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REPORT

TO Nevada Corporate Headquarters, Inc.

FROM Robert C. Kim, Ballard Spahr LLP

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RE: Statutory Review of Fiduciary Duties and Obligations under Nevada Law

This report provides a list of comments relating to Nevada corporations and Nevada limited-liability companies.

CORPORATIONS

- 1. Waiver of Corporate Opportunity.** A Nevada corporation can renounce/waive in its articles of incorporation or by board action any claim to ownership of or participation in specified business opportunities or classes/categories of business opportunities . NRS 78.070(8).
- 2. Exclusive Right to Adopt, Amend and Repeal Bylaws.** Nevada law permits the articles of incorporation to grant to the board of directors the sole and exclusive right to adopt, amend or repeal bylaws. NRS. 78.120(2).
- 3. Duties Owed to the Corporation.** Unlike many states, the directors and officers of a Nevada corporation owe their duties to the corporation as a whole and not to any specific subset or group, such as the stockholders. NRS 78.138(1).
- 4. Multi-Constituency Construct.** Consistent with the duties of directors and officers being owed to the corporation as a whole, Nevada law permits directors and officers to consider the interests of various constituents, such as the corporation's employees, suppliers, creditors and customers, the economy, the interests of the community and society and the long-term/short-term interests

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of the corporation and its stockholders, where there is no requirement to consider the effect of a corporate action on any particular group as a dominant factor. NRS 78.138(4-5).

5. **Presumption of Good Faith.** In addition to the basic presumption of good faith generally afforded to directors and officers, Nevada law specifically affords this presumption in the context of a change of control, where the actions make be taken to resist a potential change of control as long as there are reasonable grounds to believe that there is a threat to corporate policy and effectiveness and the actions to be taken are reasonable in relation. NRS 78.139.
6. **High Burden for Personal Liability.** In order for a director or officer to be found individually liable, a court must find two things: first, a breach of fiduciary duty, and second, intentional misconduct, fraud or a knowing violation of law. NRS 78.139(7).
7. **No Notice Requirement for Actions by Written Consent.** Although the ability of stockholders to take action by written consent is a common power for those holding a majority of the voting power, under Nevada law, there is no requirement that notice of any such action by written consent be provided to those stockholders not consenting to the action. NRS 78.320.
8. **Staggered Board; Classes of Directors.** Nevada law permits the board of directors to be staggered, i.e., formed with multiple classes, so that each class of directors is elected no more than once every four years. Once established, directors would only need to be re-elected not more than once every four years. NRS 78.330(2).
9. **High Threshold for Removal of a Director.** Any director cannot be removed for "cause" and may only be removed by a vote of two-thirds (2/3rds) of the outstanding voting power. NRS 78.335(1).
10. **18 Month Annual Stockholders Meeting Requirement.** Although holding an annual stockholders meeting every year is recommended, you can wait 18 months until your next annual stockholders meeting before stockholders are permitted to bring action for failure to have such a meeting. Many other states provide this right to stockholders if an annual meeting has not been held for 15 months. NRS 78.345.
11. **Stockholder Proxies.** If the grant of a proxy is coupled with an interest, the proxy granted may be irrevocable, i.e., not subject to recall or termination. NRS 78.355.
12. **Sale of Assets.** Unlike most state corporate statutes, Nevada law requires a stockholder vote only upon the sale of **all** property and assets (versus the "all or substantially all" standard). As a note of caution, the "all" standard has not been

tested by Nevada courts and, under the right circumstances, may be interpreted as including a sale of substantially all assets. NRS 78.565.

13. **Indemnification.** Nevada permits mandatory indemnification and advancement of expenses for directors, officers and/or agents if provided for in the articles of incorporation or bylaws. NRS 78.7502.
14. **Mandatory Board Recommendation for Business Combinations.** Nevada law requires that any business combinations approved by the board of directors must continue to be recommended by the board of directors in order for the matter to be submitted to a vote of the corporation's stockholders. In other words, the board of directors cannot be compelled to have a stockholders meeting to approve a transaction that the board no longer recommends or approves. NRS 92A.120(3).
15. **Dissenter's Rights.** For the stockholders who do not vote in favor of a business combination, there are dissenter's rights only if the corporation is not a publicly-traded corporation on a national securities exchange, such as Nasdaq or the New York Stock Exchange. Generally, dissenter's rights apply to corporations that are privately-held. NRS 92A.390.

LIMITED-LIABILITY COMPANIES

16. **Types of LLCs.** Nevada law permits the formation of a traditional LLC or for a series LLC or a restricted LLC, where these special types of LLCs can be used for estate planning or asset protection. NRS 86.161.
17. **No Operating Agreement Requirement.** Although it is always recommended to have the terms and conditions of your LLC in writing in the form of an operating agreement, Nevada law does not require an LLC to have an operating agreement in order to be in valid existence. NRS 86.286.
18. **Duty of Good Faith and Fair Dealing.** Under Nevada law, the duties of managers can be expanded or limited pursuant to the terms of the operating agreement. In terms of limitations, the operating agreement can limit or eliminate any and all liabilities for breach of contract and breach of duties, if any, of a member, manager or other person to a limited-liability company, to any of the members or managers, or to another person that is a party to or is otherwise bound by the operating agreement. The only limitation is that the operating agreement cannot limit or eliminate liability for any conduct that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing. NRS 86.286(7).
19. **Freedom of Contract.** Since an operating agreement is essentially a contract between the LLC and all of its members, Nevada law states that an operating agreement must be interpreted and construed to give the maximum effect to the principle of freedom of contract and enforceability. NRS 86.286(4)(b).

20. **No Dissenter's Rights.** For the members who do not vote in favor of a business combination, there are no statutory dissenter's rights (unlike for a corporation). The only dissenter's rights would exist in an operating agreement or similar agreement entered into by the parties.
21. **Limited Liability of Managers and Members.** By statute, no member or manager of a Nevada LLC is individually liable for the debts or liabilities of the company. NRS 86.371.
22. **Limitation on Actions Against Dissolved LLC.** By statute, there are limitations on when actions can be brought against a Nevada LLC by plaintiffs. If the plaintiff knew of or should have known of the cause of action prior to dissolution, the plaintiff has two years after dissolution to bring an action against the Nevada LLC. Otherwise, the plaintiff has three years after dissolution to bring an action against the Nevada LLC. If the applicable time frame is not met, the action is barred. NRS 86.505.