EXHIBIT "7"

No. 51629

In The

SUPREME COURT OF THE STATE OF NEVADA

IN RE AMERCO DERIVATIVE LITIGATION

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

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RESPONDENTS' ANSWERING BRIEF OF CHARLES J. BAYER, JOHN P. BROGAN, JOHN M. DODDS, JAMES J. GROGAN, RICHARD HERRERA, AND AUBREY JOHNSON

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants / Respondents Charles Bayer, John Brogan, John Dodds, James Grogan, Richard Herrera, and Aubrey Johnson (the "Director Defendants") write separately to present alternative bases for this Court to affirm the trial court's dismissal of the actions below.[1] The trial court correctly dismissed Plaintiffs' Amended Consolidated Verified Stockholders' Derivative Complaint ("Complaint") on the ground that the settlement and release reached in the *Goldwasser* litigation precluded the claims Plaintiffs have asserted here. Independent of the trial court's reasoning in support of its decision, the dismissal should also be affirmed for reasons briefed by the Director Defendants to, but not addressed by, the trial court.

Specifically, each cause of action asserted against the Director Defendants fails to state a claim upon which relief can be granted. Plaintiffs do not and cannot allege any specific facts showing that the Director Defendants – who are current and former outside directors of AMERCO – breached any of their fiduciary duties to AMERCO or derived any personal gain from the transactions upon which Plaintiffs' claims are based. Moreover, the Complaint itself sets forth facts showing that Plaintiffs' claims are barred by the applicable statutes of limitations. The Director Defendants moved on each of these alternative grounds for dismissal in the trial court. (Appellants'/Respondents' Joint Appendix ("App.") at 927-49.) The court below based its decision on the preclusive effect of the *Goldwasser* settlement and release, and thus did not expressly opine upon the other

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[1] The Director Defendants hereby join and incorporate by reference the arguments set forth in the brief filed by Nominal Defendant/Respondent AMERCO ("AMERCO"), which addresses the preclusive effect of the *Goldwasser* settlement and release as well as Plaintiffs' failure to allege demand futility. The Director Defendants also join and incorporate by reference (a) Part A of the argument in the Answering Brief of Defendants/Respondents William E. Carty, Edward J. Shoen and James P. Shoen ("Carty-J.&J. Shoen Defendants") Defendants," showing that the business judgment rule protects all of AMERCO's directors from liability in connection with the transactions at issue in this case, particularly in light of the fact that those very transactions had been approved by a federal judge in the *Goldwasser* case; and (b) Part II.A of the argument in the Answering Brief of Defendants/Respondents Mark Shoen and the SAC entities. To avoid duplication, the Director Defendants will not repeat those arguments here.

bases asserted by the Director Defendants in support of their motion to dismiss. Those bases are independent grounds for supporting dismissal of the Complaint against the Director Defendants.

Plaintiffs' Complaint challenges a series of transactions with the "SAC" entities, which were real estate holding companies involved in U-Haul's self-storage business operations. This lawsuit is a dispute about how AMERCO's management chose to structure and operate U-Haul's self-storage business, and as pointed out in more detail in the other appellees' briefs, there were good reasons for management's choice to structure the business the way it did. Whether one agrees with that choice or not, it was a business decision, and to the extent the Director Defendants are even alleged to have been involved in that decision at all,[2] Nevada law protects them from suit absent particularized allegations of fraud, intentional wrongdoing, or self-dealing.

Plaintiffs do not and cannot make any such particularized allegations against the Director Defendants with respect to any of their causes of action:

- Plaintiffs' First Cause of Action for breach of the fiduciary duty of loyalty is not supported by specific allegations that the Director Defendants engaged in "intentional misconduct, fraud or a knowing violation of law" as required by NRS 78.138(7) and this Court's prior decision in this case. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, & n. 60, 137 P.3d 1171, 1184 & n. 60 (Nev. 2006). Plaintiffs also fail to allege self-dealing because they do not and cannot allege that the Director Defendants personally benefited from the SAC transactions.
- Plaintiffs' Third Cause of Action for "breach of fiduciary duty: *ultra vires* acts" similarly fails to allege any self-dealing, intentional misconduct, fraud, or a knowing violation of law on the part of the Director Defendants. This cause of

[2] Plaintiffs allege that the AMERCO Board of Directors did not vote on whether to approve the subject transactions. (App. at 341, 350, ¶¶ 43, 69.) Plaintiffs contend that the Director Defendants were aware of the transactions generally, and that two of them were also on the boards of AMERCO subsidiaries that were involved in effectuating the transactions. (*Id.* at 348-50, ¶¶ 65, 67-68.)

action is further defective because Plaintiffs fail to allege facts demonstrating that the Director Defendants did anything that violated AMERCO's articles of incorporation, or that the SAC transactions were *ultra vires* acts.

- Plaintiffs' Fourth Cause of Action for wrongful interference with prospective economic advantage is deficient because (i) corporate officials acting on behalf of the corporation cannot be liable for interfering with the corporation's contracts as a matter of law, and (ii) the class of people whom Plaintiffs allege were prevented from forming a relationship with AMERCO – namely, customers who might have rented self-storage units or might have sold real estate to AMERCO – is overly speculative.
- The Sixth Cause of Action for abuse of control – assuming *arguendo* that Nevada even recognizes such a claim – fails for the same reason that the fiduciary duty claims fail, as the Director Defendants did not personally benefit from the alleged transactions.

Finally, Plaintiffs have alleged facts demonstrating that the Complaint is time-barred under Nevada's applicable statutes of limitations. The statutes of limitations that apply to Plaintiffs' claims are either three or four years. Although this action was commenced in 2002, the Complaint alleges that the SAC transactions were first entered eight years earlier, in 1994. (App. at 339, ¶ 38.) Throughout this period, AMERCO's SEC filings publicly disclosed the nature of the SAC transactions. Moreover, Plaintiff Paul Shoen gained actual knowledge of the facts regarding the SAC transactions when he re-joined AMERCO's Board almost twelve years ago, in January 1997. (*Id.* at 341, ¶ 43.) Accordingly, Plaintiffs' claims are time-barred.

In sum, dismissal of Plaintiffs' Complaint was proper, both for the reasons given by the district court and on additional independent grounds. The district court's judgment should therefore be affirmed on any or all of those grounds.

II.

STATEMENT OF ISSUES

In addition to the issues addressed in the briefs of AMERCO and the Carty – J. & J. Shoen Defendants, whether the trial court's judgment may be affirmed on alternative grounds, namely:

(1) that Plaintiffs / Appellants ("Plaintiffs") below failed to state a claim against the Director Defendants; and

(2) that the applicable statutes of limitations bar Plaintiffs' claims.

III.

STATEMENT OF THE CASE

The procedural history below is long and complicated, and is largely set forth in AMERCO's Brief. (AMERCO Brief IV.B.) We will not repeat that discussion here, but for purposes of this brief we note one additional point. There were a number of motions to dismiss the various pleadings in the trial court, including a motion by the Director Defendants on the grounds set forth in this brief, *i.e.*, that Plaintiffs had failed to state a claim and that the claims were time-barred (App. at 927-949), and motions by other Defendants arguing that Plaintiffs' claims were barred by the *Goldwasser* settlement (*id.* at 950-1005), and that Plaintiffs had failed to allege demand futility. (*Id.* at 382-407.) The trial court based its decisions on the preclusive effect of the *Goldwasser* settlement and release and, thus, did not expressly address either of the two other grounds advanced by the Director Defendants. (*Id.* at 2721)

IV.

STATEMENT OF RELEVANT FACTS

AMERCO is a holding corporation whose best-known subsidiaries comprise the "do-it-yourself" moving and storage businesses, the U-Haul System. (App. at 335-36, ¶ 27.) AMERCO is incorporated in the State of Nevada. (*Id.* at 332, ¶ 11.) The Director Defendants allegedly served on AMERCO's Board of Directors during the following time periods: John M. Dodds, from 1987 to present; Charles J. Bayer, from 1990 to present;

John P. Brogan, from 1998 to present; James J. Grogan, from 1998 to 2005; Richard Herrera, from 1991 to 2000; and Aubrey Johnson, from 1994 to 1998. (*Id.* at 333-34, ¶¶ 15, 17-21.)

Plaintiffs allege that the Director Defendants allowed AMERCO to enter into a series of transactions between 1993 and 2002 involving special purpose entities known as the "SAC" entities, which owned self-storage properties utilized by the U-Haul System. (*Id.* at 339-43, ¶¶ 39, 40-47.) These transaction are described in detail in AMERCO's brief. Plaintiffs also allege that AMERCO made loans to the SAC entities to help finance the acquisition of properties for the U-Haul System's self-storage business, and that AMERCO's subsidiaries, U-Haul and AMERCO Real Estate Company ("AREC"), contributed resources to assist the SAC entities in connection with the U-Haul self-storage business. (*Id.* at 343-46, ¶¶ 48-57.) Notwithstanding their extensive allegations about AMERCO's utilization of the SAC entities in connection with the U-Haul System's self-storage business operations, Plaintiffs inexplicably assert that the SAC entities were "a competing self-storage business under the U-Haul trade name." (*Id.* at 346-47, ¶¶ 58-60.)

None of Plaintiffs' general assertions against the Director Defendants is pled with particularity. Plaintiffs generally assert that the Director Defendants breached fiduciary duties to AMERCO and its stockholders by "assist[ing]" or "aiding and abetting" AMERCO management's structuring of these transactions, and by supposedly concealing alleged breaches of fiduciary duty by AMERCO's management. (*Id.* at 330-31, ¶¶ 1-3, and 373, ¶ 142.) Plaintiffs also assert that all the Defendants "concealed" the SAC transactions, but there are no specific allegations of any affirmative acts of concealment by anyone, let alone the Director Defendants. (*Id.* at 330-31, ¶ 3.)

The Complaint vaguely asserts that the Director Defendants, as a group, "knowingly and intentionally participated" in the SAC transactions, even though "none of these transactions was approved by the AMERCO Board." (*Id.* at 350, ¶ 69.) Plaintiffs also assert that some – though not all – of the Director Defendants were also directors and/or officers of AMERCO's wholly-owned subsidiaries, U-Haul and AREC, through

which AMERCO implemented the SAC transactions. (*Id.* at 347, ¶ 61.) Critically, however, none of the Director Defendants is alleged to have been affiliated with the SAC entities themselves, and ***none of the Director Defendants is alleged to have personally benefited from the SAC transactions.***

Plaintiffs generally assert, without any specific factual allegations, that the Director Defendants "knowingly signed incomplete and misleading public filings" and then "failed to clarify" those public filings. (*Id.* at 350-51, 359-60, 362-63, ¶¶ 71, 95, 102, 104.) There is nothing in the Complaint suggesting that any of the Director Defendants had any reason to know that AMERCO's financial statements, which were prepared by AMERCO's management and approved by AMERCO's outside auditors, contained accounting errors or were otherwise inaccurate or misleading.

In sum, Plaintiffs fail to plead any specific facts indicating that the Director Defendants knowingly committed fraud or ignored their fiduciary duties with respect to any of the allegedly improper transactions. Nor do plaintiffs allege what, if anything, the Director Defendants had to gain by allowing AMERCO to enter into such supposedly improper transactions. Instead, Plaintiffs simply provide a summary of the SAC transactions and a history of the Director Defendants' affiliation with AMERCO and/or its subsidiaries. (*Id.* at 347-350, 359-60, 362-363, ¶¶ 61-70, 94-95, 101-105.)

V.

ARGUMENT

While the trial court was correct to dismiss the Complaint because the *Goldwasser* settlement and release precludes Plaintiffs' causes of action, the Complaint should also have been dismissed because (1) it fails to state a claim against any of the Director Defendants and (2) Plaintiffs' claims are time-barred. As this Court recently held in this very proceeding, it may affirm the trial court's judgment on grounds different from the reasoning relied upon by the trial court in reaching its decision. *In re AMERCO Deriv. Litig.*, No. 51629, p. 4 (Nev. Jul. 20, 2009) ("This dismissal [of the Defendants' cross-appeal] does not preclude [the Defendants] from arguing that the district court's order

should be affirmed for reasons rejected by the district court.") (*citing, e.g., Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994)). The Director Defendants are therefore entitled to brief the Court on any ground supporting dismissal of the Complaint.

A. PLAINTIFFS FAILED TO PLEAD ALL THE NECESSARY ELEMENTS OF THEIR CAUSES OF ACTION.

A court is required to dismiss a suit when the complaint fails to state a claim upon which relief can be granted. NRCP 12(b)(5). A complaint must be dismissed where, as here, the allegations fail to demonstrate that plaintiffs have a claim. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002) ("[d]ismissal is proper where the allegations are insufficient to establish the elements of a claim for relief"). Where a plaintiff's complaint lacks a claim for relief on any possible theory, dismissal is required. *Id.; see also Nevada Power Co. v. Haggerty*, 115 Nev. 353, 358, 989 P.2d 870, 873 (1999).

1. Plaintiffs Failed To State A Claim For Breach Of Fiduciary Duty Against The Director Defendants.

Plaintiffs attempt to allege in their First and Third Causes of Action that the Director Defendants breached their fiduciary duty of loyalty and approved *ultra vires* acts, respectively. (Plaintiffs do not assert a claim for breach of the fiduciary duty of care.) Plaintiffs fail, however, to allege the facts required to establish either claim.

a. *Neither The First Nor Third Cause Of Action Sufficiently Alleges Knowing Or Fraudulent Misconduct.*

As a threshold matter, even assuming *arguendo* that Plaintiffs could allege any of the Director Defendants breached a fiduciary duty in this case (and they cannot), Plaintiffs are still unable to establish liability because they fail to allege fraud or intentional misconduct. To establish liability against any of the Director Defendants, a plaintiff must allege not only that his "alleged act or failure to act constituted a breach of his fiduciary duties," but ***also*** that his "breach of those duties involved ***intentional misconduct, fraud or a knowing violation of law***." NRS 78.138(7)) (emphasis added); *Shoen*, 122 Nev. at 640,

137 P.3d at 1184, n. 60 (Nev. 2006).[3] Absent either of these elements, the business judgment rule protects the actions of a company's directors. *Horwitz v. Southwest Forest Indus., Inc.*, 604 F. Supp. 1130, 1134 (D. Nev. 1985).

Furthermore, any claim for fraud or intentional misconduct must "be stated with particularity. The circumstances that must be detailed include averments as to the time, the place, the identity of the parties involved, and the nature of the fraud[.]" *Brown v. Kellar*, 97 Nev. 582, 583-584, 636 P.2d 874 (1981); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) *superseded on other grounds as recognized by Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006) ("bare generalized claims with [no] factual support" are insufficient as a matter of law to state a cause of action for breach of the fiduciary duty of loyalty under NRS 78.138(7)). Therefore, Plaintiffs must plead specific *facts* to support the charge that the Director Defendants engaged in intentional misconduct, fraud or a knowing violation of law.

Plaintiffs do not come close to meeting this burden. Their conclusory allegations that the Director Defendants, as a group, "knowingly orchestrat[ed], participat[ed], facilitate[ed] and aid[ed] and abett[ed] the self-dealing transactions" (App. at 373, ¶ 142) are hardly sufficient to plead a breach of fiduciary duty under Nevada law, because they do not contain particularized facts showing intentional misconduct.

Plaintiffs misleadingly attempt to imply fraud based on general allegations that the Director Defendants signed unspecified "misleading and incomplete public filings" and "failed to clarify" those filings. (*Id.*) Yet even if it were true, as Plaintiffs assert, that AMERCO's financial statements did not properly account for the SAC entities' operations or describe them in as much detail as Plaintiffs would have liked (App. at 351-54,

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[3] Section 78.138(7) was adopted effective June 15, 2001. Prior to Section 78.138(7)'s adoption, Section 78.037(1) provided that a corporation could limit a director's liability to claims of intentional or fraudulent conduct or conduct constituting a knowing violation of the law. AMERCO's Articles of Incorporation contain an exculpation provision limiting director liability under the standards recognized in former section 78.037(1). (App. at 810-31.) Accordingly, the Court held in this case that Plaintiffs must plead facts demonstrating that the Director Defendants engaged in intentional or fraudulent conduct or a knowing violation of the law. *Shoen*, 137 P.2d at 1184, n. 60.

¶¶ 74-80), that is still not enough to allege fraud by any of the Director Defendants. There is not a single factual allegation that remotely suggests any of the Director Defendants had knowledge or any reason to know of any inaccurate or misleading information in the financial statements. To the contrary, as Plaintiffs concede, PricewaterhouseCoopers ("PWC") "had audited AMERCO's financial results for over 20 years." (*Id.* at 354, ¶ 81.) Nevada law permits the Director Defendants to rely on the accuracy of audited financial statements. NRS 78.138(2)(b) ("in performing their respective duties, directors ... 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 ... public accountants ... as to matters reasonably believed to be within the preparer's or presenter's ... professional or expert competence"). Plaintiffs do not and cannot allege that AMERCO's accountants or auditors ever advised the Director Defendants prior to 2002 that AMERCO's publicly filed financial statements were incomplete or inaccurate.[4]

Simply put, there was no fraud or intentional wrongdoing here. The Director Defendants therefore cannot be liable for any alleged breach of fiduciary duty.

b. **Plaintiffs' First Cause of Action Also Fails To Allege Self-Dealing.**

In any event, Plaintiffs do not allege a claim for breach of the duty of loyalty because they have not alleged self-dealing by any of the Director Defendants. In the First Cause of Action, Plaintiffs allege that the SAC transactions were "self-interested" transactions and that the Director Defendants aided and abetted those transactions, thus violating their fiduciary duties to AMERCO. (App. at 373, ¶¶ 140-42.) Self-dealing arises when a corporate director or officer is either a party to "both sides of a transaction" or expects "to derive [a] personal financial benefit" from the transaction in question, "as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000); *see also Cinerama, Inc. v. Technicolor, Inc.*, 663

[4] In fact, AMERCO sued PWC for giving it bad advice about how to account for the SAC transactions prior to 2002. This lawsuit settled, pursuant to which PWC paid AMERCO over $51 million, net of attorney fees and costs. App. at 771.

A.2d 1156, 1169 (Del. 1995).[5] Self-dealing transactions have been defined as those "in which one or more of [the corporation's] directors has a material financial interest." *Van de Kamp v. Gumbiner*, 221 Cal. App. 3d 1260, 1277 n. 8 (1990).

In the proceedings before the district court, Plaintiffs abandoned any claim that the Director Defendants, themselves, engaged in self-dealing. Plaintiffs conceded that none of the Director Defendants derived a "personal financial benefit" from the SAC transactions. (App. at 1174, n. 10.) Plaintiffs instead fell back on the theory that some of these directors, who did not engage in self-dealing themselves, can still be liable for "aiding and abetting" Joe and James Shoen's purported self-dealing as brothers of Mark Shoen who controlled the SAC Entities. (*Id.*) Yet in the proceedings below, Plaintiffs only identified two of the Director Defendants (Messrs. Bayer and Dodds) who allegedly had any involvement in SAC transactions at all. Plaintiffs thus effectively conceded that there is no basis for their fiduciary duty claims against the other Director Defendants, Messrs. Brogan, Grogan, Herrera and Johnson.

With respect to Mr. Bayer and Mr. Dodds, Plaintiffs still cannot allege that either of them benefited personally from any of the challenged transactions. Plaintiffs merely allege that Bayer was a director and officer of AREC and that Dodds was a director of both AREC and U-Haul, and that in those capacities they "approved" a number of the SAC transactions. (App. at 359, 362, ¶¶ 94, 101.) As Plaintiffs conceded, however, AREC and U-Haul are wholly-owned subsidiaries of AMERCO, and thus were not opposite AMERCO in the SAC transactions. (*Id.* at 332, ¶ 11.) Critically, there is no allegation that either Bayer or Dodds was affiliated with any of the SAC entities – which, according to Plaintiffs, were the only entities that benefited from these supposedly one-sided transactions. Thus, there is no basis in the Complaint for inferring that Bayer or Dodds personally benefited from the SAC transactions, and therefore no basis for inferring self-dealing. (*Id.* at 359, 362, ¶¶ 94, 101.) Plaintiffs' allegations therefore fail as a matter of

[5] Where there is limited Nevada precedent on an issue of corporate law, Delaware precedent is persuasive. *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1346 (D. Nev. 1997).

law to support a claim that any of the Director Defendants was personally interested in any of the alleged SAC transactions.[6]

Recognizing that this failure is fatal to its duty of loyalty claims, Plaintiffs attempted to rely in the court below on *Kohls v. Duthie*, 791 A.2d 772 (Del. Ch. 2000) (Opp. 7, n. 10), for the proposition that a director does not need a pecuniary interest in a transaction in order to violate his fiduciary duty. Yet *Kohls* is inapposite for a number or reasons. First, *Kohls* is distinguishable and limited to its "highly unusual set of facts," in which a large investor offered to sell back 12.8 million shares, worth millions of dollars, for a mere $1,000 – an obvious corporate opportunity that would have resulted in a "substantial windfall" of "8,000%" to the company – and the board approved the CEO's personal purchase of the shares instead. 791 A.2d at 782. No such unusual circumstances are present here. Plaintiffs conceded that AMERCO received hundreds of millions of dollars in consideration for the sale of the SAC entities, in addition to management fees. (App. at 339-40, 346, ¶¶ 40-42, 58-59.) Second, and in any event, the Delaware court's decision in *Kohls* did not apply, and does not trump, the Nevada legislature's requirement that plaintiffs must allege "intentional misconduct, fraud or a knowing violation of law" to state a claim for breach of fiduciary duty. NRS 78.138(7); *supra* at 8.[7]

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[6] Presumably for purposes of trying to establish demand futility, Plaintiffs also attempt to allege that Bayer and Dodds had close personal relationships with Joe Shoen. We agree with AMERCO's brief (at Section VI.B) in which AMERCO points out that these allegations are insufficient to show that Bayer and Dodds are not independent. In any event, these allegations are plainly insufficient to establish liability based on a personal interest in the outcome of the SAC transactions. *See State of Wis. Inv. Bd. v. Barlett*, No. C.A. 17727, 2000 WL 238026, at *6 (Del. Ch. Feb. 24, 2000) (allegations that directors had business and/or personal relationships with the chairman of the board did not raise inference of self-interest).

[7] Similarly, the other cases cited by Plaintiffs in the trial court do not address this statutory requirement, and in any event required some facts showing knowledge of wrongdoing. *See In re Western World Funding, Inc.*, 52 B.R. 743, 764 (Nev. Bkcy. 1985) (finding that two directors "knowingly" aided each other's misappropriations of corporate property; citing cases from Oklahoma and New York); *Aldina v. Internet.com Corp.*, 2002 WL 31584292 (Del. Ch. Nov. 6, 2002) (finding that board members "knew" officer "secured a valuable asset of the Company at a grossly unfair price").

In sum, Plaintiffs fail to allege that any of the Director Defendants stood on both sides of any of the SAC transactions or derived a personal financial benefit therefrom. As a result, Plaintiffs' First Cause of Action should be dismissed.

c. **The Third Cause of Action Fails To State A Claim For Ultra Vires Acts.**

Plaintiffs have also failed to state a claim that the Director Defendants caused AMERCO to engage in "*ultra vires* acts." The *ultra vires* doctrine is "now largely abolished" and has been replaced by the protections of the business judgment rule. *See, e.g., Harbor Fin. Partners v. Huizenga,* 751 A.2d 879, 896, 898 n.71 (Del. Ch. 1999). This Court, in this case, not only refrained from adopting that doctrine as law in Nevada, but it noted that the "concept of *ultra vires* acts is not especially well defined." *Shoen,* 122 Nev. at 643, 137 P.3d at 1185-86. Even if this Court wishes to recognize the *ultra vires* doctrine as a basis for an independent claim, Plaintiffs fail to allege facts sufficient to satisfy the elements that other jurisdictions have articulated for such a claim.

First, Plaintiffs have failed to plead facts sufficient to demonstrate that AMERCO's Board of Directors violated the provisions of AMERCO's Articles of Incorporation with respect to the SAC transactions. Indeed, Plaintiffs concede that the SAC transactions were never even presented to or approved by the Board: "[N]one of AMERCO's transactions with the SAC Entities was approved by the AMERCO Board...." (App. at 350, ¶ 69.) Plaintiffs do not and cannot explain how the Director Defendants could be liable for transactions they did not approve.

Second, *ultra vires* acts "only become 'void' upon a determination that the corporation received no fair consideration for entering" into the transactions. *Harbor Fin. Partners*, 751 A.2d at 896-97 (emphasis added). Plaintiffs do not and cannot plead facts demonstrating that AMERCO received "no" consideration in exchange for entering into the SAC transactions. In fact, Plaintiffs admit that AMERCO received substantial value for the sale of properties to the SAC entities, alleging that AMERCO received $93.7 million in January 2002 and $146.9 million in February 2002 for the sale of property to the

SAC Defendants. (App. at 340, ¶ 42) Thus, the SAC transactions are not void as *ultra vires* acts.[8]

2. Plaintiffs' Fourth Cause of Action Fails To State A Claim For Wrongful Interference With Prospective Economic Advantage Against The Director Defendants.

Plaintiffs have also failed to state a claim that the Director Defendants wrongfully interfered with AMERCO's prospective economic advantage. In order to plead a cause of action for wrongful interference with prospective economic advantage, a plaintiff must allege "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." *Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1256 (2002) (quoting *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521-22 (1996)); *Leavitt v. Leisure Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987) (adopting the California wrongful interference with prospective economic advantage doctrine; citations omitted). Plaintiffs' Fourth Cause of Action is predicated on the tortured theory that all of the Defendants interfered with AMERCO's "prospective economic or contractual relationships with customers who would have rented self-storage units in the U-Haul facilities" and "with third parties who owned and sold properties which could be used for self-storage locations" by "seizing upon" these opportunities on behalf of the SAC Defendants. (App. at 377, ¶ 163.) This claim fails for two independent reasons.

[8] Plaintiffs, in the court below, argued merely that the transactions were "unfair" to AMERCO. (App. at 1205, n. 18.) Yet the test is not whether a shareholder can dispute the fairness of the transactions – if it were, almost every derivative lawsuit could be converted into an *ultra vires* claim. Rather, the test is whether AMERCO received "***no***" fair consideration, *i.e.*, it must have been "so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Lewis v. Vogelstein*, 599 A.2d 327, 336 (Del. Ch. 1997). As Plaintiffs concede, AMERCO received hundreds of millions of dollars in consideration for those transactions, plus management fees. (App. at 339-40.) This concession alone precludes an *ultra vires* claim.

First, the Director Defendants cannot be liable for tortious interference here, because "corporate officers acting on behalf of the corporation cannot be held liable for interfering with the employer's contracts" or prospective economic advantages. *See Crosstalk Prods., Inc. v. Jacobson*, 65 Cal. App. 4th 631, 646 (1998) (citations omitted). Plaintiffs tried to argue below that *Crosstalk* provides an exception to these protections, where the officer is not acting for the benefit of the corporation, but rather for himself. (App. at 1180-81, n. 19) (citing *Crosstalk Prods., Inc.*, 65 Cal. App. 4th at 646.) Yet as noted above, Plaintiffs do not and cannot allege that any of the Director Defendants engaged in self-dealing. Thus, any purported exception in *Crosstalk* would not apply here, anyway.

Second, Plaintiffs fail to allege "an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff." *Gemini Aluminum Corp.*, 95 Cal. App. 4th at 1256. Plaintiffs merely allege that AMERCO "would have rented self-storage units" to an unknown number of unidentified customers, or that it might have entered into unspecified real estate transactions with unknown third parties regarding hypothetical properties that "could be used as self-storage locations." (App. at 377, ¶ 163.) But a "prospective economic relationship" with an unlimited class of unidentified persons such as this, however, is an overly speculative economic relationship that cannot support a cause of action for interference with prospective economic advantage. *Westside Ctr. Assocs.*, 42 Cal. App. 4th at 523 ("The law [of tortious interference] precludes recovery for overly speculative expectancies by initially requiring proof of the business relationship containing the probability of future economic benefit to the plaintiff.") (quotations omitted). "Without an existing relationship with an identifiable buyer, [plaintiff's] future sale was at most a hope for an economic relationship and a desire for future benefit." *Id.* at 527.

Plaintiffs fail to allege, as required by *Gemini Aluminum* and *Westside Ctr. Assoc.*, that it had any past or current business or economic relationship with any of these unidentified third parties. Nor do Plaintiffs assert that AMERCO had any probability of

future economic benefit from the prospective customer rental agreements or prospective real estate acquisitions. Although Plaintiffs attempted below to identify three transactions AMERCO might have entered into (App. at 1180), they did not allege that AMERCO had any existing relationship with those sellers. These alleged missed opportunities are nothing more than "a hope for an economic relationship and a desire for future benefit." *Westside Ctr. Assoc.*, 42 Cal. App. 4th at 527. Plaintiffs thus have not alleged a key element of their interference claim.

For these independent reasons, Plaintiffs' Fourth Cause of Action fails to state a claim.

3. The Complaint Fails to State a Cause of Action for Abuse of Control.

Director Defendants are not aware of any Nevada authority recognizing a separate cause of action for "abuse of control." Plaintiffs appear to base their Sixth Cause of Action for abuse of control on the *ipse dixit* assertion that all Defendants "use[d] their positions of control within the Company for their own personal interests." (App. at 378, ¶ 171.) As noted above, however, Plaintiffs have failed to allege any self-dealing by the Director Defendants, none of whom derived a personal benefit from the alleged transactions. (*Supra*, at Section V.A.1.b.) And, to the extent this claim is based on a theory that the Director Defendants are "majority shareholders" of AMERCO, as Plaintiffs suggested below (App. at 1181), it is absurd. Plaintiffs do not allege – and could not truthfully allege – that these Director Defendants ever owned a controlling stake in AMERCO, or anything close to it. Thus, even assuming that Nevada courts would recognize this cause of action as an independent basis for relief, the absence of any alleged self-dealing precludes this claim.

B. PLAINTIFFS' CLAIMS ARE TIME-BARRED

The statute of limitations provides yet another alternative and independent basis for dismissing the Complaint. Dismissal on the pleadings is proper if the allegations of the complaint demonstrate that the action is time-barred by the applicable statute of limitations. *See Shupe & Yost, Inc. v. Fallon Nat'l Bank*, 109 Nev. 99, 100, 847 P.2d 720

(1993) (affirming district court's holding that the complaint failed to state a claim upon which relief could be granted because the action was barred by the statute of limitations). A cause of action for fraud or breach of fiduciary duty has a three year statute of limitations. NRS 11.190(3)(d); *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990) ("A breach of fiduciary duty is fraud and, therefore, the three-year statute of limitation set forth in NRS 11.190(3)(d) is applicable.").[9] NRS 11.190(2)(c) imposes a four-year statute for claims of wrongful interference with prospective economic advantage. *See Orr v. Bank of Am., NT&SA*, 285 F.3d 764, 781 (9th Cir. 2002) ("claims for (1) intentional interference with existing contractual relations and (2) intentional interference with prospective business relations are subject to Nevada's four-year limitations period").

Plaintiffs' causes of action accrued, and the statutes of limitations started running, when the plaintiff discovered, or should have discovered, the facts giving rise to the cause of action. *Nev. State Bank*, 106 Nev. at 800, 801 P.2d at 1382 ("the statute of limitation will not commence to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach"). Plaintiff Paul Shoen's original Complaint was filed on September 24, 2002. Accordingly, any claims for breach of fiduciary duty based on conduct occurring prior to September 24, 1999, and any claims for wrongful interference with prospective economic advantage based on conduct that occurred prior to September 24, 1998, are time-barred to the extent that Plaintiffs knew, or should have discovered, the bases for those claims. For the reasons discussed below, the Amended Complaint is time-barred against *all* of the Director Defendants. We note at the outset, however, the limitations defense is particularly compelling for Defendant Aubrey Johnson, who last served on AMERCO's Board in 1998. (App. at 334, ¶ 20.)

[9] While there is no Nevada statute or caselaw expressly defining the limitations period for Plaintiffs' purported cause of action for abuse of control, if such a claim even exists under Nevada law, the three-year statute should be applied to that claim, as well, as it is nothing more than a claim for breach of fiduciary duty.

1. **AMERCO's Public Filings Disclosed The Nature Of The SAC Transactions Prior To 1998.**

AMERCO's public filings disclosed the very facts on which Plaintiffs' claims are based, so there can be no dispute that Plaintiffs knew, or should have known, of the facts giving rise to their causes of action prior to September 1998. For example, AMERCO's Form 10-K for fiscal year ended March 31, 1995 (App. at 526-55)[10] provides as follows:

> During fiscal 1995, a subsidiary of the Company made a loan to SAC Self-Storage Corporation (SAC) in the total principal amount of $54,671,000 for the purchase of 44 self-storage properties by SAC. Of the 44 SAC properties, SAC acquired 24 from the Company or its subsidiaries at a purchase price of $26,287,000.... These 24 properties were sold to SAC for an amount equal to the Company's acquisition cost plus capitalized costs. Such properties are currently being managed by the Company pursuant to a management agreement, under which the Company receives a management fee equal to 6% of the gross receipts from the properties. The management fee percentage is consistent with the fee received by the Company for other properties managed by the Company.

Similarly, AMERCO's Schedule 14A dated July 23, 1998 (App. at 832-37) – filed when plaintiff Paul Shoen was serving on AMERCO's Board of Directors – provides:

> During fiscal 1998, a subsidiary of [AMERCO] funded the purchase of a number of properties and construction costs for SAC Holdings of approximately $24,574,000. Three of the properties were purchased from the Company at a purchase price equal to the Company's acquisition cost plus capitalized costs. The Company currently manages the properties owned by SAC Holdings pursuant to a management agreement, under which the Company receives a management fee equal to 6% of the gross receipts from the properties .... The management fee is consistent with the fees received by the Company for other property managed by the Company.

The facts disclosed by these public filings are the very same facts on which Plaintiffs' causes of action are predicated – *i.e.*, that the properties were sold at a price equal to "acquisition cost plus capitalized costs," which Plaintiffs now contend was too

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[10] The Director Defendants request that the Court take judicial notice of these public filings. *See, e.g., Jory v. Bennight*, 91 Nev. 763, 766, 542 P.2d 1400, 1403 (1975) (courts may take judicial notice of public filings); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) *overruled on other grounds by South Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008) (considering a corporation's SEC filings on a motion to dismiss where the plaintiff referenced the filings in the complaint).

low. (*See, e.g.,* App. at 339-40. 343, ¶¶ 40, 49.) As such, Plaintiffs at a minimum should have been aware of those facts over four years prior to filing their initial complaints. *See Nev. State Bank*, 106 Nev. at 800, 801 P.2d at 1382 (the statute of limitation begins to run when plaintiff "reasonably should have known" the facts giving rise to the breach). Plaintiffs claims are therefore time-barred.

2. Plaintiff Paul Shoen Served On AMERCO's Board Of Directors During The Time In Which The SAC Transactions Were Taking Place.

Independent of whether the SAC transactions were disclosed publicly, the Complaint also demonstrates that Plaintiff Paul Shoen personally knew, or should have known, of the SAC transactions prior to September 24, 1998. The Complaint acknowledges that Paul Shoen served on AMERCO's Board of Directors from January 1997 to August 1998. (App. at 341, ¶ 43.) Plaintiffs even concede that AMERCO sold ten properties to SAC during Paul Shoen's tenure on the Board. (*Id.*) Furthermore, as early as November 3, 1995, in his Amendment to Proof of Claim he filed in the bankruptcy court, Paul Shoen admitted to having learned of the facts regarding at least two SAC transactions. (*Id.* at 2140-45). In December 1995, Paul Shoen also conditionally objected to the *Goldwasser* Settlement. (*Id.* at 2146-50).

Given Plaintiffs' admission that Paul Shoen's tenure on AMERCO's Board of Directors coincided with some of the SAC transactions, they cannot now claim that they were ignorant of the nature of those transactions. Under Nevada law, "[d]irectors and officers ... are presumed to act ... on an informed basis ...." NRS 78.138(3). Moreover, as noted above, Plaintiffs concede that the Director Defendants did not vote to approve any of the challenged SAC transactions before Paul Shoen was on the Board. (App. at 350, ¶ 69.) If, as the Complaint asserts, the Director Defendants breached their duties by allowing, or failing to prevent, the Company from entering into the SAC transactions that took place between 1993 and 2002, the same criticism can be leveled at Paul Shoen, who served on the Board during the same time period.

Conceding that Paul Shoen was on AMERCO's Board when SAC transactions were entered, Plaintiffs, in the trial court, imply – without actually representing – that he did not know about those transactions at the time. (App. at 118, n. 21.) Are we to assume he did not read the descriptions of those transactions in AMERCO's S.E.C. filings? And, if this Court is permitted to infer – absent specific allegations – that the Director Defendants knew the SAC transactions were improper, can we not also infer that Paul Shoen knew the same thing? Plaintiffs cannot have it both ways. Their claims are time-barred.

VI.

PLAINTIFFS' REQUEST FOR REASSIGNMENT SHOULD BE DENIED

Although the trial court's judgment should be affirmed, Plaintiffs look ahead to a potential remand and ask that the case be reassigned – in the event there is a remand – to a different District Court Judge. (Plaintiffs' Brief at 30:2-30:6.) Yet Plaintiffs offer no substantive basis for this request, relying solely on the unsupported assertion that the trial court "has prejudged the case." (Plaintiffs' Brief at 30:2-30:4). The request should therefore be denied.

Although Plaintiffs cite to two cases in which this Court remanded with instructions to reassign the case to a different judge, they do not attempt to explain why those cases are applicable here. (Plaintiffs' Brief at 30:2-30:6) (*citing Leven v. Wheatherstone Condominium Corp., Inc.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (Nev. 1990); *Wolzinger v. Eighth Judicial Dist. Court,* 105 Nev. 160, 168, n. 7, 791 P.2d 335, 340, n. 7 (1989).) In *Wolzinger*, for example, the Court reassigned the case to "avoid[] a potential appearance of impropriety," and to avoid further delay in light of a "high probability" of further objections to the district judge's involvement on remand. Here, in contrast, Plaintiffs offer no evidence of either a potential appearance of impropriety or any grounds for further objections – let alone a "high probability" of such objections – to the district judge.

In *Echeverria v. State*, 119 Nev. 41, 45-46, 62 P.3d 743, 746-47 (2003) (C.J. Agosti, dissenting), the dissent suggested that Nevada courts should look to federal standards for reassignment. In *Mendez v. County of Bernardino*, 540 F.3d 1109 (9th Cir. 2008), the Ninth Circuit held:

> The factors we consider in reassigning a case are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously [ ] expressed views or findings determined to be erroneous based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

540 F.3d at 1133 (citations omitted).

These factors weigh heavily against reassignment here. First, Plaintiffs have made no showing that the trial court will have any difficulty putting previous findings out of his mind. In fact, the record is to the contrary: Following remand from this Court, the district court ruled in favor of Plaintiffs regarding demand futility (albeit erroneously, in our view, for the reasons set forth in AMERCO's brief), even though the district court had previously ruled for Defendants on the same issue. The record is therefore inconsistent with Plaintiffs' assertion that the trial court has "prejudged" this case. For this reason, there is also no reason why assignment to another judge would be needed to preserve the appearance of justice. Finally, reassignment would entail waste and duplication because the trial judge has become familiar over the years with the issues in this complex case, and the effort needed for a new judge to get up to speed on those issues would be "out of proportion" to any conceivable gain that would come from reassignment. *Id.*

Though this discussion should be rendered moot by this Court's affirmation of the judgment below, in the event of remand, Plaintiffs have not shown any reason for reassignment to a different district judge. Its request should therefore be denied.

VII.

CONCLUSION

Although Plaintiffs' Complaint properly was dismissed because the *Goldwasser* settlement precludes the claims asserted, the foregoing reasons are alternative and independent grounds for affirming dismissal of the Complaint.

DATED: August 17, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the RESPONDENTS' ANSWERING BRIEF OF CHARLES J. BAYER, JOHN P. BROGAN, JOHN M. DODDS, JAMES J. GROGAN, RICHARD HERRERA, AND AUBREY JOHNSON, 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding maters in the record to be supported by a reference to the page 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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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that service of the foregoing RESPONDENTS' ANSWERING BRIEF OF CHARLES J. BAYER, JOHN P. BROGAN, JOHN M. DODDS, JAMES J. GROGAN, RICHARD HERRERA AND AUBREY JOHNSON was made this 17th day of August, 2009, by depositing a copy for mailing, first class mail, postage prepaid to the following:

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