CITY OF SPARKS, A MUNICIPAL CORPORATION, APPELLANT, *v.* RENO NEWSPAPERS, INC., A NEVADA CORPORATION, RESPONDENT.

No. 69749

August 3, 2017 399 P.3d 352

Appeal from a district court order granting a petition for a writ of mandamus in a public records request matter. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Affirmed in part and reversed in part.

Chester H. Adams, Sparks City Attorney, and *Douglas R. Thornley*, Senior Assistant City Attorney, Sparks, for Appellant.

Glogovac & Pintar and *Scott A. Glogovac* and *Robert R. Howey*, Reno, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to determine whether respondent properly sought the disclosure of public records by means of a writ of mandamus even though a regulation was at issue and the Nevada Administrative Procedure Act, NRS Chapter 233B, provides that the validity of a regulation may be determined in a proceeding for a declaratory judgment. Because we conclude that the writ petition was procedurally proper, we further consider whether the subject regulation, NAC 453A.714(1), which governs the confidentiality of information concerning persons who facilitate or deliver medical marijuana services, exempts such information from disclosure under the Nevada Public Records Act, NRS Chapter 239, when the information is contained in medical marijuana establishment business licenses. As the identifying information of such persons has been validly declared confidential under NAC 453A.714(1), that information is exempt from disclosure by a business licensor. Accordingly, we reverse the district court's order granting a writ mandating disclosure.

FACTS AND PROCEDURAL HISTORY

Persons seeking to operate medical marijuana establishments (MMEs) must register with the Department of Health and Human Services' Division of Public and Behavioral Health (Division), NRS 453A.322(1), and, if located in a jurisdiction so requiring, obtain a business license, NRS 453A.326(3). Respondent Reno Newspapers,

Inc., which owns and operates the Reno Gazette-Journal (RGJ), a daily newspaper, asked appellant City of Sparks to disclose copies of the business licenses of persons operating MMEs in the City. In response, the City produced the business licenses but redacted the licensees' identities from the documents. The RGJ demanded unredacted copies of the business licenses, and the City denied the subsequent request.

Thereafter, the RGJ filed a petition for a writ of mandamus in the district court to compel the City to disclose the redacted information. The district court held that the petition was procedurally proper and, concluding that the City had a duty under the Nevada Public Records Act to disclose the identities of the business license holders, which duty was not exempted by NAC 453A.714's confidentiality provision, granted the petition. The City now appeals.

DISCUSSION

On appeal, the City argues that the district court erred in granting the RGJ's petition for a writ of mandamus because (1) a petition for a writ of mandamus is not the appropriate means of seeking judicial relief when challenging an administrative code, and (2) NAC 453A.714 renders confidential the identifying information of MME business license holders.

"When reviewing a district court order resolving a petition for mandamus relief, this court considers whether the district court has abused its discretion." *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). However, when the writ petition raises questions of statutory interpretation, we review the district court's decision de novo. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010).

The RGJ's petition for a writ of mandamus was procedurally proper

As a threshold matter, the City argues that an action for declaratory relief under the Nevada Administrative Procedure Act, *see* NRS 233B.110, not a writ petition, was the proper vehicle to seek unredacted copies of MME business licenses, as the RGJ's action included a challenge to NAC 453A.714. We disagree.

The Public Records Act provides that "[i]f a request for inspection . . . of a public book or record open to inspection and copying is denied, the requester may apply to the district court . . . for an order." NRS 239.011(1). Alternatively, NRS 233B.110 of the Administrative Procedure Act provides that the district court may determine the validity or applicability of any regulation in a declaratory judgment proceeding.

We have previously held that a writ of mandamus is generally the appropriate means for pursuing the disclosure of public records pursuant to NRS 239.011. *See, e.g.*, *Las Vegas Metro. Police Dep't*

v. Blackjack Bonding, Inc., 131 Nev. 80, 343 P.3d 608 (2015); *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 266 P.3d 623 (2011); *Haley*, 126 Nev. 211, 234 P.3d 922; *DR Partners v. Bd. of Cty. Comm'rs*, 116 Nev. 616, 6 P.3d 465 (2000).

Moreover, "it is an accepted rule of statutory construction that a provision which specifically applies to a given situation will take precedence over one that applies only generally." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60, 63 P.3d 1147, 1150 (2003) (internal quotation marks omitted). Here, NRS 233B.110 provides the general method to challenge "[t]he validity or applicability *of any regulation*," whereas NRS 239.011 provides relief specifically for the denial of "a request for inspection, copying or copies of a public book or record." (Emphasis added.) As the RGJ was challenging the denial of its request for records, not merely seeking to determine its rights with respect to the regulation, NRS 239.011 is the applicable law. For that reason, we reject the City's contention, under *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007), that the RGJ had to first challenge the validity of the regulation with the Division before seeking a writ in the district court.[1] Thus, we hold that the district court did not err in concluding that the RGJ's writ petition was procedurally proper in light of the circumstances of the case.

The identifying information contained in MME business licenses is confidential and not subject to disclosure under the Public Records Act

Generally, the Nevada Public Records Act requires disclosure

"Under the Nevada Public Records Act ([NPRA]), all public records generated by government entities are public information and are subject to public inspection unless otherwise declared to be confidential." *Haley*, 126 Nev. at 214, 234 P.3d at 924. In particular,

> this court will presume that all public records are open to disclosure unless either (1) the Legislature has expressly and unequivocally created an exemption or exception by statute; or (2) balancing the private or law enforcement interests for nondisclosure against the general policy in favor of an open and accessible government requires restricting public access to government records.

Id. at 214-15, 234 P.3d at 924-25 (citations omitted). "And, in unity with the underlying policy of ensuring an open and accountable gov-

[1]The City also argues that the Division should have been joined as a party pursuant to NRS 233B.110(1), which provides that "[t]he agency whose regulation is made the subject of the declaratory action *shall* be made a party to the action." (Emphasis added.) Having held that the RGJ's petition was proper under NRS 239.011, we reject this argument.

ernment, the burden is on the government to prove confidentiality by a preponderance of the evidence." *Id.* at 215, 234 P.3d at 925.

Here, neither party disputes that the City is a governmental entity pursuant to the NPRA or that business licenses are public records. However, although the City did not advance any balancing-of-interests argument, it asserted that the Legislature expressly and unequivocally created an exemption or exception from disclosure under NRS 453A.370(5) and NAC 453A.714 for the identities of MME business license holders. *See id.* at 214, 234 P.3d at 924; *PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 837, 313 P.3d 221, 223-24 (2013) (noting that, in order to overcome the presumption of disclosure under the NPRA, "[t]he state entity may either show that a statutory provision declares the record confidential, or, in the absence of such a provision, that its interest in nondisclosure clearly outweighs the public's interest in access" (internal quotation marks omitted)).

NRS 453A.370(5) and NAC 453A.714 make confidential the identifying information of persons engaged in facilitating or delivering medical marijuana services

NRS Chapter 453A provides that "[t]he Division shall adopt such regulations as it determines to be necessary or advisable to carry out the provisions [concerning the production and distribution of medical marijuana]." NRS 453A.370. In drafting and adopting those regulations, under NRS 453A.370(5), the Division "*must* . . . [a]s far as possible while maintaining accountability, *protect the identity and personal identifying information* of each person who receives, facilitates or delivers services."[2] (Emphases added.) The relevant regulation adopted by the Division, NAC 453A.714(1) (2014), provides that

> the Division will . . . maintain the confidentiality of and shall not disclose the name or any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS. Except as otherwise

[2]The RGJ argues that the phrase "[a]s far as possible while maintaining accountability," NRS 453A.370(5), is ambiguous and provides no standards of accountability. However, the phrase expresses the Legislature's intent to allow the Division to create exceptions to nondisclosure for certain persons. *See, e.g.*, Hearing on S.B. 374 Before the Assembly Judiciary Comm., 77th Leg. (Nev., June 1, 2013) (explaining that S.B. 374 would "give law enforcement open access to investigate and inspect a dispensary at any time"); *see also* NAC 453A.714(2)-(3) (allowing disclosure of the otherwise confidential information to "[a]uthorized employees of the Division . . . as necessary to perform official duties of the Division," to "[a]uthorized employees of state and local law enforcement agencies," and with the prior consent of the applicant, to local governments during an application process to operate a medical marijuana establishment). As a result, we conclude that the phrase was included for the purpose of assisting state and local agencies with the enforcement of state laws.

> provided in NRS 239.0115,[3] the name and any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS are confidential, not subject to subpoena or discovery and not subject to inspection by the general public.

The City argues that NRS 453A.370(5) confers on the Division power to protect the identity and identifying information of persons who operate businesses under that chapter, and that the Division validly did so by adopting NAC 453A.714, which expressly and unequivocally makes confidential the identifying information of MME business license holders. We agree.

When interpreting a statute, if the statutory language is "facially clear," this court must give that language its plain meaning. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009). If the statutory language is ambiguous, however, "this court will construe a statute by considering reason and public policy to determine legislative intent." *Id.* Additionally, "[t]his court also assumes that, when enacting a statute, the Legislature is aware of related statutes." *Id.* "These rules of statutory construction also apply to administrative regulations." *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 687, 262 P.3d 715, 718 (2011).

NRS 453A.370(5) grants the Division power to make confidential the identifying information of certain persons

"[T]he Legislature may authorize administrative agencies to make rules and regulations supplementing legislation if the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227, 19 P.3d 245, 248 (2001); *see also* NRS 233B.040(1)(a) (providing that reasonable regulations that are appropriately adopted by an agency "have the force of law"). We conclude that the plain language of NRS 453A.370(5) is sufficiently definite in granting the Division authority to create laws relating to confidentiality, and NAC 453A.714 was adopted accordingly.

The RGJ counters that NRS 453A.370(5) cannot be construed as authorizing an exception to public disclosure laws because any exceptions to the NPRA can only exist when explicitly provided for under NRS 239.010. However, in addition to the specific exemptions listed in NRS 239.010, the NPRA also does not apply to records "otherwise declared by law to be confidential." NRS 239.010(1). This court has held that regulations need not be expressly mentioned in NRS 239.010 to grant confidentiality and exemption from the

[3]NRS 239.0115, which is part of the NPRA, governs the disclosure of information after 30 years.

NPRA. *See City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 60-61, 63 P.3d 1147, 1150 (2003) (providing that 49 C.F.R. § 24.9(b), a federal regulation that was adopted by reference in NRS 342.105, can declare records confidential and exempt from disclosure under NRS 239.010, even if the federal regulation was not expressly listed as an exception under NRS 239.010). Accordingly, we hold that NRS 453A.370(5) confers upon the Division authority to grant confidentiality.

NAC 453A.714 expressly and unequivocally prohibits disclosure of the identity and identifying information of MME business license holders

The City argues that NAC 453A.714 expressly and unequivocally prohibits disclosure of the identity and identifying information of MME business license holders because (1) the license holders are persons who "deliver" services under NRS Chapter 453A, as that term is statutorily defined; and (2) when NRS 453A.370 was enacted in 2013, the Nevada Legislature intended to expand the grant of confidentiality beyond the existing medical-marijuana-related confidentiality statutes.

NAC 453A.714(1) (2014) prohibits disclosure of "the name or any other identifying information of any person who facilitates or delivers services pursuant to this chapter or chapter 453A of NRS." The term "[d]elivers" under NRS Chapter 453A "has the meaning ascribed to it in NRS 453.051" and "means the actual, constructive or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." NRS 453A.060. A "[m]edical marijuana establishment" is defined as either: (1) "[a]n independent testing laboratory;" (2) "[a] cultivation facility;" (3) "[a] facility for the production of edible marijuana products or marijuana-infused products;" or (4) "[a] medical marijuana dispensary." NRS 453A.116. Of the four types of MMEs, three of them engage in the act of delivering marijuana as part of their statutory functions,[4] with the exception of "testing laboratories" under NRS 453A.368. Although NRS 453A.368 does not use

[4]A "'[c]ultivation facility'" is defined as "a business that . . . [a]cquires, possesses, cultivates, *delivers*, transfers, transports, supplies or sells marijuana and related supplies." NRS 453A.056 (emphasis added). A "'[f]acility for the production of edible marijuana products or marijuana-infused products'" is defined as "a business that . . . [a]cquires, possesses, manufactures, *delivers*, transfers, transports, supplies or sells edible marijuana products or marijuana-infused products to medical marijuana dispensaries." NRS 453A.105 (emphasis added). A "'[m]edical marijuana dispensary'" is defined as "a business that . . . [a]cquires, possesses, *delivers*, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to the holder of a valid registry identification card." NRS 453A.115 (emphasis added).

the term "delivers," testing laboratories clearly engage in "the actual, constructive or attempted transfer from one person to another of a controlled substance" to test marijuana. Thus, we conclude that all MMEs "deliver" under NAC 453A.714 as part of their statutorily prescribed functions.

In addition, the term "constructive transfer" under NRS 453.051 incorporates MME business license holders pursuant to the nature of their business activities. Although the term "constructive transfer" is not defined under NAC Chapter 453A, NRS Chapter 453A, or Nevada caselaw, *Black's Law Dictionary* defines a "constructive transfer" as "[a] delivery of an item—esp. a controlled substance—by someone other than the owner but at the owner's direction." *Constructive transfer*, *Black's Law Dictionary* (10th ed. 2014). Indeed, an MME business license holder necessarily engages in the act of delivering when instructing the MME on the transfer of controlled substances and, thus, is included under NAC 453A.714's grant of confidentiality for "any person who . . . delivers services."[5] NAC 453A.714.

The RGJ counters that the term "delivers" is used in conjunction with the term "services," and the exact phrase "delivers services" is defined in neither NRS Chapter 453A nor NAC Chapter 453A. However, applying a common sense reading of the term "services" in conjunction with the term "delivers" as defined under NRS Chapter 453A, one can logically infer that "services" refers to the acts of producing and distributing medical marijuana, which is the title of the subsection governing the statutes to which the regulation applies. *See* NRS 453A.320-.344; NAC 453A.300-.720. As all MME business license holders are engaged in the acts of producing or distributing medical marijuana, we conclude that the term "delivers" includes the activities of MME business license holders.

Second, during the enactment of NRS 453A.370 in 2013, the Nevada Legislature could have referenced or relied on the language of the two existing confidentiality statutes under NRS Chapter 453A, but it chose not to do so.[6] *See D.R. Horton, Inc. v. Eighth Judicial*

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[5]We also note that pursuant to NRS 0.039, a " 'person' means a natural person, any form of business or social organization and any other nongovernmental legal entity." NRS 0.039. Thus, "any person" includes an MME and the business license holder of an MME.

[6]The two existing medical marijuana-related statutes are NRS 453A.610 and NRS 453A.700, which, respectively, provide confidentiality for the identifying information of (1) certain types of information used by the University of Nevada School of Medicine, and (2) "attending physician[s]" and persons who apply for or hold "registry identification card[s] or letter[s] of approval." NRS 453A.610 and NRS 453A.700 were both enacted in 2001, 2001 Nev. Stat., ch. 592, §§ 29, 30.2, at 3063-65, whereas NRS 453A.370 was enacted in 2013, 2013 Nev. Stat., ch. 547, § 20, at 3697.

Dist. Court, 125 Nev. 449, 456, 215 P.3d 697, 702 (2009) ("This court also assumes that, when enacting a statute, the Legislature is aware of related statutes."). Thus, we conclude that the Nevada Legislature intended to expand the grant of confidentiality beyond the then-existing medical marijuana-related statutes to include the identifying information of MME business license holders.[7]

CONCLUSION

We conclude that the RGJ's petition for a writ of mandamus was a procedurally proper means for seeking the disclosure of public records. As such, the district court did not err in considering the writ petition. However, we also conclude that (1) NRS 453A.370(5) confers on the Division power to withhold identifying information of certain persons; and (2) the identifying information of MME business license holders has been expressly and unequivocally deemed confidential under NAC 453A.714 and, thus, is exempt from disclosure. Accordingly, we reverse the district court's order granting the RGJ's petition for a writ of mandamus and directing the City to disclose unredacted copies of MME business licenses.

Cherry, C.J., and Douglas, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

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[7]We note that the Division has since amended NAC 453A.714(1) to prohibit the disclosure of "the name or any other identifying information of any person who . . . *has applied for or to whom the Division or its designee has issued a registry identification card or letter of approval*," in addition to those who facilitate or deliver services pursuant to Chapters 453A of the NRS and NAC. NAC 453A.714(1) (2017) (emphasis added). That amendment is consistent with the City's interpretation of NRS 453A.370 granting the Division power to make confidential the identifying information of certain persons beyond those enumerated in NRS 453A.610 and NRS 453A.700. *See Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003) (noting "courts generally give great deference to an agency's interpretation of a statute that the agency is charged with enforcing" (internal quotation marks omitted)).

GILBERT JAY PALIOTTA, Appellant, *v.* THE STATE OF NEVADA IN RELATION TO THE NEVADA DEPARTMENT OF CORRECTIONS; and RENEE BAKER, Warden, Respondents.[1]

No. 66664

September 14, 2017 401 P.3d 1071

Appeal from a district court order granting summary judgment in an inmate litigation (civil rights) matter. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

Reversed and remanded with instructions.

McDonald Carano Wilson LLP and *Adam D. Hosmer-Henner*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, and *Clark G. Leslie*, Assistant Solicitor General, Carson City, for Respondent.

Before the Court En Banc.[2]

OPINION

By the Court, Hardesty, J.:

Appellant Gilbert Jay Paliotta, a Nevada inmate who follows the Thelemic faith, filed suit under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment after respondents State of Nevada, Nevada Department of Corrections, and Renee Baker, Warden (collectively, the State) denied his request for a religious diet. The district court dismissed Paliotta's claims, finding as a matter of law that a religious diet is not central to the Thelemic faith. Because the district court used the centrality test rather than the sincerely held belief test in its analysis of Paliotta's Free Exercise and RLUIPA claims, we reverse.

[1]It appears from appellant's notice of appeal and the documents accompanying the notice that the following individuals are also potential respondents to this appeal: Claude Willis, Casework Specialist III; Tasheena Sandoval, Casework Specialist II; David McNeely, Administrative Service Officer; and John Doe, Grievance Responder. To the extent that these individuals are properly named respondents, this opinion shall apply to them as well.

[2]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

FACTS AND PROCEDURAL HISTORY

Paliotta is incarcerated at the Ely State Prison. In March 2011, Paliotta filed a form with the Nevada Department of Corrections declaring himself a Thelemist. According to Paliotta, Thelema was founded in 1904 in Egypt by Aleister Crowley. The religion is based on the idea: "Do what thou wilt shall be the whole of the Law." Practitioners, such as Paliotta, interpret this to partially mean: "eat and drink what one will." Some practitioners also practice other religions in furtherance of their Thelemic beliefs.

Paliotta contacted the prison chaplain about receiving a traditional Egyptian diet that was "in accordance with [his] Thelemic beliefs." The chaplain suggested that Paliotta request a kosher diet instead, which he did. Later that month, Paliotta submitted an inmate request form indicating that he was waiting to hear back about his request to participate in a religious diet.

In April 2011, Paliotta submitted an updated request form, which sought a Thelemic diet and stated that Thelema draws its principles from ancient Egyptian religions. He argued that because Egypt once ruled over Hebrews and Jewish people, and Hebrews "ate the original 'kosher' meal of the Egyptians," that a kosher meal should be provided to him in accordance with his faith. His request was denied.

Paliotta then submitted an informal grievance demanding to be placed on a kosher diet or, in the alternative, on a traditional Egyptian diet. The grievance was denied because a kosher diet was not listed under the Department of Correction's regulations as a religious consideration for Thelema. In June and July 2011, Paliotta filed first- and second-level grievances, respectively, challenging the regulation as it improperly categorized Thelema with non-Thelema religions and challenging the denial of the dietary requests because kosher meals were provided to other non-Jewish inmates. The grievances were denied.

Paliotta filed a verified complaint with the district court against the State. He alleged that in denying his requested dietary plans, the State violated the Free Exercise Clause of the First Amendment, RLUIPA, and the Equal Protection Clause of the Fourteenth Amendment. Specifically, Paliotta alleged that his sincerely held religious belief in maintaining a Thelemic diet was substantially burdened because (1) Thelema is not listed in the Department of Correction's religious guidelines; (2) he requested, and was denied, a traditional Egyptian diet; and (3) he was denied a kosher diet after he sought a compromise in the dietary selection with the State.

The parties filed competing motions for summary judgment. The district court granted summary judgment for the State because it

found that Paliotta's request for a kosher diet was not based in Thelemic beliefs. In reaching its conclusion, the district court engaged in a lengthy analysis of Paliotta's claims within the context of Free Exercise jurisprudence. The district court reasoned that under the First Amendment and RLUIPA, Paliotta only claimed a "social connection" between Thelema and Hebrew traditions, which meant that Paliotta's request for a kosher or traditional Egyptian diet was not based in theological beliefs but secular beliefs. Thus, the district court incorporated its analysis of Paliotta's Free Exercise claims as a part of its analysis of Paliotta's RLUIPA claims and determined that, because he could not sustain a claim under a Free Exercise standard, his RLUIPA claims must similarly fail. The district court did not address Paliotta's equal protection claim.[3] Paliotta appeals the district court's decision.

DISCUSSION

On appeal, Paliotta asserts that the district court erred in using the centrality test in determining that Paliotta could not sustain a Free Exercise or RLUIPA claim. The State responds that the district court properly found that Paliotta's request for a traditional Egyptian or kosher diet was not grounded in Thelemic belief and he thus failed to state a claim under Free Exercise or RLUIPA jurisprudence. In examining the parties' respective arguments, we begin our analysis with a brief overview of the requirements for bringing a claim under the Free Exercise Clause and RLUIPA. We then turn to Paliotta's claims and his assignments of error on appeal.

Free Exercise Clause and RLUIPA claims in general

While claims under the Free Exercise Clause are often brought in conjunction with claims under RLUIPA, "[t]he standards [for establishing a prima facie case] under RLUIPA are different from those under the Free Exercise Clause." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010). Although explained in more detail below, a brief overview of the requirements for bringing successful Free Exercise Clause and RLUIPA claims is warranted.

"In general, a plaintiff will have stated a free exercise claim if: (1) the claimant's proffered belief [is] sincerely held; and (2) the claim [is] rooted in religious belief, not in purely secular philosophical concerns." *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015) (alterations in original) (internal quotation marks omitted). Prisoners enjoy protection under the Free Exercise Clause, but that protec-

[3]The State presented a qualified immunity defense at district court. The district court considered this issue moot because it granted summary judgment for the State. In light of our disposition in this opinion, this issue is no longer moot and must be considered by the district court on remand.

tion is "limited by institutional objectives and by the loss of freedom concomitant with incarceration." *Id*. (internal quotation marks omitted). Thus, "a prisoner's Free Exercise Clause claim will fail if the State shows that the challenged action is 'reasonably related to legitimate penological interests.'" *Id*. (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

In contrast, "[t]o state a claim under RLUIPA, a prisoner must show that: (1) he takes part in a 'religious exercise,' and (2) the State's actions have substantially burdened that exercise." *Id*. at 1134. The statutory definition of "religious exercise" is "intentionally broad," *id*., and covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," *id*. (quoting 42 U.S.C. § 2000cc–5(7)(A)). If the prisoner shows that he is engaged in a religious exercise that State action has substantially burdened, "the State must prove its actions were the least restrictive means of furthering a compelling governmental interest." *Id*.

We turn now to Paliotta's claims.

Standard of review

A district court's order granting summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id*. (internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id*.

The district court erred in concluding that Paliotta's Free Exercise Clause claim failed as a matter of law

The Free Exercise Clause of the First Amendment to the United States Constitution, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

> To merit protection under the free exercise clause of the First Amendment, a religious claim must satisfy two criteria. First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to so-called religions which . . . are obviously shams and absurdities and whose members are patently devoid of religious sincerity. Second, the claim must be rooted in religious belief, not in purely secular philosophical concerns. Determining whether a claim is rooted in religious belief requires analyzing whether the plaintiff's claim is related to his sincerely held religious belief.

Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994) (internal quotation marks and citations omitted), *supplemented*, 65 F.3d 148 (9th Cir. 1995). However, as noted above, a prisoner's religious claim otherwise protectable under the Free Exercise Clause will fail if the State can demonstrate that its action is "reasonably related to legitimate penological interests." *Walker*, 789 F.3d at 1138 (internal quotation marks omitted).

The district court found, and the State does not dispute, that Paliotta was sincere in his Thelemic beliefs. Therefore, we only consider whether Paliotta's dietary request was related to his sincere religious beliefs. *Malik*, 16 F.3d at 333.

Paliotta's dietary request was related to his sincere Thelemic beliefs

Paliotta argues that his request for a kosher diet is sufficient to implicate free exercise protection under *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008). Despite conceding that Paliotta is sincere in his Thelemic beliefs, the State argues that Paliotta only requested a kosher diet out of a personal desire to be served more appealing prison food.[4]

In *Shakur*, the United States Court of Appeals for the Ninth Circuit considered whether it was "the sincerity of [a prisoner's] belief rather than its centrality to his faith that is relevant to the free exercise inquiry." 514 F.3d at 884. The court cited to United States Supreme Court caselaw stating that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id*. (alteration in original) (quoting *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989)). "Given the Supreme Court's disapproval of the centrality test, [the court was] satisfied that the sincerity test . . . determines whether the Free Exercise Clause applies." *Id*. at 885.

More specifically, in *Shakur*, a Muslim prisoner requested a kosher diet because his vegetarian diet caused him "gastrointestinal discomfort [that] interfere[d] with the state of purity and cleanliness needed for Muslim prayer." *Id*. at 881-82 (internal quotation marks omitted). He alleged that the kosher diet, which had the meat-based protein he desired, was consistent with a Halal diet. *Id*. "Shakur conceded during the summary judgment proceedings that he [was] not

[4]In support of its argument, the State relies on *United States v. Kuch*, 288 F. Supp. 439, 444 (D.D.C 1968) ("It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulant of this organization and the reason for its existence."). We find this case to be inapposite because it, like many older federal cases, applies a centrality test. *See id.* (stating that the church in question did not provide any "solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence").

required as a Muslim to eat Halal meat." *Id*. at 885. The district court determined that consuming Halal meat was not a central tenet of Islam and granted summary judgment for the prison. *Id*. at 883. The Ninth Circuit disagreed and concluded that "the district court impermissibly focused on whether consuming Halal meat is required of Muslims as a central tenet of Islam, rather than on whether Shakur sincerely believes eating kosher meat is consistent with his faith." *Id*. at 885 (internal quotation marks omitted).

Here, the district court cited to *Shakur*, noting that a sincerity test, not a centrality test, is the current standard. Nonetheless, the district court concluded that Paliotta's request for a kosher diet was not related to Thelema or a theological conviction. The district court reasoned that Paliotta's argument that there was "a 'social connection' to Judaism that entitles him to a religious diet" only demonstrated a secular conviction. As a result, the district court determined that Paliotta's "Free Exercise claim fails as a matter of law," which we conclude was error.

Under *Shakur*, the question is whether Paliotta "sincerely believes eating [a] kosher [diet] is consistent with his faith." 514 F.3d at 885. The district court did not undertake this analysis. Rather, it erroneously conducted a centrality analysis by inquiring into whether Thelemic tenets require a kosher diet—"Plaintiff also fails to offer any evidence that the alleged ties between the Egyptian religion and the Hebrew tradition requires him as a practicing Thelemist to maintain a kosher diet."

When viewed in a light most favorable to Paliotta, the evidence presented in the district court clearly demonstrates that Paliotta sincerely believed that eating a kosher diet is consistent with and in furtherance of his faith. For instance, in his informal grievance, Paliotta explained his belief that there is a mystical connection between Thelema, Egyptian religions, and Judaism. Additionally, in his April 2011 inmate request form, Paliotta stated that "Thelema draws its principle gods & goddesses from ancient Egyptian religion . . . [that] once ruled over the Hebrews [and] Jews . . . [who] ate the ORIGINAL 'kosher' meal of the Egyptians." Paliotta also alleged in his complaint that Thelema has its "roots in Judaism and Egyptian mythology. The three are inextricably linked. . . . [E]ach [Thelemist] has the right to fulfill themselves through whatever beliefs and actions are best suited to them . . . and only they themselves are qualified to determine what these are." Finally, in opposing the State's motion for summary judgment, Paliotta attached another Thelemic practitioner's writing that discussed how Thelema is consistent with Judaism and how that practitioner had added Jewish practices to supplement his Thelemic belief.

Accordingly, we conclude that Paliotta presented prima facie evidence that his sincere belief warrants First Amendment protection under *Shakur*. 514 F.3d at 885. Specifically, the State concedes that

Paliotta was sincere in his belief and Paliotta presented sufficient evidence that his "claim [was] rooted in religious belief, not in purely secular philosophical concerns." *Walker*, 789 F.3d at 1138 (internal quotation marks omitted). Thus, the district court erred in concluding that Paliotta's Free Exercise Clause claim failed as a matter of law, and this case must be remanded for a determination as to "whether the State's interest in compliance with the Equal Protection Clause is reasonably related to legitimate penological interests." *Id*.

In making its determination, the district court should consider: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) whether "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff"; and (4) whether there is "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) (internal quotation marks omitted).

The district court erred in concluding that Paliotta's RLUIPA claim failed as a matter of law

The district court incorporated its analysis of Paliotta's free exercise claims in rendering its determination that Paliotta's RLUIPA claims also failed as a matter of law. However, as explained above, "[t]he standards [for establishing a prima facie case] under RLUIPA are different from those under the Free Exercise Clause." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010).

In bringing a claim under RLUIPA, the plaintiff bears the initial burden of persuasion to "produce[ ] prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of" RLUIPA. 42 U.S.C. § 2000cc-2(b). Section 2000cc-1(a) provides, in relevant part, that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

"Thus, to proceed with his RLUIPA claim, [Paliotta] must demonstrate he wishes to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) is subject to a substantial burden imposed by the government." *Abdulhaseeb*, 600 F.3d at 1312. RLUIPA should "be construed in favor of a broad pro-

tection of religious exercise, to the maximum extent permitted by [RLUIPA] and the Constitution." 42 U.S.C. § 2000cc-3(g).

The district court stated that "there is nothing in the record to suggest [Paliotta] isn't sincere in his belief that he is entitled to a religious diet as a result of this Thelemic faith." As a result of this determination, we analyze for purposes of RLUIPA whether Paliotta has demonstrated that consuming a kosher or traditional Egyptian diet constitutes a "religious exercise" under RLUIPA and whether that exercise was "subject to a substantial burden imposed" by the State. 42 U.S.C. § 2000cc-1(a); *Abdulhaseeb*, 600 F.3d at 1312.

Paliotta's dietary requests constituted a "religious exercise" under RLUIPA

RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Paliotta argues that his request for a kosher diet is a religious exercise under *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), and he actually desired an Egyptian diet but compromised by officially requesting a kosher diet.

In *Koger*, the court considered whether a Thelemic prisoner's request for a non-meat diet was protected under RLUIPA. 523 F.3d at 797. The court overturned the district court's granting of summary judgment against the inmate, concluding that the prisoner's "religious exercise [was] rooted in sincerely held beliefs." *Id*. at 798. The court pointed to a letter from a group of Thelemic practitioners stating that although there were no general dietary restrictions, "each individual Thelemite may, from time to time, include dietary restrictions as part of his or her personal regimen of spiritual discipline." *Id*. at 797 (internal quotation marks omitted).

The court stated that "this portion of [the] letter can be accurately restated using the statutory definition, i.e., while there are no dietary restrictions 'compelled by' or 'central to' [Thelema], many of its practitioners adopt such restrictions as part of their 'exercise' of Thelema." *Id*. The court went on to note that had Koger been insincere in his religious beliefs, he could have attempted to align himself with a denomination that routinely consumed the type of diet he was requesting. *Id*. Instead, Koger chose to practice the Thelemic religion, "with which the prison officials were unfamiliar," thereby indicating that his religious beliefs "were sincerely held." *Id*.

Similarly, Paliotta has demonstrated that his dietary request was a "religious exercise rooted in sincerely held beliefs." *Id*. at 798. Notably, Paliotta presented evidence showing that some Thelemists translate "[d]o what thou wilt" to "eat and drink what one will." And, in opposing the State's summary judgment motion, Paliotta pointed to a teaching from a Thelemic holy book that requires practitioners to "eat rich foods and drink sweet wines that foam." Pal-

iotta also presented evidence to suggest that his Thelemic beliefs are linked with Egypt and Judaism because Thelema was started in Egypt, draws many beliefs from ancient Egyptian religions, and some Thelemic practitioners adopt dietary restrictions. If Paliotta was not sincere in his belief that kosher meals are consistent with his religion and was instead only trying to receive a more favorable dietary plan, it would arguably have been easier for him to affiliate with Judaism. *See Koger*, 523 F.3d at 797.

Although the State presented an affidavit from a Thelemic priest stating that the religion does not require a kosher or otherwise religious diet, this does not negate the protections afforded under RLUIPA. *See Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (explaining that even if petitioner's beliefs were idiosyncratic, RLUIPA's guarantees are "not limited to beliefs which are shared by all of the members of a religious sect" (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981)). Moreover, despite the district court's acknowledgment of Paliotta's initial request for an Egyptian diet, it appears that the court improperly focused its analysis on Paliotta's subsequent request for a kosher meal. The State does not dispute that Paliotta initially requested an Egyptian diet, which was denied. Paliotta alleged in his complaint that he requested the kosher diet after contacting the prison chaplain who suggested that Paliotta request a kosher diet because of the ties between Thelema and Judaism. Such a compromise is not indicative that Paliotta's dietary request "does not qualify as a sincere religious belief" as the district court determined.

Broadly construing the protections afforded under RLUIPA, we conclude that Paliotta has made a prima facie showing that his dietary request was a "religious exercise." *See* 42 U.S.C. § 2000cc-3(g) ("[RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution."); *Abdulhaseeb*, 600 F.3d at 1312. We must now decide whether Paliotta's religious exercise was substantially burdened by the State.

Paliotta's "religious exercise" was substantially burdened by the State

RLUIPA prohibits the State from "impos[ing] a substantial burden on the religious exercise" of a prisoner. 42 U.S.C. § 2000cc-1(a). The State argues that not allowing Paliotta to receive a kosher diet is not a substantial burden because the diet does not correspond to any tenet of Thelema. Paliotta argues that a complete inability to engage in a sincere religious exercise constitutes a substantial burden. Additionally, he argues that a substantial burden test that inquires into religious tenets would render meaningless RLUIPA's definition of religious exercise. The district court did not address this issue.

A prisoner must make a prima facie showing that the state's action imposes a "substantial burden on the exercise of his religious beliefs." *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). "[T]he Supreme Court has found a substantial burden as 'where the state . . . denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Id*. at 995 (second and third alterations in original) (quoting *Thomas*, 450 U.S. at 717-18). The United States Supreme Court recently decided that, under RLUIPA, it is irrelevant whether a prisoner is "able to engage in other forms of religious exercise," when the prisoner is forced to "engage in conduct that seriously violates [his] religious beliefs." *Holt*, 135 S. Ct. at 862 (alteration in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014)).

> When Congress enacted RLUIPA, it included the broad definition of religious exercise . . . . This inclusion prompted . . . consideration of what constitutes a substantial burden. Accordingly, in 2003 we held that in the context of RLUIPA's broad definition of religious exercise, a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable. In determining when an exercise has become "effectively impracticable," it is helpful to remember that in the context of the Free Exercise Clause, the Supreme Court held that a government imposes a substantial burden on a person's beliefs when it put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs.

Koger, 523 F.3d at 799 (internal quotation marks and citations omitted) (third, fourth, and fifth alterations in original).

We are persuaded by the *Koger* court's reasoning and conclude that, when determining whether the exercise of a prisoner's religious beliefs has been substantially burdened by the State, courts cannot consider whether the conduct the prisoner has requested to engage in is a precept of the prisoner's stated religion. Doing so would require the prisoner to "establish exactly what RLUIPA does not require—that [the conduct] was 'compelled by' or 'central to' [the prisoner's] faith." *Koger*, 523 F.3d at 798 (quoting 42 U.S.C. § 2000cc-5(7)(A)). The proper inquiry is whether the State's actions on the requested conduct force the prisoner to "engage in conduct that seriously violates [his] religious beliefs," *Holt*, 135 S. Ct. at 862 (alteration in original), "rendering [the prisoner's] religious exercise . . . effectively impracticable," *Koger*, 523 F.3d at 799 (internal quotation marks omitted).

Here, we conclude that Paliotta has made a prima facie showing that the State's complete denial of his request for either an Egyptian or kosher diet substantially burdens the exercise of Paliotta's religious beliefs because it forces him to "modify his behavior and violate his [sincere religious] beliefs." *Koger*, 523 F.3d at 799 (internal quotation marks omitted); *see also Warsoldier*, 418 F.3d at 994.

Issues unresolved in the district court

Because the district court concluded that Paliotta's dietary request was not protectable under the Free Exercise Clause or RLUIPA, it did not decide whether the State's denial of Paliotta's request for either an Egyptian or kosher diet was "reasonably related to legitimate penological interests." *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015) (internal quotation marks omitted). The district court similarly did not consider whether the State's denial of Paliotta's request furthers "a compelling governmental interest" and "is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000cc-1(a). These are factual issues that must be decided by the district court on remand. *See Liu v. Christopher Homes, LLC*, 130 Nev. 147, 156, 321 P.3d 875, 881 (2014) ("We do not resolve . . . factual issue[s] that the district court did not reach, as doing so would require us to inappropriately weigh the evidence and resolve questions of fact for the first time on appeal. It is up to the district court on remand to resolve these questions.").

In addition, Paliotta's complaint included an equal protection claim under the Fourteenth Amendment. The State argued that it was entitled to summary judgment on the equal protection claim, but the district court failed to consider this claim before granting the State's motion for summary judgment in its entirety. Thus, the district court must also address this issue on remand.[5] *See id*.

CONCLUSION

Because we conclude that Paliotta made a prima facie showing that his sincere religious beliefs may be entitled to protection under the Free Exercise Clause of the First Amendment and RLUIPA, the district court erred in determining that Paliotta's Free Exercise Clause and RLUIPA claims failed as a matter of law and in granting summary judgment in its entirety in favor of the State. Accordingly, we reverse the district court's summary judgment and remand

[5]Paliotta argues on appeal that he made other religious requests to the prison, such as requests to use the chapel and observe the solstice, which were ignored by the district court. He contends that the district court erred by granting summary judgment as to the entire complaint rather than just as to his dietary request. However, our review of the complaint in the record before us reveals no such allegations, and we thus conclude that this argument is without merit.

this matter to the district court. On remand, the district court must consider: (1) under the Free Exercise Clause, whether the State's denial of the meal request was "reasonably related to legitimate penological interests," *Walker*, 789 F.3d at 1138 (internal quotation marks omitted); (2) under RLUIPA, whether there was "a compelling governmental interest" and the denial of the meal request was "the least restrictive means of furthering" that interest, 42 U.S.C. § 2000cc-1(a); (3) whether Paliotta's equal protection claim has merit; and (4) whether the State's qualified immunity defense has merit.

Cherry, C.J., and Douglas, Gibbons, Pickering, and Parraguirre, JJ., concur.

PARAMETRIC SOUND CORPORATION; VTB HOLDINGS, INC.; KENNETH POTASHNER; ELWOOD NORRIS; SETH PUTTERMAN; ROBERT KAPLAN; ANDREW WOLFE; and JAMES HONORÉ, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ELIZABETH GOFF GONZALEZ, District Judge, Respondents, and VITIE RAKAUSKAS, Individually and on Behalf of All Others Similarly Situated; and INTERVENING PLAINTIFFS, RAYMOND BOYTIM and GRANT OAKES, Real Parties in Interest.

No. 66689

September 14, 2017 401 P.3d 1100

Original petition for a writ of mandamus or, alternatively, a writ of prohibition challenging a district court order denying a motion to dismiss in a corporate shareholder action.

Petition granted.

Snell & Wilmer, LLP, and *Kelly H. Dove* and *Richard C. Gordon*, Las Vegas; *Dechert, LLP*, and *Joshua D. N. Hess*, San Francisco, California; *Dechert, LLP*, and *Neil A. Steiner*, New York, New York, for Petitioners Parametric Sound Corporation and VTB Holdings, Inc.

Holland & Hart, LLP, and *Robert J. Cassity* and *J. Stephen Peek*, Las Vegas; *Sheppard, Mullin, Richter & Hamilton, LLP*, and *John P. Stigi, III*, Los Angeles, California, for Petitioners Kenneth Potashner, Elwood Norris, Seth Putterman, Robert Kaplan, Andrew Wolfe, and James Honoré.

O'Mara Law Firm, P.C., and *David C. O'Mara*, Reno; *Robbins Geller Rudman & Dowd, LLP*, and *Randall J. Baron, A. Rick Atwood, Jr., David T. Wissbroecker*, and *David A. Knotts*, San Diego, California; *Saxena White, PA*, and *Jonathan M. Stein* and *Joseph E. White, III*, Boca Raton, Florida, for Real Parties in Interest.

Brownstein Hyatt Farber Schreck, LLP, and *Jeffrey S. Rugg* and *Maximilien D. Fetaz*, Las Vegas, for Amicus Curiae State Bar of Nevada, Business Law Section.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

In this case, we consider whether shareholders lack standing to sue a corporation and its directors because the shareholders' claims are derivative, not ones asserting direct injury. In doing so, we examine *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003), which discussed the distinction between direct and derivative shareholder claims. In *Cohen*, we summarized the distinction as follows:

> A claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of the majority shareholders or directors is properly classified as an individual or direct claim. The shareholder has lost unique personal property—his or her interest in a specific corporation. Therefore, if the complaint alleges damages resulting from an improper merger, it should not be dismissed as a derivative claim. On the other hand, if it seeks damages for wrongful conduct that caused harm to the corporation, it is derivative and should be dismissed.

Id. at 19, 62 P.3d at 732 (footnotes omitted).

Although the parties agree *Cohen* is directly relevant to this case, they offer conflicting applications. Petitioners argue that the shareholders have not lost unique personal property and were not shareholders of a merging entity. Thus, under the petitioners' interpretation of *Cohen*, the shareholders' claims are derivative and their complaint should be dismissed. The shareholders argue that the petitioners' interpretation is too narrow and that *Cohen* only requires a claimant to assert wrongful conduct affecting the validity of a merger to establish a direct claim.

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[1]The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

We thus take this opportunity to clarify *Cohen* and distinguish between direct and derivative claims by adopting the direct harm test, as articulated in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004), which allows a direct claim when shareholder injury is independent from corporate injury. Applying *Tooley*'s direct harm test to the facts of this case, we conclude that the shareholders' complaint alleges derivative dilution claims, not direct claims. Accordingly, we grant the petition for a writ of mandamus[2] and instruct the district court to dismiss the complaint without prejudice to the shareholders' ability to file an amended complaint.

FACTS AND PROCEDURAL HISTORY

Petitioner Parametric Sound Corporation (Parametric) was a small, publicly traded company that negotiated a merger with petitioner VTB Holdings, Inc. (Turtle Beach), a larger, privately owned company. Parametric and Turtle Beach ultimately agreed to a reverse triangular merger.[3] To accomplish the merger, Parametric created a subsidiary named Paris Acquisition Corporation (Paris), and Paris was merged into Turtle Beach. As a result, Paris ceased to exist and Turtle Beach became a subsidiary of Parametric.

To facilitate the merger, over 90 percent of Parametric shareholders voted to authorize the issuance of new stock to the Turtle Beach shareholders as consideration.[4] Upon issuance, the Turtle Beach

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[2]In the alternative, petitioners seek a writ of prohibition. A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction. NRS 34.320. We conclude that a writ of prohibition is improper here because the district court had jurisdiction to hear and determine the outcome of the motion to dismiss.

[3]In a typical reverse triangular merger, the acquiring corporation forms a shell subsidiary, which is then merged into the target corporation. The target corporation assumes all of the assets, rights, and liabilities of both the target corporation and the shell subsidiary. The shell subsidiary ceases to exist and the target corporation survives the merger and becomes the acquiring corporation's subsidiary. The stockholders of the target corporation typically receive shares of the acquiring corporation's stock as consideration for the merger. *Sealock v. Tex. Fed. Sav. & Loan Ass'n*, 755 S.W.2d 69, 71 (Tex. 1988); *see Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, No. C.A. 5589-VCP, 2011 WL 1348438, at *6 (Del. Ch. Apr. 8, 2011); *see also* NRS 92A.250(1)(d) (providing that the entity surviving a merger "has all of the liabilities of each other constituent entity").

[4]Because Parametric was not a constituent party to the merger between Turtle Beach and Paris, the Parametric shareholders did not vote to approve the merger. *See* NRS 92A.015(1) (defining "[c]onstituent entity" as "each merging or surviving entity"); NRS 92A.120(1) (providing that each constituent entity's board of directors shall present a plan of merger to its shareholders for approval). They only voted on whether to issue new stock in accordance with NASDAQ Equity Rule 5635(a)(1), which outlines the "circumstances under which shareholder approval is required prior to an issuance of securities in connection with . . . the acquisition of the stock or assets of another company."

shareholders held an 80 percent interest in Parametric, and the original Parametric shareholders were left with a 20 percent stake in Parametric.[5] After the merger, Parametric was renamed Turtle Beach Corporation,[6] a new board of directors was elected, and a new management team was installed.

Several non-controlling shareholder actions challenging the merger were consolidated in the district court. Real parties in interest Raymond Boytim and Grant Oakes filed a class action complaint in intervention on behalf of the original, public shareholders of Parametric against Parametric, Turtle Beach, and Parametric's board of directors, petitioners Kenneth Potashner, Elwood Norris, Andrew Wolfe, Robert Kaplan, Seth Putterman, and James Honoré (we collectively refer to all petitioners as petitioners except when necessary to separately discuss the corporate entities). The shareholders eventually designated the complaint in intervention as the operative complaint in the action.

The complaint asserted two causes of action: (1) breach of fiduciary duties as to Parametric's board of directors, and (2) aiding and abetting the directors' breaches of fiduciary duties by Parametric and Turtle Beach. Those two causes of action can be divided into four main factual allegations. First, the shareholders alleged that five of the six directors were conflicted when approving the merger.[7] Second, the shareholders alleged that deal protection agreements entered into between Parametric and Turtle Beach were coercive and preclusive—depriving the shareholders of a meaningful vote on the merger while simultaneously warding off potentially superior merger offers—and that the go-shop provision[8] in the merger agreement was a sham. Third, the shareholders alleged that Parametric board members intentionally delayed announcing positive and material information about Parametric in an attempt to manipulate the premium on the merger, and made several other disclosure omissions and misstatements associated with the proxy statement. Fourth, the shareholders claimed that because of the wrongful conduct alleged, Parametric's valuation was lower than it should have been and Turtle Beach's valuation was higher than it should have been, resulting

[5]We note that, according to the proxy statement, in Parametric's fiscal year ending September 30, 2013, Parametric had a gross profit of approximately $271,000. Turtle Beach's gross profit for the same period totaled approximately $63,725,000. Thus, Parametric shareholders were retaining a 20 percent interest in a combined entity expected to be significantly more profitable.

[6]For clarity, we continue to refer to the parent company as Parametric.

[7]Although petitioner James Honoré was a named defendant in the RPI shareholders' complaint, the complaint made no allegations against him.

[8]Go-shop provisions are included in many merger agreements, providing sellers an opportunity to solicit other buyers for a certain time period. Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 Bus. Law. 729, 730, 735 (2008).

in a 65 percent to 82 percent dilution of the pre-merger value of the shareholders' Parametric stock when considering their 20 percent interest in the post-merger company.

Petitioners moved to dismiss the complaint, arguing that the shareholders lacked standing because their claims were derivative, not direct.[9] Without explanation, the district court denied the motion. This writ petition followed.

DISCUSSION

Writ relief is appropriate

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). "Writ relief is not available, however, when an adequate and speedy legal remedy exists." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene 'under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition.'" *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (footnote omitted) (quoting *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002)).

This case involves an important issue of law recognizing the distinction between direct and derivative corporate shareholder claims. We take this opportunity to clarify *Cohen* and in doing so adopt a clearer standard for recognizing the distinction between direct and derivative corporate shareholder claims in this context. Furthermore, the interests of sound judicial economy and administration favor resolving this writ petition on the merits, as clarifying the law at this early stage of the underlying litigation will permit the shareholders to appropriately plead their case and prevent this matter from proceeding under an erroneous application of the law. We review questions of law de novo, even in the context of a writ petition. *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559.

Nevada caselaw regarding direct and derivative shareholder claims

As noted above, both parties cite the rule in *Cohen* but articulate different applications to this case. Petitioners argue that the

[9]The shareholders do not argue, and we do not address, whether they can assert a derivative claim. *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1046 n.8 (Del. 2004).

shareholders' complaint states only derivative claims. They argue that *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2003), requires the loss of unique personal property for a direct claim to exist, and that because the shareholders continued to own the same number of Parametric shares before and after the merger, the shareholders did not lose any "unique personal property" and they cannot state a direct claim against Parametric. Petitioners further argue that the merger discussion in *Cohen* does not apply here, because Parametric was not a constituent entity in a merger under Nevada law, and the shareholders' claims are for the dilution in the value of their Parametric stock, which is a derivative claim.

The shareholders argue that *Cohen* does not demand such a stringent approach. Rather, the shareholders argue that *Cohen* only requires allegations regarding wrongful conduct toward "the validity of the merger" to state a direct claim. The shareholders further argue that this court's decision in *Cohen* concerning direct versus derivative claims is consistent with the Delaware Supreme Court's later decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). In *Tooley*, the Delaware Supreme Court rejected "the concept of 'special injury'" and affirmed its use of the so-called direct harm test to distinguish between direct and derivative shareholder claims; that is, "Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?" 845 A.2d at 1035.[10]

Nonetheless, both parties seek clarification of *Cohen*. They also both contend that *Cohen* is most consistent with *Tooley*'s direct harm test for distinguishing between direct and derivative claims. But petitioners argue that the direct harm test forecloses the shareholders' claims as derivative, while the shareholders argue that the test permits their claims as direct. We thus begin by examining direct and derivative shareholder claims and how we distinguished between them in *Cohen*.

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[10]The shareholders also argue that Parametric's board of directors owed fiduciary duties directly to them. In general, a corporate director or officer owes fiduciary duties to the corporation, not the shareholders, and the shareholders may enforce the fiduciary duties through derivative actions. *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007). There may be certain situations, however, in which the directors' and officers' fiduciary duties do run directly to the shareholders. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). In this case, however, while the shareholders allege and argue generally that the board of directors owed a fiduciary duty to them, the shareholders did not allege any cause of action based on a duty owed to the shareholders, as opposed to the corporation, and did not discuss how the facts demonstrate an injury to the shareholders. Thus, this argument is not determinative as to whether the claims herein are direct or derivative. *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559-60 (Tenn. 1990) ("Without more, general language concerning fiduciary duty owed to shareholders by directors does not support a direct action."); *see also* NRS 78.138(1), (4)-(5).

"A derivative claim is one brought by a shareholder on behalf of the corporation to recover for harm done to the corporation." *Cohen*, 119 Nev. at 19, 62 P.3d at 732. A shareholder must make a demand on the board of directors to address the shareholder's claims prior to bringing a derivative action, or demonstrate that such a demand is futile. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006); *see* NRS 41.520(2); NRCP 23.1. Alternatively, shareholders have standing to bring suit for direct injuries they have suffered and that are separate from any injury the corporation may have suffered without making a demand on the board of directors. *Cohen*, 119 Nev. at 19, 62 P.3d at 732. The distinction between a direct and derivative claim, however, is not always clear. We most recently addressed this distinction in *Cohen*.

In *Cohen*, Boardwalk Casino, Inc., a small publicly traded casino, merged with Mirage Acquisition Sub, Inc., a subsidiary of the Mirage Resorts, Inc.[11] 119 Nev. at 7-8, 62 P.3d at 724-25. Harvey Cohen, a minority shareholder of Boardwalk, attended a special shareholder meeting at which a majority of Boardwalk's shareholders approved the merger. *Id*. at 7, 62 P.3d at 725. Cohen did not exercise dissenters' rights, but filed a complaint alleging breach of fiduciary duty claims against Boardwalk's directors and majority shareholders. *Id*. at 7-8, 62 P.3d at 724-25. Cohen alleged that the Mirage provided Boardwalk's majority shareholders and directors with above market prices on side deals in exchange for Boardwalk being sold at a below market price. *Id.* at 8, 62 P.3d at 725. The complaint also alleged that the directors mismanaged Boardwalk, resulting in lost revenue, and that advisors who rendered a fairness opinion received payoffs to understate Boardwalk's valuation. *Id*. A motion to dismiss was granted by the district court against Cohen based on the court's finding that his claims were derivative in nature. *Id.* at 9, 62 P.3d at 726.

On appeal, this court examined minority shareholders' rights during and after a merger. *Id.* at 9-18, 62 P.3d at 726-32. We held, among other things, that a minority shareholder may initiate an action for rescission of the merger or monetary damages where the merger was accomplished through fraud or the unlawful conduct of the individuals controlling the corporation. *Id.* at 11, 62 P.3d at 727. The minority shareholder "must allege wrongful conduct that goes to the approval of the merger." *Id.* at 13, 62 P.3d at 728. The term "fraudulent" in this context is a term of art encompassing the breach of an officer's, director's, or majority shareholder's fiduciary duties. *Id.* at 13-14, 62 P.3d at 728-29.

We further explained in *Cohen* that, if artfully pleaded as to the merger allegations, a cashed-out former shareholder's claims must

[11]It is unclear from *Cohen* whether this was a forward or reverse triangular merger, but the distinction is irrelevant to our consideration of this matter.

also be direct, not derivative. *Id.* at 19, 62 P.3d at 732. The reason for this is that, "[b]ecause a derivative claim is brought on behalf of the corporation, a former shareholder does not have standing to assert a derivative claim." *Id.* On distinguishing between direct and derivative claims, this court explained that a direct claim exists when a shareholder has "injuries that are independent of any injury suffered by the corporation." *Id.* We further explained that "[a] claim brought by a dissenting shareholder that questions the validity of a merger as a result of wrongful conduct on the part of majority shareholders or directors is properly classified as an individual or direct claim" because a "shareholder has lost unique personal property—his or her interest in a specific corporation." *Id*. Concluding, we stated that "if the complaint alleges damages resulting from an improper merger," the claim was direct and should not be dismissed, but "if it seeks damages for wrongful conduct that caused harm to the corporation, it is derivative and should be dismissed." *Id.*

We then turned to an analysis of Cohen's complaint and concluded that Cohen's mismanagement claims were derivative and, thus, properly dismissed by the district court because the harm was the loss in revenue to the corporation, not to an individual shareholder. *Id*. at 21, 62 P.3d at 733-34. However, as to the allegations regarding inappropriate side deals involving majority shareholders and directors, and that advisors received excessive fees for undervaluing the Boardwalk in the fairness opinion, we concluded that they went "to the validity of the merger" and were direct claims. *Id*. at 22-23, 62 P.3d at 734. In other words, the alleged payoffs and undervaluing of the stock caused Cohen to receive less than he otherwise would have for his stock, which is harm to Cohen, as opposed to the corporation.

Thus, the majority of *Cohen* was devoted to discussing cashed-out minority shareholders' rights after a merger. As to the direct/derivative dichotomy, we somewhat confusingly stated that a direct claim involves an injury independent of a corporations' injury, but that Cohen's claim alleging wrongful conduct in a merger was a direct claim because the "shareholder has lost unique personal property—his or her interest in a specific corporation." *Id.* at 19, 62 P.3d at 732. The implication is that a loss of property was necessary to state a direct claim. We then proceeded to analyze Cohen's claims and allegations at least partially in the context of who was harmed. What we did not do in *Cohen*, however, was to adopt an explicit test for distinguishing direct and derivative shareholder claims. Accordingly, we conclude that we should clarify *Cohen*, and because we have relied on the Delaware court's corporate law in the past, we turn to the development of Delaware law in this area since we decided *Cohen*. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 225, 252 P.3d 681, 702 (2011); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 634, 137 P.3d 1171, 1179 (2006); *Cohen*, 119 Nev. at 10 n.10, 62 P.3d at 726 n.10.

How Delaware distinguishes between direct and derivative claims

One year after we decided *Cohen*, the Delaware Supreme Court reexamined its approach to distinguishing between direct and derivative shareholder claims in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). In *Tooley*, the court recounted a brief history of Delaware jurisprudence, noting that since 1953 the Delaware courts had developed competing concepts to distinguish between direct and derivative claims. *Id.* at 1034-39. One concept was that in order to bring a direct claim, a shareholder "must have experienced some 'special injury.'" *Id.* at 1035 (internal quotation marks omitted). "A special injury is a wrong that is separate and distinct from that suffered by other shareholders, or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation." *Id.* (internal quotation marks omitted); *see also Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1078 (Del. 1986) ("[A] plaintiff alleges a special injury and may maintain an individual action if he complains of an injury distinct from that suffered by other shareholders or a wrong involving one of his contractual rights as a shareholder."), *disapproved of by Tooley*, 845 A.2d at 1035.[12]

The *Tooley* court, however, criticized this concept, stating that the special injury test is "not helpful to a proper analytical distinction between direct and derivative actions" because it is an "amorphous and confusing concept." *Id.* at 1035. In particular, the *Tooley* court observed that the first prong of the special injury test, that the wrong be distinct from that suffered by other shareholders, inaccurately limited direct shareholder claims because "a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." *Id.* at 1037; *see also* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 103 (2006) (noting the logical fallacy of the assumption that if the harm is to all shareholders, that it must be derivative).

Moreover, the second prong of the special injury test, a wrong involving a shareholder's contractual rights, is problematic because its focus is on the shareholder's rights rather than the harm to the shareholder. Focusing on the harm to the shareholder is more consistent with the use of the direct/derivative dichotomy in the context of standing, which generally involves an analysis of whether the plaintiff has been injured. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing the three elements of "the irreducible constitutional minimum of standing" as an injury in fact,

[12]The special injury test is still used in some jurisdictions. *See* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 96-97 (2006).

a "causal connection between the injury and the conduct complained of," and "that the injury will be redressed by a favorable decision" (internal quotation marks omitted)).[13]

Due to the confusion surrounding the "special injury" concept, the *Tooley* court disapproved of its use as a tool to distinguish between direct and derivative claims. 845 A.2d at 1035. Instead, the *Tooley* court specified that determining whether a claim is direct or derivative must be resolved solely based on two questions, "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033. Commentators have characterized this as the "direct harm" test. *See* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 104-05 (2006).

In answering the first question—who suffered the harm—the relevant inquiry is: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?" *Tooley*, 845 A.2d at 1036 (internal quotation marks omitted). The second prong of the analysis is logically related and should follow; the inquiry is, if the plaintiff prevails, will the recovery benefit the corporation or the shareholders individually. *See id*. As a result, all shareholders can share a common injury and a direct claim will still exist, so long as the shareholders have directly suffered harm that is not dependent on any injury to the corporation.[14] *See id*.

We clarify Cohen consistent with Tooley's direct harm test

Returning to *Cohen*, although not clearly stated, *Cohen* generally focuses on the injury that was alleged and whether that injury was

[13]Some other jurisdictions use the "duty owed" test, which centers on the identity of "the source of the claim of right itself," *Stegall v. Ladner*, 394 F. Supp. 2d 358, 364 (D. Mass. 2005), and which suffers from similar problems. Under the duty owed test, courts generally focus on the source of the duty and whether the duty is owed to the shareholder "independent of the [shareholder's] status as a shareholder." *McCann v. McCann*, 61 P.3d 585, 590-91 (Idaho 2002). For example, if the shareholder and the corporation are each parties to a contract, the shareholder may sue the corporation directly for breach of contract because the contract is independent of the shareholder's status as a shareholder. Elizabeth J. Thompson, *Direct Harm, Special Injury, or Duty Owed: Which Test Allows for the Most Shareholder Success in Direct Shareholder Litigation?*, 35 J. Corp. L. 215, 222 (2009). As this approach also focuses on the rights of or duties owed to the shareholder, rather than the harm to the shareholder, it suffers similar flaws, and we also reject this approach. *See* Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 Baylor L. Rev. 63, 108-09 (2006) (raising doctrinal and practical problems with the duty owed test).

[14]New York courts have also adopted the direct harm test. *Yudell v. Gilbert*, 949 N.Y.S.2d 380, 381 (App. Div. 2012).

to the corporation or the shareholder. 119 Nev. at 19, 62 P.3d at 732. This echoes the direct harm test in *Tooley*. *Cohen*'s statement that wrongful conduct in a merger leads to a direct claim because the "shareholder has lost unique personal property—his or her interest in a specific corporation," *id.*, is a different way of stating the second prong in the *Tooley* test. In other words, if the shareholder has lost personal property in the form of his or her interest in the corporation, he or she would necessarily be the beneficiary of any recovery or other remedy.

Accordingly, we align our jurisprudence with Delaware's and clarify that *Cohen* applied the direct harm test. As the *Tooley* court stated, this standard is "clear, simple and consistently articulated and applied by [the] courts." 845 A.2d at 1036. Therefore, to distinguish between direct and derivative claims, Nevada courts should not look to whether the claim involves a transaction classified as a "merger." Rather, courts should consider only "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Id.* at 1033.

The shareholders' complaint

Having clarified the test to distinguish the direct action versus derivative action analysis, we turn to the shareholders' complaint. The shareholders frame their complaint as one challenging a merger. They argue that under *Cohen*, all they need to do is allege that the merger was invalid or improper due to the Parametric board of directors' intentional misconduct or fraud, and *Cohen* deems their claim a direct claim. We disagree, however, for three reasons. First, as explained above, *Cohen* should not be read so expansively. The focus should be on the direct harm, not on the use of the word "merger" to describe the challenged transaction. Second, although the shareholders indeed describe the transaction as a "merger," *Cohen* does not apply to the shareholders' complaint because the shareholders do not have a merger to challenge. Third, the shareholders seek damages resulting from dilution of equity and have failed to articulate a direct harm without showing injury to the corporation.

The shareholders' complaint does not allege a merger encompassing subsequent cashed-out shareholders within the contemplation of Cohen

Although we have clarified *Cohen*, the shareholders cannot proceed under *Cohen* because their claims do not challenge a merger. The shareholders hold shares of Parametric. They still hold the same shares that they held before Parametric merged with Turtle Beach, and it is here that the form of the merger is important, as opposed to the literature announcing the merger, to which the shareholders direct our attention. Through a reverse triangular merger, Parametric's

subsidiary was merged into Turtle Beach, and Turtle Beach became a subsidiary of Parametric. Parametric, as an entity, never merged with any other entity.

The shareholders here are not in the same position as the shareholder in *Cohen* or the other cases that the shareholders cite. In *Cohen*, Boardwalk was merged into a subsidiary of Mirage, and Cohen held shares of Boardwalk that were cashed out. Cohen was thus able to challenge the merger because Boardwalk was one of the merging entities.

The shareholders also cite to *In re Celera Corp. Shareholder Litigation*, in which Quest Diagnostics Incorporated acquired the Celera Corporation through a reverse triangular merger with Quest's subsidiary, the Sparks Acquisition Corporation. 59 A.3d 418, 425 (Del. 2012). In that case, Celera and Sparks were the merging entities, Sparks was merged out of existence, Celera became a wholly owned subsidiary of Quest, and the Celera shareholders were cashed out. *Id.* In that case, a Celera shareholder challenged the merger, alleging that due to breaches of fiduciary duty, it received a lower price than it should have for its shares of Celera. *Id.* at 427.

In contrast, the shareholders here do not hold shares of any entity that merged. Turtle Beach was merged into Parametric's subsidiary and became a subsidiary of Parametric. The shareholders here hold shares of Parametric, which never merged, and thus the rights discussed in *Cohen* do not inure to the shareholders. Accordingly, as the shareholders structured their complaint and arguments as challenging a merger, the complaint fails to articulate a direct claim under the direct harm test.

Equity dilution claims

This does not end our discussion of this matter, however, because the shareholders allege that their stock's value was improperly diluted when Parametric issued new shares to compensate the Turtle Beach shareholders. While we have not examined equity dilution, the Delaware courts have. "A claim for wrongful equity dilution is premised on the notion that the corporation, by issuing additional equity for insufficient consideration, made the complaining stockholder's stake less valuable." *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007).

> Such claims are not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction. In the eyes of the law, such equal "injury" to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually.

Gentile v. Rossette, 906 A.2d 91, 99 (Del. 2006). Thus, a pure equity dilution claim is viewed as a derivative claim. *Id.*

Delaware courts, however, have recognized that a certain class of equity dilution claims, equity expropriation claims, have a dual nature, being both direct and derivative shareholder claims. *Gentile*, 906 A.2d at 99-100. Equity expropriation claims involve a controlling shareholder's or director's expropriation of value from the company, causing other shareholders' equity to be diluted. *Id.*; *see also Gatz v. Ponsoldt*, 925 A.2d 1265, 1277 (Del. 2007). As the shareholders have not currently couched their complaint in terms of equity expropriation and the district court has not considered this issue, we decline to consider further whether the shareholders can adequately plead such a claim. Nevertheless, the shareholders' complaint does suggest equity dilution, and we conclude that the shareholders should be allowed to amend their complaint to articulate equity expropriation claims, if any such claims exist.[15]

CONCLUSION

Accordingly, for the reasons set forth above, we grant the writ petition. We clarify *Cohen* and adopt the direct harm test for distinguishing between direct and derivative shareholder claims, as set forth in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). We further conclude that dismissal of the shareholders' complaint is proper because Parametric itself was not an entity involved in the reverse triangular merger. We also conclude, however, that the shareholders should be given leave to amend their complaint to articulate equity expropriation claims, if any such claims exist. Accordingly, we direct the clerk of this court to issue a writ of mandamus directing the district court to dismiss the complaint without prejudice to the shareholders' ability to file an amended complaint.

Cherry, C.J., and Douglas, Gibbons, Pickering, and Parraguirre, JJ., concur.

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[15]We note that the Nevada Legislature has addressed this issue in part by enacting statutes that give conclusive deference to the directors' judgment as to the consideration received for issued stock absent actual fraud. *See* NRS 78.200(2); NRS 78.211(1). Thus, the shareholders must show actual fraud in any direct equity dilution claim they may have in order to overcome the statutory deference afforded to the directors.

O.P.H. OF LAS VEGAS, INC., Appellant, *v.* OREGON MUTUAL INSURANCE COMPANY; DAVE SANDIN; and SANDIN & CO., Respondents.

No. 68543

September 14, 2017 401 P.3d 218

Appeal from district court orders granting summary judgment in an action by an insured against its insurer and its broker arising out of cancellation of a fire insurance policy. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed in part, reversed in part, and remanded.

McLetchie Shell, LLC, and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Appellant.

Hutchison & Steffen, LLC, and *Michael K. Wall, Patricia M. Lee*, and *Michael S. Kelley*, Las Vegas, for Respondents Dave Sandin and Sandin & Co.

Lewis Brisbois Bisgaard & Smith LLP and *Robert W. Freeman, Jr.*, and *Priscilla L. O'Briant*, Las Vegas, for Respondent Oregon Mutual Insurance Company.

Before Douglas, Gibbons and Pickering JJ.

OPINION

By the Court, Pickering, J.:

In this insurance policy cancellation dispute, we are asked to resolve two issues. The first is whether NRS 687B.360 requires a cancellation notice to contain a statement of a policyholder's right to request additional information to be effective. We hold that NRS 687B.360 requires strict compliance; without an express statement of a policyholder's right to request additional information about the reasons for a policy's cancellation, the cancellation notice is ineffective. Because the insurance company's cancellation notice failed to provide the statement required by NRS 687B.360, the policy remained in effect at the time of loss. We therefore reverse the district court's grant of summary judgment for the insurance company and remand so the insured may pursue its claims against the insurer.

The second issue is whether, under Nevada law, an insurance broker who obtains an insurance policy for a client has a duty to monitor the client's premium payments and to alert the client when the policy is about to be canceled for nonpayment of premiums. We hold that the relationship between the insurance broker and the in-

sured client in this case did not give rise to such a duty. We therefore affirm summary judgment in favor of the broker against the insured.

I.

Unless otherwise noted, the following facts are undisputed: Appellant O.P.H. of Las Vegas, Inc. operated an Original Pancake House restaurant in Las Vegas. Between 2002 and 2012, respondent Dave Sandin or Sandin & Co. served as the insurance broker for OPH (except for a two-year period when OPH used another broker). In December 2011, Sandin recommended that OPH purchase a Business Owner Protector policy[1] for the restaurant from respondent Oregon Mutual Insurance Co., which OPH did. The policy term ran from December 26, 2011, until December 26, 2012, and permitted periodic premium payments.

On July 26, 2012, OPH defaulted on its obligation to pay the premium for which it had been billed earlier in the month. Five days later, Oregon Mutual issued OPH a cancellation notice (Notice). The Notice stated that Oregon Mutual would cancel the policy on August 16, 2012, if it did not receive payment by August 15, 2012. The Notice did not inform OPH of its right under NRS 687B.360 to request and receive within 6 days additional information if needed to relay "with reasonable precision" the facts on which OPH based its cancellation decision.

Though OPH denies receiving the Notice, Oregon Mutual attests that it mailed the Notice to OPH on August 1, 2012. Oregon Mutual did not mail a copy of the Notice to the broker, Sandin. On August 13, 2012, OPH realized that it had not made its July premium payment, wrote a check for the premium due, then failed to mail the payment to Oregon Mutual. On August 17, 2012, a fire destroyed the Original Pancake House. OPH reported the loss and submitted a claim under the policy. Oregon Mutual denied coverage, stating that the policy had been canceled for failure to pay the premium effective August 16, 2012, the day before the fire.

OPH sued Oregon Mutual, Sandin, and Sandin & Co. on various theories, including, as against Oregon Mutual, breach of contract, bad faith and negligence and, as against the Sandin defendants, breach of fiduciary duty. Early on in the case, OPH filed a motion for partial summary judgment against Oregon Mutual on the ground the Notice did not comply with NRS 687B.360 and thus had no effect. The district court denied the motion. After conducting discovery, Oregon Mutual moved for summary judgment asserting that the policy did not cover the loss because it had been validly canceled

[1]A Businessowner's Policy is an insurance policy that typically includes property insurance, business interruption insurance, and liability protection. *What Does a Businessowner's Policy (BOP) Cover?* Insurance Information Institute (July 18, 2017, 4:24 p.m.), http://www.iii.org/article/what-does-businessowners-policy-bop-cover.

for nonpayment of premiums before the fire occurred. The Sandin defendants also filed a motion for summary judgment in which they disclaimed any duty to monitor and notify OPH of its premium payment default. The district court granted both motions, and OPH appeals.

II.

A.

Whether NRS 687B.360 invalidates Oregon Mutual's notice of cancellation presents an issue of law that we review de novo. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000) ("review in this court from a district court's interpretation of a statute is de novo") (internal quotation and editing marks omitted); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("[t]his court reviews a district court's grant of summary judgment de novo").

Like most states, Nevada has enacted statutes that restrict the permissible bases for, and impose procedural limits on, an insurer's ability to cancel an insurance policy midterm. *See* NRS 687B.310-NRS 687B.420; for a general discussion see Eric Mills Holmes, *Holmes's Appleman on Insurance 2d*, § 16.10, at 423 (2016). These statutes aim to provide policyholders "protection against arbitrary termination" of insurance coverage, NRS 687B.310(3), and provide rights that "are in addition to and do not prejudice any other rights the policyholder may have at common law or under other statutes," NRS 687B.310(4). Here, Oregon Mutual's cancellation Notice complied with NRS 687B.320(1)(a) and (2), which allow an insurer to cancel a policy for "[f]ailure to pay a premium when due" on 10 days' written notice. The Notice also complied with NRS 687B.310(6), which specifies how an insurer must deliver a notice of cancellation, and requires that it "state the effective date of the cancellation . . . and be accompanied by a written explanation of the specific reasons for the cancellation." The question presented is whether the Notice needed to comply with NRS 687B.360 as well, and, if so, whether strict compliance was required or substantial compliance would do.

NRS 687B.360 reads in full as follows:

> If a notice of cancellation or nonrenewal under NRS 687B.310 to 687B.420, inclusive, does not state with reasonable precision the facts on which the insurer's decision is based, the insurer shall supply that information within 6 days after receipt of a written request by the policyholder. *No notice is effective unless it contains adequate information about the policyholder's right to make such a request.*

(Emphasis added.)

Oregon Mutual's Notice did not advise OPH that it had the right to request additional information about the reason for the cancella-

tion and to receive a response, if appropriate, within 6 days. Oregon Mutual offers two reasons why its failure to include the information NRS 687B.360 seemingly requires does not invalidate the Notice. First, Oregon Mutual argues that the Notice "state[d] with reasonable precision the facts" on which Oregon Mutual based its cancellation decision, to wit: OPH did not pay the $2,822 premium by its due date. Since NRS 687B.360 only requires the insurer to supply additional information "if" the notice of cancellation "does not state with reasonable precision the facts" underlying the cancellation decision, and here, the cancellation Notice gave all the information there was to give, Oregon Mutual maintains that the second sentence in NRS 687B.360, requiring that the Notice advise the insured of its right to additional information on request, never came into play. Second, Oregon Mutual argues that, even if the Notice did not literally comply with NRS 687B.360, it substantially did so. As support, Oregon Mutual points to the facts that the Notice directed OPH to call Sandin with any questions, giving Sandin's contact information, and that, on the back of the Notice, Oregon Mutual provided "information describ[ing] the billing practices of Oregon Mutual," which included a "billing customer service" 800 number the insured could call.

Neither argument carries. Textually, NRS 687B.360 does not condition its requirement that a notice of cancellation tell the insured about the insured's right to ask for and receive additional information on the notice providing incomplete information. By law, a notice of cancellation is already required to "be accompanied by a written explanation of the specific reasons for the cancellation." NRS 687B.310(6). NRS 687B.360 establishes the further right of a policyholder to request and receive additional information on 6 days' written request if the notice "does not state with reasonable precision the facts on which the insurer's [cancellation] decision is based"—and to be advised of this right in the notice itself. And, as written, NRS 687B.360 categorically invalidates a notice of cancellation that does not include this advice: "*No notice is effective* unless it contains adequate information about the policyholder's right to make such a request." (Emphasis added.)[2]

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[2]The Nevada Division of Insurance agrees:

> If a notice of cancellation or nonrenewal does not state with reasonable precision the facts on which the insurer's decision is based, the insurer shall supply that information within 6 days after receipt of a written request by the policyholder. *No notice is effective unless it contains adequate information about the policyholder's right to make such a request even if the notice does include the reason for cancellation or nonrenewal*.

Nevada Division of Insurance, Property and Casualty Review Standards Checklist, updated 2014, 4th ed., doi.nv.gov/... /_public-documents/Insurers/ReviewStandardsChecklist.pdf (last visited Aug. 28, 2017) (emphasis added) (2012 Standards identical to text quoted above).

"[I]n determining whether strict or substantial compliance [with a statute] is required, courts examine the statute's provisions, as well as policy and equity considerations." *Leven v. Frey*, 123 Nev. 399, 406-07, 168 P.3d 712, 717 (2007). "Substantial compliance may be sufficient 'to avoid harsh, unfair or absurd consequences.'" *Id.* at 407, 168 P.3d at 717 (quoting 3 Norman J. Singer, *Statutes and Statutory Construction* § 57:19, at 58 (6th ed. 2001)). The question is whether "the purpose of the statute . . . can be adequately served in a manner other than by technical compliance with the statutory . . . language." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011).

Oregon Mutual makes a strong substantial compliance case. The notice was clear; it unequivocally stated that Oregon Mutual would cancel the policy due to OPH's failure to pay its premium; and it otherwise complied with NRS 687B.310 through NRS 687B.420. Invalidating the Notice because it failed to include the statutorily required language regarding the insured's right to request information about the cancellation when there was no more information to provide seems illogical, especially since OPH denied receiving the Notice. It also seems unfair, since the loss occurred before Oregon Mutual could send a second, properly worded notice.[3]

But the arguments for strict compliance are more compelling. Judicially relaxing the statute's literal requirements and accepting substantial compliance as good enough would disserve NRS 687B.360's plain text and invite litigation and its attendant uncertainty. NRS 687B.310 through NRS 687B.420 are "designed to protect individuals from the arbitrary actions of insurers who cancel insurance policies without [adequate] notice to their insureds" and reflect the "state's overriding concerns of protecting its citizens and insuring that they are afforded fair and equitable treatment by insurers." *Daniels v. Nat'l Home Life Assurance Co.*, 103 Nev. 674, 677, 747 P.2d 897, 899 (1987). For these and related reasons, most states hold that statutes imposing requirements on cancellation notices "are to be strictly construed" such that "[n]otices not conforming to the statutory requirements [are] ineffective to terminate the insurance contract for nonpayment of premiums. Even if a policy is in default, recovery may be had for a loss occurring prior to the time a [statutorily compliant] notice of termination was given." *Appleman on Insurance*, *supra*, § 16.10, at 446-47 (footnote omitted).

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[3]Of note, Oregon Mutual sent a second notice of cancellation, dated August 21, 2012, which advised, "If this notice of cancellation or non-renewal does not state the facts on which our decision is based we will supply that information within 6 days after receipt of a written request by you." By then, the fire had occurred.

The California court of appeal addressed a challenge similar to that presented here in *Lee v. Industrial Indemnity Co.*, 223 Cal. Rptr. 254 (1986). In *Lee*, the insurer sent the insured a notice of cancellation for nonpayment of premium that did not advise the insured, as required by then-current California law, "that, upon written request of the named insured, the insurer shall furnish the facts on which the cancellation is based." *Id.* at 256 n.1 (quoting 1972 Cal. Stat., ch. 237, § 1(677), at 478). The district court granted summary judgment for the insurer and denied the insured's cross-motion for summary judgment, holding that the notice substantially complied with the statute. The court of appeal reversed and entered summary judgment for the insured, holding that the statute imposed a mandatory requirement on the insurer, noncompliance with which invalidated the notice of cancellation. *See id.* at 257-58; *accord Grubbs v. Credit Gen. Ins. Co.*, 939 S.W.2d 290, 294 (Ark. 1997) ("strict compliance with the cancellation statute is what is mandated—not substantial compliance"); *Reynolds v. Infinity Gen. Ins. Co.*, 694 S.E.2d 337, 340 (Ga. 2010) ("to effect a cancellation of insurance coverage, the language of the statute is to be strictly construed against the insurer . . . . And, until the statutory notice requirements are met, the policy remains in effect."); *Dorsey v. Mich. Mut. Liab. Co.*, 250 N.W.2d 143, 145 (Mich. Ct. App. 1976) (requiring strict compliance with the statutory notice requirements and noting that, to hold otherwise, would defeat the "salutary goal of the notice statute, that is, the desire to avoid embroiling the courts in needless litigation on the question of whether or not a cancellation notice had been received"); *Blanks v. Farmers Ins. Co.*, 97 S.W.3d 1, 5 (Mo. Ct. App. 2002) ("To cancel an insurance policy, strict compliance with all the notice requirements is a prerequisite, even when such requirements are unreasonable."); *Pearson v. Nationwide Mut. Ins. Co.*, 382 S.E.2d 745, 750 (N.C. 1989) ("strict compliance by the insurer with a statute governing cancellation notices is essential to effect cancellation by such notices").

Oregon Mutual notes that, after *Lee*, the California legislature amended its statute to exempt premium nonpayment cancellations from the requirement that the insurer advise the insured of its right to additional information. *See* Cal. Ins. Code § 677 (West 1987). But this change in California statutory law favors OPH, not Oregon Mutual, because it underscores the fact that it is the legislature, not the courts, that scripts the requirements for a valid notice of cancellation. As written, NRS 687B.360 applies to premium nonpayment cancellations equally with other cancellations permitted by NRS 687B.320(1). While many premium-nonpayment cancellations are cut-and-dried, not all are. *See Lee*, 223 Cal. Rptr. at 257 (noting the confusion the insurer engendered by sending multiple premium

billings, in varying amounts). The Legislature can and has treated premium-nonpayment cancellations differently from other types of cancellations as it deems apt. *See* NRS 687B.370 (specifically excepting premium nonpayment cancellations from the requirement that the notice of cancellation provide information about applying for insurance through a voluntary or mandatory risk-sharing plan). That the Legislature has not done so when it comes to NRS 687B.360's requirement that, to be effective, a notice of cancellation must advise the insured of the insured's right to request additional information, reflects a legislative policy judgment we should respect. *See Daniels*, 103 Nev. at 678, 747 P.2d at 900 ("If the statute under consideration is clear on its face, we cannot go beyond it . . . .").

Our holding that NRS 687B.360 requires strict, not substantial, compliance disposes of Oregon Mutual's back-up argument that the notice sufficiently complied with NRS 697B.360 to pass muster. The Notice did not inform OPH of its right to request additional information from Oregon Mutual about the reasons for the cancellation. Advising the insured that it could contact its broker is not enough. Nor was it enough to provide an 800 number on the back of the Notice that the insured could call with billing inquiries. For these reasons, we reverse the district court's decision to grant summary judgment in favor of Oregon Mutual.

B.

We turn next to OPH's appeal of the district court's summary judgment order in favor of Sandin. OPH urges us to hold that Sandin had a "de facto fiduciary duty" to monitor OPH's premium payments and to alert OPH when its policy was at risk of cancellation for nonpayment of premiums. The existence of duty presents a question of law; if no duty is owed to the plaintiff by defendant, then summary judgment is appropriate. *Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008); *see Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009).

In Nevada, an agent or broker has a duty "to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978); *see Havas v. Carter*, 89 Nev. 497, 499-500, 515 P.2d 397, 398-99 (1973). OPH cites no case holding that an insurance broker owes a duty to monitor its insured client's premium payments and to alert the client when the policy is about to be canceled for nonpayment of premiums. "The duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client." *Kotlar v. Hartford Fire*

Ins. Co., 100 Cal. Rptr. 2d 246, 250 (Ct. App. 2000). As even OPH recognizes, the usual "relationship between an insurance broker and its client is not the kind which would logically give rise to" a duty to monitor and remind the client about overdue premium payments. *Id.*

We recognize that an insurance broker may assume additional duties to its insured client in special circumstances. *See* Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R. 4th 249, § 2[a] (1991) (collecting cases). But here, the record does not establish that Sandin undertook the duty OPH claims. Oregon Mutual sent its premium billings to OPH, not Sandin. OPH cites three instances over a ten-year period in which its broker alerted it to a past-due premium, but two of the three times this occurred, Sandin was working elsewhere, meaning the broker who provided OPH notice of impending cancellation was someone other than Sandin. This is not enough to establish a genuine issue of material fact sufficient to defeat summary judgment in favor of Sandin.

III.

We thus affirm the order of summary judgment for Dave Sandin and Sandin & Co., reverse the order of summary judgment for Oregon Mutual Insurance Company, and remand this case to the district court for proceedings consistent with this opinion.

Douglas and Gibbons, JJ., concur.