 2 that the SAC transactions did not "present a conflict of interest for any officer or director of the Company or any of its subsidiaries." (*Id.* at 2044.) Exhibit 2 also stated that future decisions to pay compensation or make a distribution of SAC assets to an officer or director of the Company or any of its directors would be subject to conflict of interest procedures in the board resolutions. (*Id.*) The board resolutions were attached to the settlement stipulation that was submitted to, and approved by, the Arizona Federal Court. (*Id.* at 2049-52.)

On November 3, 1995, United States District Judge Roslyn O. Silver entered a Final Judgment and Order of Dismissal ("the *Goldwasser* Judgment"), which provided in pertinent part:

> 3. Pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, this Court hereby approves the settlement set forth in the Stipulation and finds that said settlement is, in all respects, fair, just, reasonable and adequate to *AMERCO*.
>
> 4. The Court hereby dismisses with prejudice . . . the Litigation against the Defendants . . . .
>
> 5. Upon the Stipulation Effective Date . . ., each and every Released Claim of the Plaintiffs *and AMERCO* . . . is and shall be deemed to be conclusively released as against the Released Persons . . . to the fullest

> extent permitted by law. Notwithstanding that the Plaintiffs *or AMERCO* may hereafter discover facts in addition to or different from those which they or their counsel now know or believe to be true with respect to the subject matter of the release, *AMERCO and each Plaintiff is and shall be deemed, upon the Stipulation Effective Date, to have fully, finally and forever settled and released any and all Released Claims as against the Defendants and the Released Persons*, whether such Released Claims are known or unknown, suspected or unsuspected, contingent or non-contingent, concealed or hidden, now exist, hereafter exist, or heretofore have existed, and without regard to the subsequent discovery or existence of such different or additional facts.
>
> 6. Plaintiffs *and AMERCO are hereby forever restrained and enjoined from prosecuting, pursuing, or litigating any of the Released Claims against any of the Released Persons in this or any* other forum.

(*Id.* at 2050-51.) (emphasis added.) There was no appeal.

The settlement stipulation was also independently approved by the United States Bankruptcy Court for the District of Arizona. (*Id.* at 2151-2156.) Four of the defendants in the *Goldwasser* Action — Joe Shoen, James Shoen, John Dodds and William Carty — filed Chapter 11 bankruptcy proceedings in February 1995. (*Id.* at 1994.) On November 1, 1995, the debtors filed a Second Amendment Modifying the Amended and Restated Plan of Reorganization Proposed by the Debtors which attached a copy of the *Goldwasser* settlement stipulation. (*Id.*) That document was provided to (1) Paul Shoen, who had filed a proof of claim in the bankruptcy proceedings, through his counsel of record Latham & Watkins, which continues to represent Paul Shoen in this action, and (2) Milberg Weiss. (*Id.* at 2136-2137.) Paul Shoen filed a "Conditional Objection To Approval of Stipulation for Settlement Re Derivative Claims and Request for Hearing" which stated that he did "not object to approval of the proposed stipulation assuming that it is not intended to affect any rights or claims against AMERCO or other parties." (*Id.* at 2147-48.) Thus, Paul Shoen objected only to the extent that the settlement might be construed to extinguish any *direct* claims that *he* (not AMERCO) might have. On January 12, 1996, the Honorable James M.

Marlar, United States Bankruptcy Judge approved the Stipulation of Settlement of Derivative Claims. (*Id.* at 2152-56.)

D. After 1995, AMERCO Continued To Transact Sales To The SAC Entities, Which Were Disclosed In Public Filings

AMERCO thereafter continued to engage in transactions with the SAC Entities, and continued to disclose those transactions in its public filings. Plaintiff Paul Shoen was himself a director of AMERCO from January 1997 until August 1998 (2 J.A. 270), so he was aware that AMERCO was selling properties to the SAC Entities, making loans to the SAC Entities, and entering into management agreements to manage those properties.

E. In March 2002, AMERCO Restated Its Financial Statements Due To Changed Advice From Its Long Time Auditors, PricewaterhouseCoopers

Although Plaintiffs claim that this case arose out of the allegedly unfair terms of the SAC Transactions, that is simply not true. As stated, AMERCO disclosed the SAC Transactions in all of its public filings beginning in 1995, and Paul Shoen, who initiated this action in September 2002, knew about the SAC Transactions as a director. What triggered this lawsuit was AMERCO's disclosure in March 2002 that it was being required to restate prior financial statements by PricewaterhouseCoopers ("PwC"). (2 J.A. 269.) Despite years of approving nonconsolidated accounting for AMERCO and the SAC Entities, PwC advised AMERCO that it should report the financial results of the SAC Entities and AMERCO on a consolidated basis. (*Id.*) Shortly after that announcement, Paul Shoen filed this action.

AMERCO sued PwC for professional negligence and, in 2005, AMERCO received $51.3 million net of attorneys fees and costs from PwC in settlement. (*Id.* at 771.)

F. AMERCO Shareholders Ratified The SAC Transactions

In 2007 and again in 2008, stockholders submitted a proposal to AMERCO to ratify the SAC Transactions in order to put an end to this action, which by then had been pending five years. (11 J.A. 2189; 12 J.A. 2203, 2234-43.) Stockholders holding more than 80% of

the stock voted to ratify the SAC Transactions, including a majority of stockholders other than Joe, James and Mark Shoen. (*Id.* 2204-5.)

VI. ARGUMENT

A. The District Court Correctly Ruled That Plaintiffs Are Precluded From Bringing This Action

1. AMERCO Itself Released The Claims That Plaintiffs Are Attempting To Bring, And The United States District Court Found That Release To Be Fair To AMERCO

a. AMERCO can and did release its claims

Plaintiffs question (erroneously) the res judicata effect of the *Goldwasser* judgment, but they ignore the preclusive effect of the release that AMERCO gave as part of the settlement. Release and res judicata are different defenses. *See* Nev. R. Civ. Proc. 8(c) (listing release and res judicata as separate affirmative defenses). *AMERCO* released all of its claims against its directors related to any sales (including future sales) of AMERCO property to the SAC Entities. That release is enforceable, and there is no requirement that a corporation provide notice to shareholders before giving such a release. To the contrary, Nevada law expressly provides that such a contract is enforceable if it is fair to the corporation, as the Arizona Federal Court found here. Plaintiffs cannot challenge that finding in this Court.

As this Court has explained, a "derivative" action, by definition, is a suit brought derivatively by a shareholder asserting claims *belonging to the corporation.*

> [S]o-called derivative suits allow shareholders to "compel the corporation to sue" and to thereby pursue litigation on the corporation's behalf against the corporation's board of directors and officers, in addition to third parties. But because the power to manage the corporation's affairs resides in the board of directors, a shareholder must, before filing suit, make a demand on the board, or if necessary, on the other shareholders, to obtain the action that the shareholder desires.

Shoen, 122 Nev. at 633-34.

AMERCO, like any corporation, has the ability to release claims, including claims against its own officers and directors. *See, e.g., National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18-19 (2d Cir. 1981) (J. Friendly) ("The plaintiff in a derivative suit is suing on behalf of the corporation. . . . The corporation has the power to release its claims whether asserted in the complaint or not."); *In re: Mi-Lor Corp.*, 348 F.3d 294, 302 (1st Cir. 2003) ("Corporations . . . have a strong interest in being able to give valid and enforceable releases. . . . even a release of self dealing claims against its controlling shareholder.").

Under Nevada law, a corporation's release of claims against its officers and directors is neither void nor voidable if the release is fair to the corporation. Nev. Rev. Stat. § 78.140 ("[a] contract or other transaction is not void or voidable solely because: (a) The contract or transaction is between a corporation and . . . [o]ne or more of its directors or officers . . ."). Nevada Revised Statutes Section 78.140(2) then delineates "[t]he circumstances in which a contract or other transaction is not void or voidable" because of self-interest, including where "(d) the contract or transaction is fair as to the corporation at the time it is authorized or approved."

The Arizona Federal Court expressly found the settlement and release contained therein to be, "in all respects, fair, just, reasonable and adequate to AMERCO." (11 J.A. 2050.) Plaintiffs did not contend below and do not contend now that the release was not fair to AMERCO. And, the Arizona Federal Court expressly found that it was fair to AMERCO. That ruling is final, and Plaintiffs cannot challenge it years later in this Court.

None of the cases or authorities that Plaintiffs rely upon discusses the defense of release, or applies in the situation here, where a court has found a settlement agreement that includes a release to be fair to the corporation. Plaintiffs string-cite a number of cases that they claim stand for the proposition that "the notice requirements of Rule 23.1 are a mandatory prerequisite for any settlement intended to bind absent shareholders." (AOB 15:5-6.) But that ignores that the *Goldwasser* settlement included a release of AMERCO's claims. (11 J.A. 2026.) None of Plaintiffs' authorities purports to limit the ability of the

corporation itself to release claims.[2] None of those authorities supports an argument that the enforceability of a *corporation's* release of its own direct claims depends on giving notice to shareholders. None of those authorities provides any basis to question the enforceability of a release by the corporation that was ruled by a Court to be fair to the corporation. Finally, none of the cases that Plaintiffs cite concerns an injunction entered in federal court enjoining the company from bringing the released claims, or a collateral attack years later in a different forum. Plaintiffs' cases are simply not relevant.

b. AMERCO's release was distinct from, and in addition to, the Goldwassers' release of their claims

This same point — that *AMERCO* released *its* claims — is also the short answer to Plaintiffs' patently incorrect argument that "the only parties who released any claims . . . are the individual plaintiffs in *Goldwasser*." (AOB 18:6-8.) AMERCO expressly released the Released Parties from any claims arising out of the SAC Transactions. "Plaintiffs *and AMERCO, and each of them*, release and discharge each and all of the Released Persons of and from the Released Claims." (11 J.A. 2026.) The *Goldwasser* judgment provides that "each and every Released Claim of the Plaintiffs *and AMERCO* is and shall be deemed . . . to be conclusively released . . . . *AMERCO* and each Plaintiff is and shall be deemed . . . to

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[2] Plaintiffs cite *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993) (finding on appeal merely that the notice that was given pursuant to district court order in a derivative case was adequate); *Maher v. Zapata Corp.*, 714 F.2d 436, 450 (5th Cir. 1983) (same); *Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259 (3d Cir. 1978) (finding that shareholders' voluntary dismissal of cause of action was not entitled to res judicata effect); *Phillips v. Tobin*, 548 F.2d 408 (2d Cir. 1976) (noting in dicta that 23.1 requires notice must be given as court directs); *Papilsky v. Berndt*, 466 F.2d 251, 256 (2d Cir. 1972) (holding that involuntary dismissal of derivative action due to failure to answer interrogatories was not entitled to res judicata effect); *Prudential-Bache Secur., Inc. v. Matthews*, 627 F. Supp. 622 (S.D. Tex. 1986) (dismissing claim with prejudice upon showing that sole shareholder had actual notice of dismissal); *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1026 (N.D. Ill. 1981) (dismissal of cause of action where shareholder's counsel admitted that it was "mistake" to include that claim was not entitled to res judicata effect); *Haberman v. Tobin*, 480 F. Supp. 425, 426 (S.D.N.Y. 1979) (requiring notice before plaintiffs' complaint dismissed for failure to post bond); *Grima v. Applied Devices Corp.*, 78 F.R.D. 431 (E.D.N.Y. 1978) (requiring notice before plaintiff could voluntarily dismiss derivative claim); *Blau v. Reidy*, 1968 U.S. Dist. LEXIS 12042 (S.D.N.Y. 1968) (same).

have fully, finally and forever settled and released any and all Released claims. . . . Plaintiffs *and AMERCO* are hereby forever restrained and enjoined from . . . litigating any of the Released Claims." (11 J.A. 2050-51.)

Plaintiffs assert that the definition of Released Claims supports their argument that the release was given only by the Goldwassers because it excludes "any Claim either individual or derivative, of any AMERCO shareholder other than the Plaintiffs herein." (AOB 19:6-8.) But that limited carve out concerned claims *of shareholders*, not claims that belong to AMERCO. (11 J.A. 2024.) The claims at issue in this case are claims that belong to AMERCO, not to shareholders. It would have been misleading to the point of fraud for the parties to include those multiple references to AMERCO releasing AMERCO's claims if the only effect were to prohibit two shareholders from bringing derivative claims on behalf of AMERCO again.

The trial court correctly interpreted the releases as meaning that the Goldwassers released all of their individual causes of action, and AMERCO released its claims related to the matters described in the release, but the parties were not purporting to release either (1) the individual claims of any other AMERCO shareholder, or (2) any of AMERCO's claims on any matter not referenced in the release. There is no question, however, that claims regarding the SAC transactions were included in that release. (14 J.A. 2721.) The trial court properly interpreted the settlement stipulation and the release.

c. AMERCO released all claims related to future SAC Transactions

The court below also correctly interpreted AMERCO'S release as applying to all causes of action challenging transactions, including future transactions, between AMERCO and the SAC Entities that related to the circumstances described in the Exhibit 2 to the *Goldwasser* settlement stipulation. (*Id.*)

A settlement and release agreement is interpreted like any other contract to effectuate the parties' intent. *May v. Anderson*, 121 Nev. 668, 672 (2005) ("Because a settlement agreement is a contract, its construction and enforcement are governed by

principles of contract law."). Here, there is no doubt that AMERCO intended to release all claims against its officers and directors arising out of AMERCO's sales of self storage properties to the SAC Entities, including future sales. AMERCO made that perfectly clear in the papers submitted to the Arizona Federal Court before that Court expressly found the settlement and release to be fair to AMERCO. (11 J.A. 2050.)

As stated, the plaintiffs and their counsel raised issues about the SAC Transactions because they allegedly diverted AMERCO assets to AMERCO insiders. (11 J.A. 1999.) In response, AMERCO provided information about the SAC Transactions (*id.* at 2042-45), stated that the SAC Transactions did not create any conflicts of interest (*id.* at 2044), indicated that such transactions would continue and agreed to adopt board resolutions governing how transactions that *did* raise conflicts of interest would be handled by the board in the future. (*Id.* at 2036-41.) AMERCO then released its officers and directors from any claims against them in connection with their role in allowing those SAC Transactions to occur. It is inconceivable that those released parties and AMERCO intended that AMERCO could thereafter bring claims against those released parties for continuing to allow SAC Transactions to occur.

d. Plaintiffs' argument that discovery should have been allowed has no merit

Plaintiffs' contention that they were deprived of discovery should be rejected out of hand because Plaintiffs never claimed in the trial court that they needed discovery. Indeed, they still have not attempted to describe what discovery they want to take or its relevance.

Plaintiffs apparently want to argue that the *Goldwassers* did not *intend* to release the claims at issue here, and seek discovery to support such an argument. (AOB 22:2-7.) But the intent of the Goldwassers is irrelevant. *AMERCO* gave a release to the Released Parties, and there is no dispute about the intent of AMERCO and the Released Parties — they all agree that AMERCO intended to and did release AMERCO's officers and directors from any claims arising out of the SAC Transactions. (11 J.A. 2026.)

The key facts are undisputed. The Arizona Federal Court approved the settlement and release (*id.* at 2049-52); in Exhibit 2 to the *Goldwasser* settlement, AMERCO stated that the SAC transactions did not "present a conflict of interest for any officer or director of the Company or any of its subsidiaries," and that future decisions to pay compensation or make a distribution of SAC assets to an officer or director of the Company or any of its directors would be subject to the conflict of interest procedures in the Board Resolutions (*id.* at 2044); and the Arizona Federal Court approved the settlement and release as fair. (*Id.* at 2050.) No further "fact finding" is required or permissible.

2. The Arizona Federal Court Judgment Is Res Judicata

Res judicata or "claim preclusion . . . appl[ies where]: (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008). Those elements exist here.

First, AMERCO and its directors were parties and appeared in both *Goldwasser* and in this action. *Ross v. Bernhard*, 396 U.S. 531, 539 (1970) ("The corporation is a necessary party to the action . . . . Although named a defendant, it is the real party in interest, the stockholder being at best the nominal plaintiff.").

Second, the *Goldwasser* judgment is *valid*. A judgment by a court of competent jurisdiction is presumed valid and is entitled to preclusive effect even if erroneous. *Federated Dep't Stores, Inc. v. Moitiei*, 452 U.S. 394, 398 (1981). *See also, Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action.]"). Plaintiffs do not argue that the *Goldwasser* judgment is not "valid" within the narrow meaning of that term. To the contrary, Plaintiffs concede the judgment is valid, they just quarrel about the scope of its preclusive effect.

Third, the issues that Plaintiffs seek to litigate here were or could have been raised in *Goldwasser*. As explained, in *Goldwasser*, shareholders asserted that AMERCO's

directors had breached their fiduciary duties by allowing AMERCO to sell dozens of self-storage properties to Mark Shoen — the same claims raised here. The *Goldwasser* judgment extinguished all claims against AMERCO directors arising from the SAC Transactions, including SAC Transactions after 1995.

Res judicata applies "where the judgment entered in the prior action (1) incorporated a settlement intended to govern future, related transactions between the parties, . . . or where (3) 'the object of the first proceeding was to establish the legality of the continuing conduct into the future." *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1151 (10th Cir. 2006) (citations omitted). *See also, Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 289-91 (2d Cir. 2000) (consent judgment in first action establishing new policies for sick leave was res judicata as to claims arising from continuing implementation of those policies because they were a connected series of transactions).

Here, the *Goldwasser* judgment incorporated a settlement intended to govern "future, related transactions," and the purpose of that settlement was to resolve any questions about the "legality of the continuing conduct into the future."

Plaintiffs thus do not and cannot dispute that all of the prerequisites for res judicata exist here. Plaintiffs rely upon cases that concern a shareholder simply abandoning a cause of action in a derivative case without knowledge of the corporation or other shareholders, or approval by a court that the action was fair to the corporation. In that situation, it makes sense that the corporation (or other shareholders suing derivatively on behalf of the corporation) would not be bound because the first shareholder only *purported* to act on behalf of the corporation but the corporation itself was not an active party in the action and the court was not called on to approve of that dismissal as fair to the corporation. But Plaintiffs do not cite a single case where a court refused to give preclusive effect to a settlement and judgment that a court approved as fair to the corporation. Here, AMERCO signed the *Goldwasser* settlement stipulation that was submitted to the Arizona Federal Court, and the Arizona Federal Court found that settlement to be fair to AMERCO.

Moreover, Federal Rule of Civil Procedure 23.1 provides that "A derivative action may be settled . . . or compromised only with the court's approval. Notice of a proposed settlement . . . or compromise must be given to shareholders or members *in the manner that the court orders*." (Emphasis added.) Judge Silver acted within her discretion by not requiring notice. *See Rosen ex rel. Price Communs. Corp. v. Price*, No. 95 Civ. 5089, 1998 U.S. Dist. LEXIS 9198, * 3 (S.D.N.Y. June 22, 1998) (approving of settlement of derivative action without notice; "This is an appropriate case for dispensing with notice to shareholders because their interests will not be substantially affected by the compromise."); *Plaskow v. Peabody Int'l Corp.*, 95 F.R.D. 297, 299 (S.D.N.Y. 1982) (approving settlement of derivative action without notice to shareholders; "this Court is persuaded to waive these requirements [of notice to shareholders] in this action . . ."); 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 1839 (3d Ed. 2005) ("[n]otice and court approval . . . is intended to discourage the private settlement of a derivative claim under which a shareholder-plaintiff and attorney personally profit to the exclusion of the corporation and the other shareholders."); *Wolf v. Barkes*, 348 F.2d 994, 996 (2d Cir. 1964) (J. Friendly) ("the prime 'mischief and defect' the rule [is] intended to prevent [is] 'private settlements under which the plaintiff stockholder and his attorney got the sum paid in settlement, and the corporation got nothing.'").

This case does not concern a situation where a "private settlement" was reached that was not approved by any court that secretly excluded the corporation from sharing in a recovery obtained on the corporation's behalf.

Finally, both Paul Shoen and Belec received notice of the Arizona judgment and did not challenge it although they could have objected before it was final or appealed after the judgment was entered. (11 J.A. 2137, 2147-50.) For them to now argue that this Court can and should ignore the Arizona Federal Court's judgment because that Court failed to order notice to *other* shareholders is preposterous.

3. Plaintiffs Ignore The Federal Court Injunction

The Arizona Federal Court *enjoined* AMERCO from litigating claims arising out of the SAC Transactions in any forum. (*Id.* at 2051.) That Court "retain[ed] continuing jurisdiction over (a) implementation of this settlement; . . . (c) all parties to the Litigation for the purpose of enforcing and administering the Stipulation and the releases contained therein; and (d) any other matter related of ancillary thereto." (*Id.*) Thus, if the Plaintiffs believed that the release was somehow invalid or wanted to challenge the Arizona Federal Court's orders, they should have presented those issues to that Court, instead of asking this Court to ignore or second guess Judge Silvers' rulings years later. Although a federal court will not lightly enjoin state court proceedings, it will do so under the Anti-Injunction Act when necessary "to protect or effectuate its judgments." 28 U.S.C. § 2283.

B. Plaintiffs' Complaint Should Have Been Dismissed Because It Does Not Allege Particularized Facts Establishing That Demand Would Be Futile

As an alternative ground for affirmance of the judgment, the trial court should have granted AMERCO's Motion to Dismiss for failure to satisfy the pleading standards this Court established in *Shoen* regarding demand futility.

1. A Majority of the Board Is Not Interested In the SAC Transactions; Plaintiffs Have Never Claimed So

As this Court explained in *Shoen*, where "the board considering a demand is not implicated in a challenged business transaction . . . 'the demand futility analysis considers only whether a majority of the directors had a disqualifying interest in the [demand] matter or were otherwise unable to act independently' at the time the complaint was filed." *Shoen*, 122 Nev. at 638 (quoting *Rales v. Blasband*, 634 A.2d 927 (Del. 1993)). The *Rales* test focuses on whether a majority of the board considering a demand have a disabling interest in a *demand* — that is, whether they face a substantial likelihood of personal liability — not whether a majority of the board have an interest in the underlying transactions. This Court found that, because Plaintiffs "do not challenge any board-considered business decision, . . . the *Rales* test applies." , 122 Nev. at 641.

The trial court, however, did not apply the *Rales* test, and did not find that a majority of the board faced a substantial threat of personal liability. Instead, it denied AMERCO's motion on the ground that "Plaintiffs have satisfied the heightened pleading requirements of demand futility by showing a majority of the members of the AMERCO Board of Directors were interested parties in the SAC transactions." (7 J.A. 1395.) Plaintiffs have never argued that a majority of AMERCO's Board is interested in the SAC Transactions themselves,[3] and, that is not the relevant inquiry here because, as this Court observed, Plaintiffs "essentially allege that the AMERCO board members knew or should have known of the challenged acts . . . but nonetheless failed to prevent or remedy the wrongs." *Shoen*, 122 Nev. at 641.

2. Plaintiffs Fail To Allege Facts Establishing "A Substantial Likelihood of Personal Liability"

Plaintiffs' Complaint alleges that Directors Bayer, Carty, Dodds, Brogan and Grogan are self-interested in a demand because they each face "a substantial likelihood of personal liability for his participation in AMERCO's dealings with the SAC Entities." (2 J.A. 297-98, 300-1.) Not true.

> Allegations of mere threats of liability through approval of the wrongdoing or other participation . . . do not show sufficient interestedness to excuse the demand requirement . . . [I]nterestedness because of potential liability can be shown only in those 'rare case[s] . . . where defendants' actions were so egregious that a substantial likelihood of director liability exists.' . . . [D]irectors and officers may only be found personally liable . . . if that breach involves intentional misconduct, fraud, or a knowing violation of the law.

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[3] "A director is interested in a transaction when the director receives a personal benefit (or detriment) from a transaction that is not shared by the other shareholders of the corporation and the benefit is of subjective material significance to the director. A director can also be interested in a transaction where the director stands on both sides of the transaction. *Kahn v. Portnoy*, No. 3515-CC, 2008 Del. Ch. LEXIS 184*, 36-37 (Del. Ch. Dec. 11, 2008). Here, Plaintiffs never argued that four or more Directors had an interest in the SAC Transactions.

> Accordingly, interestedness through potential liability is a difficult threshold to meet.

Shoen, 122 Nev. at 640. The trial court did not find, and could not have found, that Plaintiffs could meet that "difficult threshold."

a. The Directors' alleged actions were not "so egregious"

Plaintiffs contend that Directors Bayer, Carty, and Dodds (but not Brogan, Grogan or Lyons) face a substantial threat of personal liability because of their alleged "participation" in AMERCO's transactions with the SAC Entities while they were directors and officers of AREC. (2 J.A. 297.) But this Court held that allegations that a defendant "participated" in a challenged transaction are not enough to establish a disabling interest in evaluating a demand, and overruled *Johnson v. Steel, Inc.*, to the extent it "suggests that the demand prerequisite could be excused with a mere allegation of participation." *Shoen*, 122 Nev. at 635.

Moreover, AMERCO's Articles of Incorporation provide that:

> A director[ ] or officer of the corporation shall not be personally liable to this corporation or its stockholders for damages for breach of fiduciary duty as a director or officer, but this article shall not eliminate or limit the liability of a director or officer for . . . acts o[r] omissions which involve intentional misconduct, fraud or a knowing violation of the law.

See id., n.60; (11 J.A. 2010-2045). Thus, Bayer, Carty and Dodds cannot be personally liable unless Plaintiffs prove that they engaged in "intentional misconduct, fraud or a knowing violation of law." *See, e.g., In re Baxter Int'l Inc. Shareholders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995) ("When the certificate of incorporation exempts directors from liability, the risk of liability does not disable them from considering a demand fairly unless particularized pleading permits the court to conclude that there is a substantial likelihood that their conduct falls outside the exemption."). Plaintiffs have not alleged such facts.

Nor is there anything "egregious" about directors and officers of a subsidiary approving transactions such as selling assets, loaning money, or entering into management agreements. As mentioned, the fact that those transactions were occurring was disclosed in

AMERCO's public filings (3 J.A. 536-37, 564-65, 575, 600, 616, 641, 664-65), but this action was not commenced until 2002, only after AMERCO's auditors changed their advice about the proper accounting treatment of the SAC transactions. (2 J.A. 269.) Directors do not face a substantial likelihood of personal liability merely because they "participated" in transactions that ultimately led to a restatement due to the auditor's changed advice.

b. Directors do not face a substantial likelihood of liability for signing allegedly false financial statements

Plaintiffs contend that Bayer, Carty, Dodds, Grogan and Brogan face a substantial likelihood of personal liability because they failed to ensure adequate internal accounting controls and signed financial statements that were ultimately restated. (2 J.A. 297-301.)

A claim that directors "face[] a substantial likelihood of liability for their failure to institute sufficient internal controls to monitor the condition of [the company's] businesses and its accounting practices . . . 'is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'" *In re IAC/InterActiveCorp Secs. Litig.*, 478 F. Supp. 2d 574, 605 (S.D.N.Y. 2007) (applying Delaware law and finding that directors did not face substantial threat of liability where "plaintiffs allege accounting irregularities only in the most general terms and do not even allege that defendants violated GAAP.").

In *Guttman v. Jen-Hsun Huang*, 823 A.2d 492 (Del. Ch. 2003), plaintiffs brought a derivative action after the corporation had restated its financial statements. The Delaware Chancery Court found plaintiffs' demand futility allegations insufficient, however, because the plaintiffs had not alleged "that the company lacked an audit committee, that the company had an audit committee that met only sporadically and devoted patently inadequate time to its work, or that the audit committee had clear notice of serious accounting irregularities and simply chose to ignore them or . . . to encourage their continuation." *Id* at 507. No such allegations exist here either.

Plaintiffs' Complaint alleges AMERCO's restatement due to its auditor's changed advice but their Complaint lacks any particularized allegations establishing that AMERCO's

Directors *knew* that the company's earlier accounting treatment for AMERCO's transactions with SAC was incorrect. Nor is there any basis for presuming such knowledge because directors are permitted to rely on the advice of experts such as accountants. *See* Nev. Rev. Stat. § 78.138(2)(b) ("In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by . . . (b) . . . public accountants . . . as to matters reasonably believed to be within the preparer's of presenter's professional or expert competence.").

3. Plaintiffs Do Not Allege Particularized Facts Showing That A Majority Of The Board Lacks Independence

Alternatively, Plaintiffs assert that Directors Bayer, Dodds, and Carty are so dominated and controlled by Joe Shoen that they are more loyal to him than to AMERCO. (2 J.A. 306-7.) (Plaintiffs do not allege that Brogan, Grogan and Lyons lack independence.) This Court accepted that Joe and James were interested because of their "direct familial ties with Mark," but, to establish futility, Plaintiffs were required to allege particularized facts to establish that *two* of Bayer, Dodds and Carty are dominated and controlled by Joe Shoen. Plaintiffs did not do so.

a. Directors are presumed to be independent

Directors are presumed to be independent, and plaintiffs bear the burden of alleging "particularized facts creating a reasonable doubt of a director's independence to rebut the presumption at the pleading stage." *Beam v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). "Independence is a fact-specific determination made in the context of a particular case. The court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Id.*

Thus, Plaintiffs must allege with particularity facts that explain why, if demand were made on the AMERCO Board to pursue the causes of action in the Complaint, two of Bayer, Carty and Dodds would be unable to exercise their independent judgment about the wisdom of bringing such claims due to the influence of Joe Shoen, who is allegedly

interested because Mark Shoen is his brother. Plaintiffs' allegations do not offer any cogent explanation. The connection is too attenuated.

b. Allegations that Bayer, Carty and Dodds previously voted with Joe Shoen on other matters do not establish a lack of independence.

Plaintiffs allege that Joe Shoen's domination of Bayer, Dodds, and Carty is proved by the fact that, as AMERCO directors, they did not stop Joe Shoen from taking acts in the past that Plaintiffs contend were not in AMERCO's best interests. (2 J.A. at 306.) Specifically, Plaintiffs contend that Dodds and Carty were AMERCO directors when the board voted to change AMERCO's bylaws to require a two-thirds majority vote to institute certain changes (*id.* at 303); were AMERCO directors when the board voted to use AMERCO's funds to repurchase stock owned by shareholders who sought to take control of AMERCO (*id.* at 304); did not intervene to stop Joe and Mark Shoen from using AMERCO's assistant general counsel to represent them in a personal action (*id.* at 304-305); were on the board when the board advanced the date of AMERCO's annual meeting, which allegedly prevented Paul from obtaining a seat on the AMERCO board (*id.*); and allowed Joe, James and Mark Shoen to obtain an injunction against the holding of AMERCO's annual meeting which resulted in Paul Shoen serving as an AMERCO Board member for 17 months rather than 24 months (*id.* at 305-306). At most, Plaintiffs' allegations show that AMERCO took actions that Paul believes were not in *his* interests, but they do not show a pattern of decisions that were so clearly against *AMERCO's* interests that it overcomes the presumption that Bayer, Carty and Dodds exercise their independent judgment.

In *Khanna v. McMinn*, No. 20545-NC, 2006 Del. Ch. LEXIS 86, *57-58, 2006 WL 1388744, *15 (Del. Ch. May 9, 2006), the Delaware Chancery Court rejected the argument that board consensus was evidence that one director dominated and controlled the board:

> [T]he Amended Complaint sets forth the repeated incantation that the directors' lack of independence is demonstrated by their 'pattern' of votes and 'acquiescence' is permitting McMinn and others to benefit from self dealing transactions. The complaint fails to explain, in most

> instances, how the directors' alleged acquiescence benefited them . . . or to set forth particularized facts showing a pattern of votes . . . from which the Court could draw a reasonable inference. Although there may be instances in which a director's voting history would be sufficient to negate a director's presumed independence, routine consensus cannot suffice to demonstrate disloyalty on the part of a director.

Plaintiffs here do not allege how the "alleged acquiescence [of Bayer, Dodds and Carty] benefitted them," or "a pattern of votes," from which a court could reasonably infer that Joe Shoen invariably controls the votes of Bayer, Dodds and Carty. Indeed, Plaintiffs do not even allege that the actions described above were put to a board vote or how Bayer, Dodds and Carty voted.

Moreover, AMERCO's Independent Governance Committee, composed of non-directors, Paul Bible and Thomas Hayes, and independent directors, Michael Gallagher and John Brogan, concluded in 2007 that both Dodds and Bayer (and Lyons and Brogan) *were* independent. (12 J.A. 2217, 2219.) The Independent Governance Committee did not consider Carty and Grogan because they were no longer Board members by 2007. (12 J.A. 2227.)

c. Plaintiffs' additional allegations about Dodds do not establish domination

Plaintiffs assert that Dodds is controlled by Joe Shoen because in 1988 Joe identified Dodds as a key AMERCO employee who should be entitled to purchase newly issued AMERCO shares, and loaned Dodds money to purchase that stock. (2 J.A. 300-1.) The fact that Joe Shoen, in 1988, believed that Dodds should be allowed to buy AMERCO stock, and loaned him money to purchase it, does not suggest that (*id.* at 303), 20 years later, Dodds would be dominated by Joe Shoen in his capacity as an AMERCO director. Plaintiffs' allegations suggest merely that Dodds was a valued employee long ago, but do not show why Dodds could not be expected to exercise independent judgment. Plaintiffs' allegation is simply a variation on the contention that a director dominates other directors that he or she selected. That contention is contrary to law. *Aronson v. Lewis*, 473 A.2d 805, 815 (Del.

1984) (allegations that director "personally selected each . . . director . . . do not support any claim under Delaware law that these directors lack independence.").

d. Plaintiffs' additional allegations about Carty do not establish that he was dominated by Joe Shoen

This Court held that "depending on the circumstances, allegations of close familial ties might suffice to show interestedness or partiality. . . .[T]o show partiality based on familial relations, the particularized pleadings must demonstrate why the relationship creates a reasonable doubt as to the director's disinterestedness." *See Shoen*, 122 Nev. at 640 n. 56. Thus, the mere allegation of a familial relationship is insufficient to establish domination. Plaintiffs' Complaint does not allege *why* Carty's familial relationship creates a reasonable doubt as to his disinterestedness. (Emphasis added.)

Plaintiffs allege that "Carty, Joe and Mark Shoen share an intensely close and deep familial relationship, going back decades." (2 J.A. 298-99.) That allegation is a mere conclusion. *See Shoen*, 122 Nev. at 634 ("[C]onclusory assertions will not suffice under NRCP 23.1's 'with particularity' standard.").

The allegation that "Joe and Mark Shoen spent much of their childhood and adolescent years with Carty at Carty's ranch" does not render it plausible that Mr. Carty's decisions on the AMERCO board are dominated by Joe Shoen. Indeed, it adds nothing to the allegation that Carty is Joe and Mark's uncle. (2 J.A. 298-99.) If a plaintiff could satisfy NRCP 23.1 by alleging that family members spent time together, then virtually every familial relationship would be deemed to create a lack of independence — a proposition that this Court has already rejected.

Plaintiffs include several alleged anecdotes that are legally irrelevant — that both Carty and his nephew, Joe, may have believed that L.S. Shoen murdered Anna Mary Shoen, and attributed U-Haul's success to Anna Mary (*id.*); that Joe Shoen's ex-wife believed that Joe "closely resembled Carty, had the same facial expressions, carried his body in the same manner, and was prone to engage in name petty [sic] calling, just like Carty was known to do" (*id.*); that Carty told Joe, James and Mark Shoen that he could '"hire a guy who would

take care of anyone who stood in [their] way'" (*id.* at 299); and that Carty "was overheard commenting at AMERCO Board meetings that the Shoen Insiders should engage in 'inside deals' with AMERCO because he believed that was the 'real benefit' of owning a business." (*Id.*) None of those allegations allege with particularity "why the [uncle-nephew] relationship creates a reasonable doubt as to the director's disinterestedness." *Shoen*, 122 Nev. at 640 n. 56.

Recent decisions under analogous federal pleading standards have strengthened the rationale for requiring the allegation of specific facts to demonstrate, under Rule 8, that the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (U.S. 2009). In *Iqbal*, the Supreme Court held that a plaintiff must allege facts (not mere conclusions) showing that a requisite for the claim is more plausible than another interpretation of the same facts. *Iqbal*, 129 S. Ct. at 1949 ("Where a complaint pleads facts that are "'merely consistent with'" a defendant's liability, it "'stops short of the line between possibility and plausibility of "entitlement to relief."'"). Here, the facts that Plaintiffs rely on to establish that Carty lacks independence are "merely consistent" with Plaintiffs' theory, but they are at least equally consistent with the presumption under Nevada law that each director exercises his or her independent business judgment.

C. The Allegation That Transactions Were Ultra Vires Does Not Excuse Demand

Based on *California Public Employees Retirement System v. Coulter*, No. 19191, 2002 Del. Ch. LEXIS 144 (Del. Ch. Dec. 18, 2002), Plaintiffs have argued that demand on the AMERCO board is automatically excused because Plaintiffs allege that the SAC Transactions were ultra vires. (2 J.A. 308.) The demand requirement is not so easily evaded.

In *Shoen*, this Court doubted Plaintiffs' argument.

> "Even in the face of potentially void acts, however, the board of directors has a duty to take corrective action, for instance, by undoing the transaction or taking other legal action. In fact, under those

> circumstances, the reason behind making the demand is especially strong, particularly where, as here, it is not alleged that the board has affirmatively voted for the alleged ultra vires acts. As set forth above, the only reason to then excuse demand would arise when, under *Aronson*, a board has acted outside of the business judgment rules' protection, or when, under *Rales*, the board would not be able to impartially consider the demand."

Shoen, 122 Nev. at 643-44. The Court was right.

In *In re InfoUSA, Inc. Shareholders Litig.*, 953 A.2d 963 (Del. Ch. 2007) — which was decided after *Shoen* — the Delaware Chancery Court (which decided *Coulter*) rejected the argument that demand is excused whenever a transaction is challenged as ultra vires. "Needless to say, the case [*Coulter*] does not stand for the *per se* rule plaintiffs suggest. In *Coulter*, the defendant board allegedly amended the terms of a stock option agreement without receiving required shareholder approval. The *Coulter* plaintiffs challenged an affirmative action taken by the board, and the Court applied the standard analysis under *Aronson* . . ." *In re InfoUSA*, 953 A.2d at 988. Thus, even where a board takes affirmative action that is allegedly *ultra vires* (which this Court found not to be the case here), the usual tests applies. Here, the relevant question under *Rales* is whether a majority of the Board face a substantial threat of personal liability in connection with the SAC Transactions. As shown, it does not.

VII. THE REQUEST FOR REASSIGNMENT IS TOTALLY UNFOUNDED

AMERCO joins in the argument by the Outside Directors.

Dated: August 17, 2009

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CERTIFICATE OF COMPLIANCE

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

Dated: August 17, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of August, 2009, I served the foregoing **NOMINAL DEFENDANT/RESPONDENT AMERCO'S ANSWERING BRIEF** by United States mail, postage prepaid to the following:

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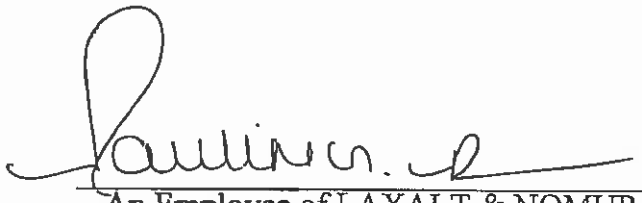

An Employee of LAXALT & NOMURA, LTD.

CERTIFICATE OF FILING

I hereby certify that on the 17 day of August, 2009 I filed with the Nevada Supreme Court Clerk **NOMINAL DEFENDANT/RESPONDENT AMERCO'S ANSWERING BRIEF** pursuant to NRAP 25(1)(A)(1) via electronic filing.

An Employee of Laxalt & Nomura Ltd.