# EXHIBIT "6"

IN THE SUPREME COURT OF THE STATE OF NEVADA

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| IN RE: AMERCO DERIVATIVE LITIGATION | Case No. 51629 |
| GLENBROOK CAPITAL LIMITED PARTNERSHIP; ALAN KAHN; RON BELEC; and PAUL F. SHOEN,<br><br>Appellants/Cross-Respondents,<br><br>*VS.*<br><br>EDWARD J. SHOEN, an individual; MARK V. SHOEN, an individual; JAMES P. SHOEN, et al.,<br><br>Respondents/Cross-Appellants. | |

**APPEAL**
From the Second Judicial District Court, Washoe County
THE HONORABLE BRENT ADAMS, District Judge
District Court Case No. CV02-05602

# APPELLANTS' OPENING BRIEF


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## I. INTRODUCTION

For 30 years, AMERCO's most powerful executive officers and majority shareholders – Respondents/Defendants Joe, Mark and James Shoen (the "Shoen Insiders") – have abused their control over the Board of Directors to further their own interests at the expense of AMERCO. Beginning in 1994, however, they embarked upon their most flagrant scheme to date: the wholesale transfer of AMERCO's lucrative self-storage business to the "SAC Entities," privately-held companies that the Shoen Insiders founded that are now owned (ostensibly) by AMERCO executive officer (and Joe and James Shoen's brother) Mark Shoen ("Mark"). Over the next eight years, Defendants[1] transferred over $500 million in self-storage properties to the SAC Entities at unfairly low prices, and they forced AMERCO to provide over $600 million in non-recourse loans that the SAC Entities used to develop a competing self-storage enterprise. As a result of this scheme, the SAC Entities (and Mark personally) acquired one of the nation's largest and most profitable self-storage businesses for a fraction of its value, to the detriment of AMERCO and its minority shareholders.

Defendants have admitted in public filings that the prices at which AMERCO sold the self-storage properties to the SAC Entities were over $15 million *less* than their appraised values. Defendants also have acknowledged that the terms of their dealings with the SAC Entities never were reviewed or approved for fairness by any independent committee, the properties were not made available to other potential buyers, and the properties were not sold through any type of competitive bidding process. In short, there was nothing fair about the *terms* of these transactions or the *process* through which Defendants executed these transactions. Accordingly, by

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[1] In addition to the Shoen Insiders, the other individual Respondents/Defendants in this case include John Dodds, William Carty, Charles Bayer, John Brogan, Richard Herrera, Aubrey Johnson and James Grogan. (Appellants'/Respondents' Joint Appendix ("App."), Vol. 2, at 332-34 (¶¶12-21).) Each Defendant's involvement in the scheme is set forth in detail in the Amended Consolidated Verified Stockholders Derivative Complaint for Damages and Equitable Relief. (*Id.* at 347-57 (¶¶61-87).)

their own admission, Defendants cannot possibly satisfy the "entire fairness" standard under which self-dealing transactions are reviewed, and Defendants' liability for their manifest disregard of their fiduciary duties is beyond dispute.[2]

Appellants/Plaintiffs Glenbrook Capital Limited Partnership ("Glenbrook"), Alan Kahn ("Kahn"), Ron Belec ("Belec") and Paul F. Shoen ("Paul") commenced this derivative action in 2002, to halt and unwind these "classic" self-dealing transactions. But this case still has not proceeded beyond the pleadings. In 2003, the District Court dismissed the case with prejudice based upon its finding that Plaintiffs had not alleged demand futility with sufficient particularity. This Court reversed that holding in July 2006. (*Shoen*, 137 P.3d 1171.) This appeal marks the second time the District Court has dismissed this case in its entirety, this time in a two-page order dated April 7, 2008. (App., Vol. 14, at 2720-22.) In the most cursory manner, the District Court held that all of Plaintiffs' claims were precluded on two grounds. *First*, it held that a 1995 settlement of another derivative case that involved different plaintiffs, different allegations and which never was actively litigated – *Goldwasser v. Shoen*, CIV-95-1446-PHX-ROS (D. Ariz. 1994) ("*Goldwasser*") – barred Plaintiffs' claims against AMERCO's officers and directors in this case. *Second*, it held that Plaintiffs lacked standing to assert claims (on AMERCO's behalf) against the SAC Entities – the beneficiaries of the self-dealing – because AMERCO "participated in the challenged transactions." These rulings constitute plain error.

As an initial matter, the District Court's application of the *Goldwasser* settlement in this case cannot be squared with fundamental tenets of due process. *Goldwasser* was settled without notice to AMERCO's minority shareholders or a "fairness hearing," as required under Federal Rule of Civil Procedure 23.1. Thus, as a matter of law, the release in *Goldwasser* cannot have *any* preclusive effect on the

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[2] When an interested fiduciary's transactions are challenged, the fiduciary bears the burden of establishing good faith and the transaction's fairness. (*Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 n.61 (2006); *Foster v. Arata*, 74 Nev. 143, 155, 325 P.2d 759, 765 (Nev. 1958).)

claims asserted in this litigation. For this reason alone, the District Court's order cannot stand.

Putting this fundamental issue of due process aside, the unambiguous language of the *Goldwasser* settlement makes clear that the release is limited to the individuals who initiated that derivative action (*i.e.*, the Goldwassers), and can only be asserted as a defense against the *Goldwasser* parties. Moreover, the release is limited to "existing" claims – *i.e.*, claims arising from events that occurred *on or before* the date of the settlement (October 27, 1995). The Defendants have conceded this point, and even the District Court acknowledged that the *Goldwasser* settlement cannot bar claims arising out of subsequent self-dealing transactions. The vast majority of the transactions giving rise to the claims in this case took place years after the *Goldwasser* settlement was executed. Thus, even if *Goldwasser* were relevant to this case, it cannot bar claims arising out of transactions that had not even taken place (with SAC Entities that did not even exist) as of October 27, 1995.

The District Court also committed clear error in holding that AMERCO (on whose behalf these claims are asserted) lacked standing to bring claims against the SAC Entities because AMERCO "participated" in the challenged transactions. In a derivative case, the corporation *always* "participates" in the conduct at issue, usually as the victim of wrongdoing by its officers or directors. But this misconduct is *not* imputed to the company, and the doctrine of *in pari delicto* (on which the District Court apparently relied), does *not* apply where fiduciaries are engaged in self-dealing to the detriment of innocent minority shareholders. Given the facts alleged in this case – which involve hundreds of "classic" self-dealing transactions – the District Court's dismissal of the claims against the SAC Entities was patently incorrect.

For each of these reasons, as discussed below, Plaintiffs respectfully request that the Nevada Supreme Court reverse the District Court's order in its entirety and remand this case for further proceedings.

## II. STATEMENT OF ISSUES

(1) Whether a release executed pursuant to a settlement agreement in a derivative action without notice or a "fairness hearing" under Federal Rule of Civil Procedure 23.1 bars other shareholders from bringing a subsequent derivative action.

(2) Whether a release that is expressly limited in scope to the specific parties who initiated an action can bar different shareholders from pursuing different derivative claims based upon different transactions that post-dated the settlement.

(3) Whether minority shareholders lack standing to assert derivative claims against the beneficiaries of a "self-dealing" scheme where: (a) interested and controlling fiduciaries acting adversely to the company's interest forced the company to "participate" in the self-dealing, and (b) the same fiduciaries own or control the beneficiaries.

(4) Whether a case may be dismissed on the pleadings based upon affirmative defenses that turn on disputed factual issues.

## III. STATEMENT OF THE CASE

### A. Proceedings Leading To The Prior Reversal

In 2002 and early 2003, Plaintiffs filed several derivative cases that now comprise this consolidated action. (*Shoen*, 137 P.3d at 1174-76.) Among other things, Plaintiffs alleged that through a series of "classic" self-dealing transactions, Defendants forced AMERCO to transfer its thriving self-storage business at below-market prices to the SAC Entities, to the detriment of AMERCO and its minority shareholders. (*Id.*; *see also* App., Vol. 1, at 1-121.)[3]

On February 20, 2003, Defendants moved to dismiss the complaints filed by Paul, Belec and M.S. Management (which no longer is a party). Defendants claimed that Plaintiffs had not satisfied the demand requirements of Nev. R. Civ. P. 23.1 or

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[3] The SAC Entities are Nevada corporations and partnerships that are individually identified in the caption and described in the Amended Consolidated Verified Stockholders Derivative Complaint for Damages and Equitable Relief. (App., Vol. 2, at 334-35 (¶¶22-24).)

adequately pled demand futility. (*See Shoen*, 137 P.3d at 1176.) A few days later, the District Court issued an order consolidating the three pending cases, and requested that the three derivative Plaintiffs merge their complaints. (*See id.* at 1176.) Thereafter, Plaintiffs Glenbrook and Kahn filed two additional derivative actions. (*Id.*)

On May 2, 2003, the District Court notified Paul, Belec and M.S. Management (but not Glenbrook or Kahn) that it would conduct a hearing on May 6, 2003 to address "issues concerning dismissal." (*See id.* at 1176, 1186 n.71.) Plaintiffs then notified the District Court of their intent to seek leave to file a consolidated complaint, as the Court had requested. (*Id.* at 1176.) Nevertheless, the District Court proceeded with the hearing on the pending motions on May 6, 2003, before Plaintiffs had even submitted opposition briefs. A few days later, the District Court dismissed all of the cases with prejudice (including the complaints filed by Glenbrook and Kahn, for which there were no motions pending) for failure to adequately plead demand futility. (*Id.* at 1178.)

Paul, Belec, Glenbrook and Kahn appealed the District Court's May 2003 order. (*Id. at* 1171). Three years later, following a stay arising out of AMERCO's Chapter 11 bankruptcy, this Court reversed and remanded the case for further proceedings. (*Id* at 1186-87.)[4] In the interim, during AMERCO's bankruptcy proceedings, the derivative claims in this case were expressly carved out of the release and discharge provisions of AMERCO's plan of reorganization. (*See* App., Vol. 6, at 1053-54 (¶1.55), 1086 (¶11.4(d)), 1101 (¶15).)

**B. Proceedings Following The Reversal**

On remand, Plaintiffs filed a consolidated amended complaint. In December 2006, Defendants once again moved to dismiss this case, primarily advancing the

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[4] Among other things, this Court found that "because no motion to dismiss had been filed and no notice of any potential dismissal proceedings had been given in Glenbrook Capital's and Kahn's cases, the district court violated those parties' procedural due process right." (*Shoen*, 137 P.3d at 1186, n.71.)

same arguments they had raised in prior motions. On March 29, 2007, the District Court denied AMERCO's motion to dismiss, holding 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*." (App., Vol. 7, 1395-96 (emphasis added).)

The next day, the Court conducted a hearing on the remaining motions. At the hearing, the District Court inquired (for the first time) into the impact of the *Goldwasser* settlement on this case. Mark and the SAC Entities had argued – in a two-sentence passage in their motion – that the *Goldwasser* settlement barred any claims predicated on transactions with the SAC Entities that occurred *before* October 27, 1995 (*i.e.*, the date of the *Goldwasser* settlement).[5] The District Court acknowledged that "the [*Goldwasser*] release does not release any future claim" and that "the released claims would not include . . . claims subsequent to the [*Goldwasser*] agreement." (App., Vol. 8, at 1542 (144:9-14) and 1545 (147:7-12).) The District Court nevertheless requested supplemental briefing on these issues, which the parties submitted on May 14, 2007. (App., Vols. 8-11, at 1617-2168.)

**C. The Second Dismissal**

Over a year after the hearing, on April 7, 2008, the District Court ruled that the *Goldwasser* release barred *all* of the derivative claims against AMERCO's officers and directors in this case, even those arising out of transactions that post-dated the *Goldwasser* settlement. (*See* App., Vol. 14, at 2720-21.) The District Court further held that because AMERCO "participated in the challenged transactions," Plaintiffs (on behalf of AMERCO) lacked standing to pursue derivative claims against the SAC Entities. (*Id.* at 2721-22) This timely appeal followed.

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[5] Specifically, Mark and the SAC Entities argued: "All of plaintiffs' claims based on any SAC transactions as of October 27, 1995, are precluded because these claims were released by the 1995 *Goldwasser* settlement . . . . Thus, all claims on any SAC transactions ***through October 27, 1995*** (there were 24 transactions in 1995), should be dismissed." (App., Vol. 5, at 961-62 (emphasis added); *see also* App., Vol. 7, 1321-23.)

## IV. STATEMENT OF FACTS

### A. AMERCO Is Looted By The Shoen Insiders

AMERCO and its subsidiaries are controlled by the Shoen Insiders. (App., Vol. 2, at 332-37 (¶¶11-14, 27, 34).) The Shoen Insiders are the Company's highest ranking executive officers, they own or control 54% of AMERCO's common stock, and they have publicly acknowledged their effective control over the election of the Board and approval of significant transactions. (*See id.*) The Shoen Insiders, along with a group of loyal subordinates who serve under them, have a long and well-documented history of abusing their executive positions and majority stock ownership to further their own interests. (*Id.* at 364-70 (¶¶106-31).) The blatant "self-dealing" in this case is the latest chapter in a long and unfortunate saga for AMERCO and its minority shareholders.

#### 1. The Shoen Insiders Form Private Entities To Compete With AMERCO

AMERCO is a Nevada holding corporation. Its main operating subsidiary, U-Haul International, Inc. ("U-Haul"), operates a network of Company-owned rental centers through which U-Haul rents trucks and trailers, and provides related products and services. (*Id.* at 335-36 (¶¶27-29).) A different subsidiary, Amerco Real Estate Corporation ("AREC"), owns approximately 90% of AMERCO's real estate assets, and is responsible for the purchase, sale and lease of properties used by AMERCO. (*Id.* at 335-36 (¶¶27, 30).) AREC has over 25 years of experience identifying and acquiring existing self-storage properties and developing them from raw land. (*Id.*)

Prior to 1994, AMERCO aggressively expanded its self-storage business by capitalizing on U-Haul's consumer goodwill and AREC's expertise in developing self-storage properties. AMERCO's leadership position in the truck and trailer rental industry facilitated its success in the self-storage business. According to AMERCO, most incoming self-storage customers are in the midst of moving and the thousands of U-Haul truck and trailer rental centers offer prime opportunities for storage

facility development. Because the U-Haul brand creates instant name recognition, AMERCO enjoyed substantial competitive advantages by locating storage facilities in close proximity to U-Haul rental centers. (*Id.* at 336-37 (¶¶29-31).)

In 1993, the Shoen Insiders formed the first of the SAC Entities to operate as real estate holding companies. (*Id.* at 337 (¶32).) The Shoen Insiders each received one-third (10,000 shares) of the common stock issued by the SAC Entities. (*Id.*) In December 1994, shortly before filing personal bankruptcies to avoid a judgment in another (prior) case involving breaches of their fiduciary duties, Joe and James transferred their shares to Mark for $100 (despite the fact that a contemporaneous appraisal valued the SAC Entities at nearly a million dollars). (*Id.*) Given the timing and circumstances of this transfer, and the terms of AMERCO's subsequent dealings with the SAC Entities (described below), Appellants contend that Joe and James have retained a pecuniary interest in the SAC Entities. (*Id.* at 332-38 (¶¶12-14, 27, 32, 34).)[6]

### 2. Defendants Forced AMERCO To Sell Self-Storage Properties To The SAC Entities At Unfair Prices

Beginning in 1994, the Defendants began to refocus AMERCO's efforts to expand its lucrative self-storage business to benefit the SAC Entities. Specifically, Defendants forced AMERCO to sell substantially all of its self-storage properties (and transfer all related corporate opportunities) to the SAC Entities in three different ways: (1) AMERCO sold existing self-storage facilities to the SAC Entities at unfairly low prices; (2) AMERCO identified self-storage facilities owned by third parties and financed the SAC Entities' purchase of the self-storage properties; and (3) AMERCO identified raw land, developed it into thriving self-storage businesses and sold them to the SAC Entities. (*Id.* at 338-40 (¶¶36, 40).)

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[6] In addition to being Joe and James' brother, Mark served as an executive officer of AMERCO at all relevant times. There is no dispute that Mark, as both a fiduciary of AMERCO and the owner of record of the SAC Entities, stood on both sides of the Company's transactions with the SAC Entities. (App., Vol. 2, at 337-38 (¶34).)

By 2002, AMERCO had sold well over 200 self-storage properties to the SAC Entities. (*Id.* at 339-40 (¶¶40-42).) These were not arm's length transactions, nor were the properties sold at fair market value. (*See id.* at 341-43 (¶¶44-47).) Instead, the vast majority of AMERCO's sales to the SAC Entities were based upon AMERCO's "acquisition cost plus capitalized expenses." (*See id.*) This method is an inappropriate (and unfairly low) measure of value because it prevented AMERCO from ever realizing a profit on the sales, and it failed to account for appreciation, expected earnings potential, and other characteristics that would affect (*i.e.*, increase) the price in an arm's length transaction. (*Id.* at 341-42 (¶¶45-46).)[7]

Putting to rest any question regarding the legitimacy of these transactions, Defendants have admitted that the prices at which AMERCO sold properties to the SAC Entities were over $15 million *less* than their appraised values. (App., Vol. 13, at 2236.) Defendants further confessed that the properties were not publicly listed for sale, no other buyers were sought or considered, no competitive bidding procedures were employed and the terms of the transactions were never reviewed or approved by an independent committee.[8]

### 3. Defendants Caused AMERCO To Finance The SAC Entities' Development Of A Competing Enterprise

AMERCO subsidized the SAC Entities' purchases of self-storage properties (both from AMERCO and third parties). (App., Vol. 2, at 330-31 (¶¶2, 4), 343-44 (¶¶48-51).) From 1995 to 2002, Respondents forced AMERCO (and its subsidiaries) to provide over $600 million in non-recourse loans to Mark and the SAC Entities. (*Id.*) The SAC Entities, in turn, used these loans to acquire and develop self-storage properties in direct competition with AMERCO and its subsidiaries. (*Id.*) In the

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[7] Indeed, on some occasions, Mark and the SAC Entities simply "flipped" the self-storage properties to turn a quick profit. (App., Vol. 2, at 342-43 (¶¶46-47).)

[8] *See* AMERCO's Form DEF 14A, filed with the U.S. Securities and Exchange Commission on July 15, 2008, *available at* http://edgar.ir.edgar-online.com/fetchFilingFrameset.aspx?FilingID=6043917&Type=HTML, at pp. 29-30.

end, all of the benefits of property ownership – such as appreciation, tax benefits, net cash flow and other value in the transferred properties – resided with the SAC Entities. On the other hand, all of the risks associated with financing these acquisitions – such as the possibility of cash flow not meeting debt service – remained with AMERCO and its subsidiaries, the holders of the non-recourse loans. (*Id.* at 344-45 (¶¶52-53).)

#### 4. The SAC Entities Exploited AMERCO's Resources

After the SAC Entities acquired the self-storage properties, the SAC Entities entered into "management agreements" with U-Haul. These "management agreements" required U-Haul to upgrade and manage existing facilities on behalf of the SAC Entities. (*Id.* at 346-47 (¶¶58-59).) Indeed, under these "management agreements," U-Haul runs all aspects of the self-storage business, and the properties operate under the U-Haul trade name. (*Id.*) In return, the SAC Entities pay U-Haul a "management fee" equal to six percent of the "gross revenue" generated from the self-storage property.[9] Despite the fact that AMERCO and its subsidiaries performed all of the work associated with identifying, developing, financing and operating the self-storage facilities, the remainder of the revenue (*i.e.*, 94%), is retained by Mark and the SAC Entities.

### B. The *Goldwasser* Case

The claims in *Goldwasser* arose out of entirely different alleged misconduct, and were asserted by other shareholders many years ago. Simply put, *Goldwasser* has *nothing* to do with this case.

#### 1. The Events Precipitating *Goldwasser*

In 1988, the plaintiffs in an Arizona state court litigation challenged a scheme in which the defendants issued stock to select employees who were loyal to Joe Shoen, and in exchange, the employees gave Joe proxies to vote their shares (the

[9] On many occasions, however, the SAC Entities used AREC and U-Haul resources to conduct their business without *any* consideration. (App., Vol. 2, at 345-46 (¶¶54-57).)

"Shares Litigation"). (*See, e.g.*, App., Vol. 9, at 1672-74, 1712-13 (¶¶2-3), 1851-52 (¶¶2-3).) The plaintiffs alleged that the defendants improperly seized control of AMERCO to thwart a takeover attempt. *Id.*

Before the Shares Litigation went to trial, the defendants caused AMERCO to adopt an agreement indemnifying them and holding them harmless from any judgment. (*See, e.g., id.* at 1672-74, 1712-13 (¶3), 1851-52 (¶3).) In 1993, after the indemnity was executed but before the Shares Litigation went to trial, AMERCO conducted a preferred stock offering. (*Id.* at 1672-74, 1713-16 (¶¶4-6), 1727-28 (¶¶30-31), 1852-54 (¶¶4-6).) AMERCO's disclosures stated that the defendants did not expect the Shares Litigation to result in a material loss to the Company, but made no mention of the indemnity agreement or its potential impact on AMERCO. (*Id.*)

On October 7, 1994, the jury in the Shares Litigation returned a verdict against defendants for $1.4 billion, and $70 million in punitive damages against Joe Shoen personally. (*See id.*) Only after the verdict was rendered did AMERCO disclose the existence (and significance) of the indemnity agreement. Thereafter, AMERCO's stock price plummeted almost 45%.

**2. The Federal Securities Class Actions And *Goldwasser***

Three groups of AMERCO preferred stock purchasers filed separate putative class actions in federal court in Nevada, charging the defendants with violating the federal securities laws. (*Id.* at 1671, 1710-848.) The revelation of the indemnity agreement and the initiation of the securities fraud cases, in turn, prompted *Goldwasser*. (*Id.* at 1674, 1850-74.)

The plaintiffs in *Goldwasser* alleged that AMERCO management (Joe, James, Mark, Dodds, Herrera, Carty and Bayer – the "*Goldwasser* Individual Defendants") breached their fiduciary duties by adopting the indemnification agreement, making misrepresentations about the prospect of material loss to AMERCO in the Shares Litigation and exposing the Company to potential liability for securities fraud. (*Id.* at 1857-60 (¶14), 1869-71 (¶¶28-35).)

Neither the securities class actions nor *Goldwasser* was actively litigated. (*Id.* at 1675-76, 1876-87; Vol. 10, at 1888-936.) Some of the *Goldwasser* Individual Defendants never even responded to the complaints; others filed motions to dismiss that were never fully briefed. (*See, e.g.,* App., Vol. 9, at 1675.) After the four cases were consolidated in April 1995, they were transferred to a federal court in Arizona, where they were stayed pending settlement discussions. (*See id.* at 1675, 1887 (#118); Vol. 10, at 1902-06 (#s 25, 86), 1908-47.)

### 3. The Securities Class Actions Are Dismissed And *Goldwasser* Is Settled

By October 1995, two significant developments had occurred that significantly impacted the claims asserted in the securities fraud cases. First, several of the *Goldwasser* Individual Defendants filed for bankruptcy when the plaintiffs in the Shares Litigation refused to stay execution of the judgment. (App., Vol. 9, at 1675, 1678-79.) Second, AMERCO's preferred stock price had rebounded, limiting the ability of the class action plaintiffs to recover damages. (*Id.* at 1678.) Accordingly, the plaintiffs in the class actions dismissed their claims without prejudice to AMERCO's other shareholders. (*See* App., Vol. 10, at 1949-58.)

Once the securities cases were dismissed, the only viable claim remaining in *Goldwasser* was for breach of fiduciary duty arising out of the approval of the indemnity agreement. (*See* App., Vol. 9, at 1678-79.) This claim was resolved by a Stipulation of Settlement dated October 27, 1995 (the "*Goldwasser* Stipulation"). (*Id.* at 1669-708.) Pursuant to the terms of the *Goldwasser* Stipulation, the defendants agreed to adopt board resolutions requiring, among other things, independent legal counsel to assess demands for indemnification. (*See id.* at 1676, 1684, 1695-700.) This "therapeutic" relief constituted the "benefit" to AMERCO under the agreement. (*Id.* at 1679.) In return, the shareholder plaintiffs in *Goldwasser* provided a limited release, recovered their attorneys' fees and costs, and agreed to dismiss their suit. (*Id.* at 1684-86.)

The *Goldwasser* Stipulation was filed on October 27, 1995. (*Id.* at 1669; Vol. 10, at 1916 (#129), 1929-35.) The parties did not provide notice of the settlement to other shareholders pursuant to Federal Rule of Civil Procedure 23.1, and the court did not conduct a "fairness hearing." (*See id.*). Instead, the court signed the proposed judgment that the parties attached to the *Goldwasser* Stipulation a week later, dismissing the case with prejudice. (*See* App., Vol. 9, at 1705-08; Vol. 10, at 1916, 1960-63.)[10]

**4. Defendants' Conduct Following *Goldwasser***

The Defendants' statements and actions since *Goldwasser* demonstrate that they never intended (nor understood) the *Goldwasser* Stipulation to be dispositive of the derivative claims alleged in this case. Indeed, in the six years this case has been pending, the parties have submitted hundreds of pages of legal briefing, and AMERCO has completed a Chapter 11 reorganization. Not once in *any* of these proceedings did *any* of the Defendants contend that *Goldwasser* was dispositive of this case.

To the contrary, as Defendants made abundantly clear in their original motions to dismiss: ***"Defendants are <u>not</u> arguing that the settlement in Goldwasser***

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[10] The only connection between *Goldwasser* and the claims in this case is Exhibit 2 of the *Goldwasser* Stipulation. As part of the negotiations leading to the *Goldwasser* settlement, the defendants agreed to confirm certain details regarding specific related-party transactions, including the initial handful of transactions between AMERCO and the first two SAC Entities. Exhibit 2 of the settlement agreement is a three-page letter that describes – in limited detail – AMERCO's transactions to date with (among other related companies) the two SAC Entities that existed at that time. As of the date of the settlement, however, AMERCO had only engaged in a very small number of transactions with the SAC Entities; the vast majority of the transactions took place years later. In this case, the District Court apparently based its holding on the fact that "Exhibit 2" is referenced in the definition of "Released Claims." (*See* App., Vol. 14, at 2721.) However, there is no express reference to the SAC Entities (or the self-dealing transactions) in the settlement agreement itself; and AMERCO's dealings with the SAC Entities did not form the basis of *any* of the claims asserted in *Goldwasser*. In any event, as discussed below, the *Goldwasser* settlement was entered into without notice to AMERCO's other shareholders pursuant to Federal Rule of Civil Procedure 23.1. Moreover, the plain language of the *Goldwasser* Stipulation explicitly (and repeatedly) states that the only parties releasing any claims (and the only parties against whom settlement and release may be asserted) are the Goldwassers. Thus, *Goldwasser* cannot have any impact on the claims asserted in this action.

***released the claims asserted here."*** (App., Vol. 1, at 136 (emphasis added).) Putting any remaining question to rest, the First Amended Joint Plan of Reorganization of AMERCO and AREC (the "Plan") – submitted to and approved by the bankruptcy court in 2004 – expressly *excluded* the claims in this lawsuit from the Exculpation and Release provisions of the Plan:

> Notwithstanding anything in this Plan to the contrary, the confirmation of this Plan ***shall not . . . enjoin, impact or affect the prosecution of the Derivative Actions*** . . . except that the Debtors and the Reorganized Debtors shall retain the right to object to the allowance of any Claim filed in the Chapter 11 Cases . . . related to the Derivative Actions . . . .

*See* App., Vol. 6, at 1053-54 (¶1.55), 1086 (¶11.4(d)), 1101 (¶15) (emphasis added).) To date, the only person who has understood *Goldwasser* as being dispositive of the derivative claims in this case is the judge who dismissed this action with prejudice (twice).

## V. ARGUMENT

The District Court's dismissal "is subject to a rigorous standard of review on appeal," *i.e.*, *de novo* review. (*E.g.*, *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. Adv. Rep. 21, 181 P.3d 670, 672 (2008); *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (citations omitted).)

### A. *Goldwasser* Cannot Have *Res Judicata* Effect On This Case As A Matter Of Law

Federal Rule of Civil Procedure 23.1 provides that a derivative "action shall not be dismissed or compromised without the approval of the court, and ***notice*** of the proposed dismissal or compromise ***shall be given to shareholders*** or members in such manner as the court directs." (FED. R. CIV. P. 23.1 (emphasis added); *see also* NEV. R. CIV. P. 23.1 (same); 16 ARIZ. REVISED STAT., Rule 23.1 (same).) Due process mandates strict adherence to these requirements. (*See Cramer v. Gen. Tel. & Elecs. Corp.*, 582 F.2d 259, 268-69 (3d Cir. 1978); *see also Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993) (not only "must" notice be given, but "[t]o satisfy

due process, the notice 'must be sufficiently informative and give sufficient opportunity for response'") (citation omitted).)[11]

Except in rare circumstances not present here (*e.g.*, where a corporation has been dissolved, a stipulated dismissal is without prejudice or where there is full recovery on an alleged claim),[12] the notice requirements of Rule 23.1 are a mandatory prerequisite for any settlement intended to bind absent shareholders. (*Bell Atl. Corp.*, 2 F.3d at 1317; *Maher v. Zapata Corp.*, 714 F.2d 436, 450 (5th Cir. 1983); *Lewis v. Knutson*, 699 F.2d 230, 240 (5th Cir. 1983); *Cramer*, 582 F.2d at 269; *Phillips v. Tobin*, 548 F.2d 408, 415 (2d Cir. 1976); *Papilsky v. Berndt*, 466 F.2d 251, 257 (2d Cir. 1972); *Prudential-Bache Secs., Inc. v. Matthews*, 627 F. Supp. 622, 624 (S.D. Tex. 1986); *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1026-27 (N.D. Ill. 1981); *Haberman v. Tobin*, 480 F. Supp. 425, 426-27 (S.D.N.Y. 1979); *Grima v. Applied Devices Corp.*, 78 F.R.D. 431, 431-32 (E.D.N.Y. 1978); *Blau v. Reidy*, No. 68 Civ. 892, 1968 U.S. Dist. LEXIS, at **2-3 (S.D.N.Y. Apr. 29, 1968).)

Rule 23.1's notice provisions promote two fundamentally important policies. *First*, notice protects the interests of both the corporation and its shareholders:

> The wisdom of this rule is clear. Although a derivative action is brought by a single shareholder, the named plaintiff represents both the corporation itself and the entire class of stockholders. Notice is essential to ensure that the dismissal of the derivative action comports with the best interests of the corporation and its shareholders.

(*Cramer*, 582 F.2d at 268-69; s*ee also Lewis*, 699 F.2d at 240.) Notice protects the

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[11] These provisions, which are intended to ensure that the interests of absent parties are adequately represented, have their genesis in the intersection of the "principle of general application of Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party" and "due process which the Fifth and Fourteenth Amendments require." (*See generally Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).)

[12] *See, e.g., Katz v. Aspinwall*, 342 F. Supp. 286 (N.D. Ala. 1971), *aff'd per curiam*, 459 F.2d 1045 (5th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); *Plaskow v. Peabody Int'l Corp.*, 95 F.R.D. 297 (S.D.N.Y 1982); *Sheinberg v. Fluor Corp.*, 91 F.R.D. 74 (S.D.N.Y 1981); *Daugherty v. Ball*, 43 F.R.D. 329 (C.D. Cal. 1967).

corporation and its shareholders "against the loss of a valid claim by a plaintiff who is incompetent, in collusion with the wrongdoers, or who simply grows 'faint-hearted' at the prospect of continued litigation." (*Colan*, 524 F. Supp. at 1025; *see also Cramer*, 582 F.2d at 269 (same); *Papilsky*, 466 F.2d at 258 (same).) Notice also is necessary to "fairly apprise [shareholders] of the terms of the proposed settlement and of the options that are open to them." (*Maher*, 714 F.2d at 451 (citations omitted).)

*Second*, Rule 23.1 affords "the district court the opportunity to receive the benefit of 'that broader information which comes from receiving advice as to the views of *all* parties concerned and from considering evidence proffered by them upon the relevant points of the case.'" (*Maher*, 714 F.2d at 452 (quoting *Cohen v. Young*, 127 F.2d 721, 725 (6th Cir. 1942) (emphasis added).) This policy is critical; it provides "the court and other shareholders . . . the opportunity to supervise . . . plaintiff's conduct of the suit before the settlement or judgment becomes final and binding on the corporation." (*Colan*, 524 F. Supp. at 1025.) In fact, as noted above, notice not only must be given, but it must be meaningful:

> Notice to shareholders of a hearing to review the compromise of a derivative suit must be structured in terms of time and content to enable shareholders to rationally decide whether they should intervene in the settlement proceedings or otherwise make their views known and, if they choose to do so, to have sufficient opportunity to prepare their position.

(*Milstein v. Werner*, 57 F.R.D. 515, 518 (S.D.N.Y. 1972); *see also Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324-25 (10th Cir. 1984).)[13]

Furthermore, before a settlement of a derivative action may be approved, a court must independently and objectively analyze evidence, the circumstances of the

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[13] Failure to give notice prevents a settlement from having any preclusive effective, even "against the *same defendants*, alleging the *same wrong*, and involving the *same factual context*." (*Colan*, 524 F.Supp. at 1024-27 (emphasis added) (concluding that "notice should be a precondition to the application of *res judicata* following any dismissal of a derivative suit").)

case and a variety of other factors to determine whether the settlement is in the best interests of the corporation and those whose claims will be extinguished. (*See, e.g.*, *In re Cendant Corp., Derivative Action Litig.*, 232 F. Supp. 2d 327, 332 (D.N.J. 2002); *Fricke v. Daylin, Inc.*, 66 F.R.D. 90, 97-98 (E.D.N.Y. 1975).) The court cannot simply "rubber-stamp" a derivative settlement; rather, it must consider the proposed settlement in view of the submissions of the parties, as well as the objections filed in response to the notice, at a "fairness hearing." (*See, e.g.*, *Howington v. Ghourdjian*, 208 F. Supp. 2d 892, 894-95 (N.D. Ill. 2002); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996).)

In this case, it is undisputed that the parties to *Goldwasser* did not provide notice of the *Goldwasser* Stipulation to AMERCO's other shareholders. Nor were any of AMERCO's other shareholders given an opportunity to object in the district court to the settlement (or even be heard). Instead, the *Goldwasser* Stipulation was filed on October 27, 1995 without briefing, and the proposed judgment was signed (and the case was dismissed) *one week later* without any proceeding, much less the required Rule 23.1 "fairness hearing." (*Compare* App., Vol. 9, at 1669; Vol. 10, at 1916 (#129), 1929-35 *with* App. Vol. 9, at 1705-08; Vol. 10, at 1916, 1935, 1960-63.)

The failure to provide notice of, and an opportunity to object to, the *Goldwasser* Stipulation ends the analysis. Standing alone, this establishes that the District Court's ruling – that the claims in this case (asserted by Plaintiffs who were not parties to *Goldwasser*) are barred by the prior settlement – is unsupportable as a matter of law. (*See Cramer*, 582 F.2d at 269 ("Absent such notice, the voluntary dismissal will ***not*** bar a subsequent action by a shareholder who did not participate in the prior suit" because without notice a "voluntary dismissal cannot be given res

judicata or collateral estoppel effect.") (emphasis added); *see also Papilsky*, 466 F.2d at 256; *Colan, supra,* 524 F. Supp. 1023.)[14]

### B. The Plain Language Of The *Goldwasser* Release Provides An Independent Basis For Reversal

The District Court's dismissal of this case suffers from another fatal flaw. The plain language of the *Goldwasser* Stipulation makes absolutely clear that the only parties who released any claims – and the only parties against whom a settlement and release defense may be asserted – are the individual plaintiffs in *Goldwasser*.

#### 1. The *Goldwasser* Release Expressly Excludes Claims Belonging To Other AMERCO Shareholders

By its express terms, the release in the *Goldwasser* Stipulation does not release any claims of AMERCO shareholders *other* than the Goldwassers and their "Related Parties." The *Goldwasser* Stipulation defines "Released Claims" as "any and all 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 . . . ." (App., Vol. 9, at 1682 (§§VI.A.12) (emphasis added).) The Stipulation defines "Plaintiffs" as "Bernard L. and Frieda Goldwasser, Co-Trustees

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[14] Defendants have argued that one of the Plaintiffs, Paul, received notice of the *Goldwasser* Stipulation because he filed a claim in the bankruptcy proceedings of Defendants Joe, James, Dodds and Carty, and the *Goldwasser* Stipulation was attached to the debtors' Second Amendment Modifying the Amended and Restated Plans of Reorganization Proposed by the Debtors (the "Restated Plans"). By even advancing this argument, Defendants concede that AMERCO never provided notice pursuant to Rule 23.1. Indeed, the Restated Plans were sent only to claimants in the bankruptcy proceedings, and they were not sent until November 3, 1995, the same day the Arizona federal court entered the judgment in *Goldwasser*. (App., Vol. 11, at 2065-139.) In any event, Paul filed a conditional objection to the extent the *Goldwasser* Stipulation "affect[s] any rights or claims that he may have against AMERCO or other parties." (*Id.* at 2147-50.) A subsequent order by the bankruptcy court acknowledged that the *Goldwasser* Stipulation "does not affect any rights or claims which Paul . . . may claim to have against AMERCO or any of the Parties." (*Id.* at 2153-54 (¶D).)

of the Goldwasser Family Trust, and Bernard Goldwasser, IRA, and their Related Parties." (*Id.* at 1681 (§VI.A.9).)[15]

Even if this language, on its own, were ambiguous, two additional provisions in the *Goldwasser* Stipulation confirm the narrow scope of the release (and the fact that it has no bearing on this case). *First*, the release *itself* expressly provides:

> [T]his definition [of "Released Claims"] ***does not include*** any Claim, ***either individual or derivative***, of any AMERCO shareholder ***other than the Plaintiffs herein***.

(*Id.* at 1683 (§VI.A.12(d)) (emphasis added).) *Second*, the *Goldwasser* Stipulation explains that the defendants being released by the settlement may:

> [F]ile and use the Stipulation and/or the Judgment, and/or any document executed pursuant to or in furtherance of the Stipulation or the Settlement, in any action that may be brought against them in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim ***against the Plaintiffs only***.

(*Id.* at 1690 (§IX, lines 7-22) (emphasis added).) Again, "Plaintiffs" is defined as the Goldwassers and their "Related Parties." (*Id.* at 1681 (§VI.A.9).)

Thus, the plain language of the *Goldwasser* Stipulation makes the intent of the parties unmistakably clear: the scope of the release was intended to apply only to the Goldwassers and their Related Parties, and correspondingly, the individuals against whom a settlement and release defense may be asserted was intended to be limited to

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[15] "Related Parties" is defined as "each of a Person's past or present officers, directors, employees, partners, principals, agents, underwriters, 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 venturers, 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." (*See* App., Vol. 9, at 1681 (§VI.A.11).) It is undisputed that the Plaintiffs in this action are not the Goldwassers' "Related Parties," as defined in the *Goldwasser* Stipulation.

the Goldwassers and their Related Parties. In fact, the narrow scope of the release may explain why AMERCO did not provide notice to other shareholders; consistent with the plain language of the *Goldwasser* Stipulation, the release never was intended to release any claims ("individual or derivative") that could be asserted by shareholders *other than* the Goldwassers and their Related Parties. And, as set forth above, Respondents' own submissions – both in this case and in AMERCO's intervening bankruptcy – indicate that the Company itself understood (and intended) that the release in the *Goldwasser* Stipulation would be limited to the Goldwassers and their Related Parties. (*See Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (the intentions of the parties to a contract may be inferred from their "subsequent acts and declarations").)

### 2. The District Court Disregarded The Plain Language Of The Settlement And Manufactured Its Own Terms

It is black letter law that a settlement agreement is a contract, and its construction and enforcement are governed by principles of contract law. (*See May*, 121 Nev. at 672, 119 P.3d at 1257.) Moreover, it is a fundamental canon of construction that contracts should be read to give effect to all of their terms. (*Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) ("A basic rule of contract interpretation is that 'every word must be given effect if at all possible.'") (citation omitted).) Accordingly, "'[a] court should not interpret a contract so as to make meaningless its provisions.'" (*See Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978) (citation omitted).) On the other hand, a court may not create its own terms in interpreting a contract. (*See Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 322-24, 182 P.2d 1011, 1016-17 (1947).)

Notwithstanding these established principles of law, the District Court in this case reasoned:

> Plaintiffs . . . argue this action may proceed because the settlement expressly excluded "any claim either individual or derivative of any Amerco [sic] shareholder other than the Plaintiffs herein." ***The language***

> ***"any claim," must, necessarily, be read to mean "any other claim."*** To hold otherwise would render the release meaningless, because it would prohibit only a small portion of the shareholders (the Plaintiffs of the *Goldwasser* litigation) from again raising said claims, while, at the same time, permitting each individual remaining shareholder to bring a new derivative action seeking to relitigate identical claims. Such an arrangement would be nonsensical and provide no benefit to Amerco [sic] as a settling party.

(App., Vol. 14, at 2721 (lines 11-19) (emphasis added).)

To support its strained holding, the District Court was forced to ignore multiple provisions in the *Goldwasser* Stipulation that expressly (and repeatedly) restricted the scope of the release, and instead manufacture its own terms (*i.e.*, "[t]he language 'any claim,' must, necessarily, be read to mean 'any other claim.'"). In doing so, the District Court disregarded the most basic principles of contract interpretation, and it augmented the scope of the release far beyond what its plain terms – or due process – can possibly support. The District Court's observation that the alternative would be "nonsensical" is itself nonsensical.[16] The plain language of the settlement coupled with the subsequent conduct of the parties (including the Company's decision not to provide notice to other shareholders) illustrate that the parties intended the release to be limited to the Goldwassers and their "Related Parties."

### 3. The District Court Dismissed Claims Based Upon Transactions That Post-Dated *Goldwasser*

What makes the District Court's application of the *Goldwasser* settlement in this case even more curious is that it did not even attempt to address the fact that the overwhelming majority of transactions that give rise to this action occurred years

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16 The District Court simply was incorrect in stating that the *Goldwasser* Stipulation "provide[d] no benefit to Amerco as a settling party" because such "an arrangement" would allow other shareholders to "relitigate identical claims." As an initial matter, this case does not involve "identical" claims. More importantly, the benefit AMERCO received from the *Goldwasser* Stipulation – the bargained-for "therapeutic relief" – is not impacted by this litigation. (*See* App., Vol. 9, at 1679 (lines 2-8), 1684 (¶1).)

after the *Goldwasser* settlement was executed (and involved SAC Entities that did not even exist at the time of *Goldwasser*). It is clear from the language of the *Goldwasser* Stipulation that the parties never intended to release claims based upon *future* transactions. Indeed, the *Goldwasser* Stipulation defines "Released Claims" as claims "that *have been* or that *could have been* asserted" in the *Goldwasser* case "or the related securities class actions . . . ." (App., Vol. 9, at 1682 (§VI.A.12, line 7) (emphasis added).)[17]

Simply put, a judgment cannot preclude claims based on events that occurred after the date it was entered. (*See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."); *Frank v. United Airlines*, 216 F.3d 845, 851 (9th Cir. 2000) ("A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim."); *Int'l Techs. Consultants, Inc. v. Pilkington PLC,* 137 F.3d 1382, 1388 (9th Cir. 1998) ("By winning the first action, the defendants 'did not acquire immunity in perpetuity from the antitrust laws.'") (citation omitted).)

The Defendants certainly appreciated the significance of the fact that most of the self-dealing transactions in this case post-dated the *Goldwasser* Stipulation when they advanced their arguments in the District Court:

> All of plaintiffs' claims based on any of the SAC transactions ***as of October 27, 1995***, are precluded because these claims were released by the Goldwasser settlement . . . . Thus, all claims based on any SAC

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[17] The definition of "Unknown Claims" is consistent. (App., Vol. 9, at 1683 (§VI.A.16, lines 12-14) ("Unknown Claims" means any Released Claims which AMERCO or any Plaintiff does not know or suspect to *exist* in his, her or its favor, or derivatively in favor of AMERCO, *at the time* of the release . . . .") (emphasis added).)

> transactions through October 27, 1995 (there were 24 transactions in 1995) should be dismissed.

(App., Vol. 5, at 961-62 (emphasis added); Vol. 7, at 1321-23.) In fact, at the hearing on Defendants' motions to dismiss, even the Court agreed that whatever the impact of the *Goldwasser* Stipulation, it simply could not bar claims arising out of transactions that had not yet occurred. (App., Vol. 8, at 1542 (144:9-14) and 1545 (147:7-12) ("[T]he [*Goldwasser*] release does not release any future claim"; "I'll at least agree with you that the released claims would not include . . . claims subsequent to the [*Goldwasser*] agreement.").)

Nevertheless, the District Court dismissed all of the claims against AMERCO's officers and directors based upon the *Goldwasser* Stipulation, even through the vast majority of the transactions with the SAC Entities occurred years *after* the *Goldwasser* Stipulation. (*See* App., Vol. 2, at 339-47 (¶¶40-60).) Claims based upon transactions with the SAC Entities that occurred after October 27, 1995 cannot possibly have existed "at the time of the [October 27, 1995 *Goldwasser*] release." To be sure, most of the SAC Entities that participated in the self-dealing scheme did not even exist at the time of the *Goldwasser* settlement. (*See id.*) Thus, even if the *Goldwasser* Stipulation were relevant to this case (it is not), it has absolutely no bearing on those claims premised upon self-dealing transactions that post-date the settlement.

### C. Plaintiffs Have Standing To Pursue Claims Against The SAC Entities On AMERCO's Behalf

Plaintiffs alleged claims for breach of fiduciary duties, usurpation of corporate opportunities, wrongful interference with prospective economic advantage, unjust enrichment and abuse of control against Mark and the SAC Entities. (App., Vol. 2, at 372-79 (¶¶138-172).) Mark, as both an AMERCO executive officer and the controlling shareholder of the SAC Entities, stood on both sides of the challenged

transactions.[18] Accordingly, Mark is liable for "classic" self dealing. *See, e.g.*, *Solomon v. Armstrong*, 747 A.2d 1098, 1114 (Del. Ch. 1999) ("In a classic self-dealing transaction, the corporation engages in any sort of contract or deal with an individual or group of officers and directors."); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. Supr. 1993) (same). The SAC Entities – which are owned by and operate through Mark – are liable for aiding and abetting Defendants' breaches of their fiduciary duties.[19]

Notwithstanding the SAC Entities' liability for their knowing participation in the self-dealing scheme, the District Court dismissed these derivative claims on the grounds that Plaintiffs (on behalf of AMERCO) "lack standing" because AMERCO "participated in the challenged transactions." (*See* App., Vol. 14, at 2721-22.) The District Court provided virtually no analysis in support of this holding. Instead, it simply quoted a readily distinguishable bankruptcy court decision from the Second Circuit – *In re Mediators, Inc.*, 105 F.3d 822, 826 (2d Cir. 1997) – and essentially applied an *in pari delicto* affirmative defense at the pleading stage. In reaching this holding, the District Court completely ignored established Nevada law, which differs substantially from the New York law applied in *Mediators*, and improperly imputed

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[18] Mark Shoen is an executive officer of AMERCO, with the title President of Phoenix Operations of U-Haul. (App., Vol. 2, at 332-3 (¶13), 337-8 (¶34).) From 1990 until 1997, Mark Shoen served on the AMERCO and the U-Haul Board of Directors. (*Id.*)

[19] Courts have long recognized claims for aiding and abetting breaches of fiduciary duties. (*See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. Supr. 2001); *Jackson Natl. Life Ins. Co. v. Kennedy*, 741 A.2d 377, 391-92 (Del. Ch. 1999); *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 120 (Del. Ch. 1999); *Weinberger v. Rio Grande Industs. Inc.*, 519 A.2d 116, 131 (Del. Ch. 1986).) To plead a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." (*Malpiede*, 780 A.2d at 1096 (internal quotations omitted).) Moreover, "[a] court can infer a non-fiduciary's knowing participation . . . if a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges specific facts from which [the] court could reasonably infer knowledge of the breach." (*Jackson*, 741 A.2d 391-92.) In this case, Plaintiffs allege that Mark breached his fiduciary duties in an inherently wrongful manner, and he owned and controlled the beneficiaries of the self-dealing scheme (*i.e.*, the SAC Entities). Thus, the Court need not "infer" the SAC Entities' "knowing participation" in the scheme, because they act and operate through the same fiduciary who was engaged in "classic" self-dealing transactions.

Defendants' misconduct to AMERCO. The "standing" ruling in the District Court's dismissal order, premised solely upon its finding that AMERCO "participated" in the challenged transactions, must be reversed.

### 1. The District Court's Holding Disregards Established Nevada Law And Fundamental Principles Of Equity

The District Court's application of an *in pari delicto* defense to exonerate the beneficiaries of AMERCO's looting squarely contravenes Nevada law. This Court has directed lower courts not to be "so enamored with the [L]atin phrase *'in pari delicto'* that they blindly extend the rule to every case where illegality appears somewhere in the transaction." (*Shimrak v. Garcia-Mendoza*, 112 Nev. 246, 252, 912 P.2d 822, 826 (1996) (citing *Magill v. Lewis*, 74 Nev. 381, 386, 333 P.2d 717, 719 (1958).) Rather, "[t]he fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered." (*Id.*) As this Court has explained, "the rule should *not* be applied" where:

> [1] the public cannot be protected because the transaction has been completed, [2] where no serious moral turpitude is involved, [3] where the defendant is the one guilty of the greatest moral fault and [4] where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff . . . . (*Id.* (emphasis added).)

Here, the District Court did not consider *any* of these factors. Had it done so, it could not have "extend[ed] the [*in pari delicto*] rule" to this case. As discussed above, the transactions with the SAC Entities have been completed, and the SAC Entities have acquired a thriving self-storage enterprise at admittedly unfair prices, to the detriment of AMERCO and its minority shareholders. Nor can AMERCO, which is controlled by the Shoen Insiders, be said to have "moral turpitude." Mark (who stood on both sides of the challenged transactions) and the SAC Entities (which he owns and controls and which were the beneficiaries of the scheme) undoubtedly are guilty of the greatest moral fault. And, as a result of the self-dealing, the SAC Entities – by Defendants' own admission – have been unjustly enriched at the

expense of AMERCO and its innocent minority shareholders. The SAC Entities cannot, on one hand, reap the benefits of Mark's illegal conduct, *and then under the guise of equity*, prevent AMERCO's minority shareholders from seeking redress by attempting to impute this same wrongdoing to AMERCO.

In short, the District Court's failure to consider, much less analyze, the factors it is charged with evaluating with respect to the *in pari delicto* defense mandates reversal.[20]

### 2. Under The "Adverse Interest" Exception, Defendants' Misconduct Is Not Imputable To The Company

The District Court also should not have *even reached* the issue whether an *in pari delicto* defense applied because the "adverse interest" exception prohibits Defendants' misconduct from being imputed to AMERCO. "Under Nevada law, . . . [a]n officer or director's knowledge will not be imputed to the corporation when the agent is acting on his own behalf and not on behalf of the corporation." (*USACM Liquidating Trust*, 2008 WL 4790112, at *2; *see also Keyworth v. Nev. Packard Mines Co.*, 43 Nev. 428, 186 P. 110, 113 (1920) (the knowledge of officers and agents of the corporation while acting for themselves, and not for the corporation, are not imputable to the corporation).) This is particularly true in cases – such as this one – that involve self-dealing or corporate looting, which "is the 'classic example' of an agent acting adversely to the corporation." (*USACM Liquidating Trust*, 2008 WL 4790112, at *2.)[21]

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[20] The District Court's holding is even more troubling considering the standard it applied, *i.e.*, dismissing Plaintiffs' claims simply because AMERCO had "participated" in the transactions. Mere "participation" by a corporation in a challenged transaction is neither remarkable nor can it serve as the basis for dismissing a derivative action. Indeed, derivative claims *typically* arise where management causes the corporation to engage in conduct harmful to the company. (*See, e.g., Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 19, 21, 62 P.3d 720, 732, 734 (2003).) The standard crafted by the District Court would completely gut the effectiveness of a derivative action under these circumstances, and "leave the constituencies of corporate entities . . . with no recourse when their corporation is injured by its managers." (*See In re HealthSouth Corp. Shareholders Litig.*, 845 A.2d 1096, 1107-8 (Del. Ch. 2003).)

[21] The *USACM* case involved the successor-in-interest to an entity (USACM) in the business of originating and servicing loans. (2008 WL 4790112, at *1.) The successor

The Defendants in this case acted for the benefit of the SAC Entities, which are owned and controlled by the very insider who stood on both sides of the challenged transactions. By selling AMERCO's valuable self-storage assets to the SAC Entities at unfair prices, and by providing the SAC Entities with the financing they needed to develop a competing self-storage enterprise, the Defendants acted directly *adversely* to AMERCO. Because the Defendants were acting to benefit the SAC Entities – and AMERCO was significantly harmed as a result of this misconduct – the "adverse interest" exception prevents the SAC Entities from imputing the Defendants' conduct to the Company. For this additional and independent reason, the District Court's order must be reversed. (*See, e.g., USACM Liquidating Trust*, 2008 WL 4790111, at **1-3.)

### 3. The District Court's Reliance On *Mediators* Was Misplaced

The District Court relied upon a single bankruptcy case from the Second Circuit, decided under New York law, to support its holding. The *Mediators* case, however, is not even remotely similar to this case and the District Court's reliance on that decision was fundamentally misplaced.

The *Mediators* decision is a bankruptcy case in which a creditors committee brought an adversary proceeding against Mediators' President and *sole* shareholder, and his wife (the Manneys), for breach of fiduciary duties arising out of their purchase of the company's art collection at an unfair price. (*Id.* at 824-25.) The committee also sued Mediators' lawyers and bank for aiding and abetting the breaches of fiduciary duties. (*Id.*) Notably, the Court acknowledged that under the "adverse interest exception" the conduct of an agent acting adversely to his corporate principal's interest is not imputable. (*See id.* at 827.) However, the Court applied an

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sued USACM's auditors for aiding and abetting a breach of fiduciary duty by USACM's insiders, who allegedly misappropriated USACM's funds for their own purposes. (*Id.*) The auditors moved to dismiss, contending that the insiders' fraud was imputable to the plaintiff and plaintiffs' claims were barred by *in pari delicto*. (*Id.*) Applying Nevada law, the court denied the motion to dismiss, finding that the complaint adequately alleged that the insiders were acting adversely to USACM. (*Id.*, at **2-3.)

even narrower exception to the "adverse interest exception," frequently referred to as the "sole actor" rule:

> Because Manney was the sole shareholder and decision-maker of the Mediators, his orchestration of the art transfer rendered the Mediators a participant. Therefore, the Mediators has no standing to assert aiding-and-abetting claims against third parties for cooperating in the very misconduct that it had initiated.

(*Id.* at 826; *see also id.* at 827 ("Where, as here, a sole shareholder is alleged to have stripped the corporation of assets, the adverse interest exception to the presumption of knowledge cannot apply.").)

There are two critical facts that immediately set this case apart from *Mediators*. First, unlike in *Mediators*, the "third parties" whose conduct was exonerated by the District Court's order – the SAC Entities – are not legitimate "third parties," at least as far as the imputation analysis is concerned.[22] As discussed above, the SAC Entities were created by the Shoen Insiders for the purpose of siphoning off AMERCO's lucrative self-storage business, and they are owned and controlled by the very fiduciary who stood on both sides of the challenged transactions (*i.e.*, Mark). (*See, e.g.*, App., Vol. 2, at 330-31 (¶¶1-3), 332-33 (¶¶12-14), 334-35 (¶¶22-25), 337-38 (¶¶32-34).)[23] Second, the self-dealing scheme was

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[22] It is well established that insiders *themselves* cannot invoke the doctrine as a defense where they are acting adversely to the corporation's interests; by allowing the SAC Entities to invoke the *in pari delicto* defense, the District Court's ruling effectively violated this principle because the SAC Entities are owned and controlled by insider Mark. (*See HealthSouth*, 845 A.2d at 1107 (Del. Ch. 2003) (the "in pari delicto doctrine has been rejected in situations when corporate fiduciaries seek to avoid responsibility for their own conduct vis-à-vis their corporations."); *see also In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, No. 2:03-md-1565, 2009 WL 1322391 (S.D. Ohio May 11, 2009) (same).)

[23] The fact that the Shoen Insiders facilitated the self-dealing through the SAC Entities does not change the analysis. (*See, e.g., Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007) ("[T]ransactional creativity [] should not affect how the law views the substance of what truly occurred, or how the public shareholders' claim for redress should be characterized;" "equity will not permit a fiduciary to deprive his beneficiaries of their entitlement to seek direct redress for fiduciary misconduct by structuring a transaction so as to obscure that entitlement"); *In re Fortune Natural Res. Corp.*, 350 B.R. 693, 696 (Bankr. E. D. La. 2006) (holding that when the son of a director of the debtor is an insider "it would be both folly and a triumph of form over substance to hold that the LLC over which [the son] exerts

not orchestrated by AMERCO's sole shareholders. Indeed, AMERCO has thousands of minority shareholders who had absolutely no involvement in the Company's dealings with the SAC Entities. The "sole actor" exception therefore has no bearing on this case.[24] The District Court's reliance on an irrelevant case from another jurisdiction applying inapplicable law further exposes the plainly erroneous nature of its "standing" ruling.

### D. The District Court Improperly Dismissed This Case Based Upon Affirmative Defenses That Turn On Factual Issues

If the discussion above has illustrated anything, it is that the intent of the parties to the *Goldwasser* Stipulation, as well as the applicability of the *in pari delicto* doctrine, cannot be resolved at the pleadings stage. (*See, e.g., Anvui v. G.L. Dragon, LLC*, 123 Nev. 25, 163 P. 3d 405, 407 (2007) ("The parties' intentions regarding a contractual provision present a question of fact."); *USACM Liquidating Trust*, 2008 WL 4790112, *3 (determining whether an officer's knowledge and conduct should be imputed to a corporation for *in pari delicto* purposes is inappropriate at the pleading stage).

The fact that the District Court dismissed this case on the pleadings, without allowing Plaintiffs an opportunity to conduct discovery, provides an additional and independent basis for reversal. (*See, e.g., Cohen*, 119 Nev. at 22, 62 P.3d at 734 ("A complaint should not be dismissed unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief ... [and] when a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy.").)

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complete control is not an insider"); *see also Reno Club v. Young Inv. Co.*, 182 P.2d at 1022 ("Equity regards the substance and not the form.").)

[24] Indeed, the Second Circuit has confirmed that "[t]he sole actor rule does not apply [where the] managers involved in the fraud were not the sole shareholders of the corporation [and where there is no] finding that all shareholders were compliant in the fraud." (*In re CBI Holding Co.*, 529 F.3d 432, 453 n. 9 (2d Cir. 2008).)

## VI. REQUEST FOR REASSIGNMENT

Plaintiffs submit that Judge Adams' successive dismissals demonstrate that he has prejudged this case. In the interests of justice and efficiency, Plaintiffs respectfully request that this action be reassigned on remand. (*See, e.g., Levin v. Weatherstone Condo. Corp.*, 106 Nev. 307, 791 P.2d 450 (1990); *Wolzinger v. Eighth Jud. Dist. Ct.*, 105 Nev. 160, 168, 773 P.2d 335, 340 (1989).)

## VII. CONCLUSION

For the reasons discussed above, Appellants respectfully request the Supreme Court to reverse the District Court's dismissal in its entirety.

Dated: July 15, 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.

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I HEREBY CERTIFY that on the 15th day of July, 2009, I served the foregoing APPELLANTS' OPENING BRIEF by United States mail, postage prepaid to the following:

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