Case No. 71267

In the Supreme Court of Nevada

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Elizabeth A. Brown
Clerk of Supreme Court

JAMES J. COTTER, JR., individually and derivatively on behalf of READING INTERNATIONAL, INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and THE HONORABLE ELIZABETH GONZALEZ, District Judge,

Respondent,

and

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and READING INTERNATIONAL, INC.,

Real Parties in Interest.

District Court No. A719860, coordinated with No. P082942 and No. A735305

APPENDIX TO REPLY IN SUPPORT OF WRIT PETITION
VOLUME 4
PGS. 541-720

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR. Plaintiff vs. READING INTERNATIONAL, INC. Defendant And related cases and parties	CASE NO. A-735305 A-719860 P-082942 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, MOTION TO COMPEL, AND MOTION TO AMEND

TUESDAY, AUGUST 9, 2016

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COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFF:	KRISTEN T. GALLAGHER, ESQ. MICHAEL A. SHERMAN, ESQ. MARK G. KRUM, ESQ.
FOR THE DEFENDANTS:	HAROLD STANLEY JOHNSON, ESQ. MARK E. FERRARIO, ESQ. MARSHALL M. SEARCY, ESQ.

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LAS VEGAS, NEVADA, TUESDAY, AUGUST 9, 2016, 10:23 A.M.

(Court was called to order)

THE COURT: If I could go to Cotter.

We missed you, Mr. Ferrario, on the last argument, but Mr. Miltenberger did a fine job without you.

MR. FERRARIO: He's masterful sitting there.

THE COURT: He said some things.

MR. FERRARIO: I didn't see it. He's very capable.

THE COURT: All right. We're dealing with competing motions for summary judgment first, and then we'll go to the motion to compel.

MS. GALLAGHER: Good morning, Your Honor. Kristen Gallagher and Michael Sherman on behalf of plaintiff James Cotter, Jr.

THE COURT: Good morning.

MR. SHERMAN: Good morning, Your Honor.

Your Honor, on behalf of Mr. Cotter's claim for advancement I would really like to begin, if I may, by presenting a copy of one of the documents that we had attached to our motion.

THE COURT: You can just tell me where to go. I have your motion right here.

MR. SHERMAN: Very well. It is the employment demand for arbitration itself.

THE COURT: And that's Exhibit 2?

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MR. SHERMAN: I believe it is, Your Honor, yes.

The demand for arbitration with claimant Reading International, respondent James J. Cotter, Jr., states on the second page the nature of relief, the attachment to the arbitration demand as follows. If you go down to about the fifth line down, "Reading contends that this includes requiring him to resign his position...on the company's board of directors." That's how they started this in mid July 2015. It continues on, "Mr. Cotter is challenging the validity," and they go on, "...and has refused to resign from any position." In that same demand for arbitration in the second paragraph, "Nature of Claim. Reading seeks declaratory relief determining that...Mr. Cotter is required to submit his resignation from all positions with the company and its affiliates and subsidiaries, including as a member of the board of directors." They go on, in case it's not clear enough, that "Reading will also seek an order requiring Mr. Cotter to resign and/or any damages resulting from his failure to resign."

Your Honor, it is clear that -- as the substantial body of caselaw demonstrates, that because this arbitration revolves around Reading's claim that Mr. Cotter has an obligation to resign as a director of Reading it doesn't matter how they're going to try to spin this now. You can tell from the face of the arbitration demand that there is a

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causal connection between the arbitration and Mr. Cotter's position as a director, implicating all the fiduciary duties that that entails.

Now, I started with what I thought was the meat of the issue because I think that there's a -- maybe a forshpeis, an appetizer, if you will, the suggestion that any action, suit, or proceeding would not include an arbitration. I mean, clearly an arbitration is a proceeding. The subordinate clause is not in any way restrictive. Delaware authority, which is obviously persuasive here in Nevada, Your Honor, provides repeatedly with bylaws exactly the same the Palino [phonetic] case, for example, that arbitrations are candidates for advancement. Advancement provisions, as this Court knows, are construed very broadly. The Home Store case teaches the tie goes to the runner. This is not close. And in that regard, Your Honor, unless the Court has other questions, I'd reserve for any --

THE COURT: You are only seeking reimbursement related to the arbitration in this motion; correct?

MR. SHERMAN: We're only seeking advancement for that, yes.

THE COURT: Thank you.

MR. FERRARIO: Good morning, Your Honor.

THE COURT: 'Morning.

MR. FERRARIO: I think this was very thoroughly

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briefed by all sides. All cases were analyzed. I really think the starting point here isn't the demand for arbitration, because I don't think that that really changes any of the analysis. The starting point is the provision in the bylaws. If you look at the provision of the bylaws, conspicuously absent there is any reference to advancement in an arbitration proceeding. In fact, the bylaws specifically state that advancement will occur in defending a civil or criminal action, suit, or proceeding. And what the plaintiffs are trying to do here is really do violence to the employment agreement that was executed that has a prevailing party attorneys' fees provision in it. They want us to pay attorneys' fees up front, and I guess it would be a pay and chase situation. And what they're really advocating here is a distorted concept where you have an employee who refuses to abide by their agreement then claiming if they're an officer or director that somehow that triggers advancement under the bylaws provision. And that's not this works. And in the cases that we cite and the analysis we provide shows that even in Delaware that doesn't fly.

What I found interesting in Mr. Sherman's comments this morning was he said that the proceeding clearly involves Mr. Cotter's job as a director and it implicates all the fiduciary duties. That's simply incorrect. This case involves -- or this arbitration proceeding, which is not a

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civil action, which is not a criminal action, this arbitration proceeding, a private arbitration pursuant to the employment contract involves one issue, did he breach his agreement, yes or no. That does not in any way implicate his fiduciary obligation as a director.

Now, having said that, why did Mr. Sherman make that comment? It's because the cases that we cite show that the only time you trigger advancement and hence indemnification down the road under the bylaws provision is where you have a proceeding that does that. And this case simply doesn't involve that.

So at the end of the day Mr. Cotter, Jr., isn't left out in the cold. There is a prevailing party attorneys' fees provision in the arbitration agreement -- or in the employment agreement; and if he's successful, he can petition for fees there. Simply put, advancement isn't triggered under the very language of the bylaw section that they're citing.

And I'll be happy to answer any questions from Your Honor.

THE COURT: Thank you, Mr. Ferrario.

Anything else, sir?

MR. SHERMAN: Yes. Mr. Ferrario suggests that the arbitration involves one issue. Your Honor has the demand in front of you. You see what they've read. The suggestion that we ought to be going deeper than that right now really does

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violence to the whole principle of advancement that this is to be determined in a summary fashion by the Court. He suggests that Mr. Cotter, Jr., is not being left out in the cold. There is a critical distinction, as this Court is well aware, between advancement and a later determination of a right to attorneys' fees. Mr. Cotter has provided an undertaking. This is no different than a mandatory requirement that Mr. Cotter be -- advance these moneys akin to equivalent to a loan. And this is in no way distortive of anything. We're using their own words in terms of the obligation, the alleged obligation to resign as a director and the fact that this arbitration revolves around that fact. Thank you, Your Honor.

THE COURT: Thank you.

The motion is denied. Here the employment arbitration is not within the scope of the bylaws reimbursement provision. So good luck. 'Bye.

Now could I go to the motion to compel. Did you get Mr. Krum's most recent supplemental privilege log that he mentioned in the opposition I read this morning?

MR. SEARCY: Your Honor, I did receive the supplemental privilege log last night, and I'd like to talk about that with the Court briefly.

We've got a pattern here, Your Honor, where we bring a motion to compel and then plaintiff submits a privilege log to us that's deficient. As we set forth in our papers, we

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brought a motion to compel in March. The plaintiff was ordered to provide a proper privilege log. Plaintiff didn't. So we brought another motion to compel again in June. Plaintiff was ordered to provide a proper privilege log. Plaintiff didn't. We were promised a proper privilege log in July 12th, July 22nd, promised one again on July 26th. Now, on August 8, after discovery has ended, plaintiff has provided us with a privilege log that still fails to meet the Court's order.

And particularly, Your Honor, there are six pages' worth of entries on there that contain communications between the attorneys for T2 and the attorneys for plaintiff. And Your Honor specifically inquired of plaintiff at the hearing in June whether plaintiff recognized that there was no privilege between plaintiff and T2 concerning those communications. Specifically, at page 17, line 19, and page 18, line 5, of the hearing transcript where the Court asks, "So you recognize there's no privilege between your client and Mr. Robertson's clients' communications related to Reading?" Plaintiff's counsel responded, "I think that's the case. I know there's no joint prosecution agreement."

So now, Your Honor, we still have a privilege log that's deficient, and I'd like to be able to address the issues in that privilege log as quickly as possible with the Court. What I would --

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THE COURT: Today's not the day we're going to do it.

MR. SEARCY: And that's --

THE COURT: Okay.

MR. SEARCY: You're two steps ahead of me, Your Honor, as usual. What I would like to do, Your Honor, is submit the privilege log that plaintiff has provided to us to the Court and schedule with the Court at some point at the Court's earliest convenience a call where we can go over the deficient entries in those privilege log and finally bring this issue to an end.

THE COURT: So why don't you first talk to Mr. Krum about the deficiencies in the privilege log he gave you yesterday.

MR. SEARCY: And I intend to do that, Your Honor.

THE COURT: Okay. But don't involve me till you've done that.

MR. SEARCY: But I believe if we can set up a call with the Court, then we can move that process along quickly.

THE COURT: How about you give Mr. Krum your comments first.

MR. SEARCY: All right. Thank you.

THE COURT: You never know. You may resolve them.

MR. SEARCY: Your Honor, we're looking at our fourth motion to compel on the privilege log --

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THE COURT: I am aware of that.

MR. SEARCY: -- so I'm not optimistic. But I'll certainly give Mr. Krum a call.

THE COURT: Well, no. You've got to do more than that. You've got to actually talk to him.

MR. SEARCY: Absolutely.

THE COURT: Not just call. You've got to talk to him.

MR. SEARCY: And, Your Honor, if I may point out, on our third motion to compel we've done a lot of talking to Mr. Krum. In fact, Mr. Krum and I speak quite a bit.

THE COURT: Yes.

MR. SEARCY: So I don't want there to be any confusion on that point. But we --

THE COURT: I speak with you guys a lot, too, though.

MR. SEARCY: Yes, you do, Your Honor. And I'd like to -- I'd like to try and bring this issue to a head. So thank you, Your Honor.

THE COURT: Okay. Mr. Krum, anything you want to tell me?

MR. KRUM: Your Honor, I'm not going to take any of my limited time or yours to repeat what's in our papers --

THE COURT: Okay.

MR. KRUM: -- or even respond to what he said.

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Unless you have questions, I have nothing to add.

THE COURT: So since you've already produced a privilege log, I'm going to require that counsel meet and confer. I would prefer an actual meeting where you actually sit down and talk about it between the two of you, but if that's not possible, a telephonic conference call where you sit down and talk about it. After you are unable to resolve your differences related to the supplemental privilege log it would be lovely if you would send it to me and we would have a conference call.

MR. SEARCY: Thank you, Your Honor.

THE COURT: Okay. So if I can go to the motion to amend.

MR. KRUM: Thank you, Your Honor.

The motion to amend raises matters learned in the course of discovery and developments that postdate the last pleading, a classic matter appropriately included in a motion to amend. The principal areas --

THE COURT: Certainly better than asking to amend according to proof at the time of trial.

MR. KRUM: Well, we were pretty proud of that, actually, Your Honor, that we got ahead of that curve. So one of those new subjects is the supposed search hiring Ellen Cotter as CEO. We raised that in our first amended complaint as best we could given that our first amended complaint

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preceded the conclusion of that series of events. That subject was raised in the intervening plaintiff's claim. The defendants have taken discovery with respect to it. Had we sought to file an amended complaint, as their opposition suggests, promptly following the public announcement of it, I can just hear Mr. Ferrario saying something like, come on, Judge, is Mr. Krum going to amend the complaint every time Mr. Cotter disagrees with a board decision. So what we did is what we're entitled to do, is take discovery, learn facts, and file the pleading. Discovery, by the way, Your Honor, effectively commenced in mid April. As you'll recall, defendants delayed approximately -- the individual defendants delayed approximately five months before making a substantial production of documents.

The other -- another new subject is not new. That's Margaret Cotter is the director of real estate for New York City. This was raised in our first amended complaint based on facts we knew at the time. See, for example, paragraph 18. She was made -- given that position in March. I guess the opposition says we're therefore supposed to file an amended complaint then. But we wanted to see the documents and take some depositions; because, after all, what we knew is that the individual director defendants had previously by and large taken the position that she was not qualified for that. So obviously there were going to be documents and/or testimony

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that explained why they took a different position. We took that discovery. Based on that discovery we included that in the second amended complaint.

Now, I should add, Your Honor, that counsel for the director defendants, including Ms. Conning and Mr. Rodniak, spent extensive time examining plaintiff about that, questions like, "You think it's a wrong decision to have hired Margaret Cotter; correct?" "Am I correct that if the right process was followed and they hired Margaret you would be fine with that?" On and on and on and on. So they took discovery with respect to that. There's no prejudice to anybody.

The other subject that's a new one is the offer. And that obviously is a development so recent that we could not have taken, much less completed, discovery regarding it. The response of the director defendants to the offer, Your Honor, raises exactly the issue raised in most, if not all, of the matters in the FAC, the first amended complaint, namely, entrenchment and self dealing by Ellen and Margaret Cotter and abdication of the fiduciary responsibilities by the other individual director defendants in deference to what they believe to be the wishes of Ellen and Margaret Cotter.

So this is in the first amended complaint, this kind of conduct, for example, paragraphs 1, 3, 6, 7, 9, 16, and 57. We quote Mr. Storey as saying, "As directors we can't just do what a shareholder," meaning Ellen and Margaret, "asks."

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Paragraph 160 of our second amended complaint says, "Each of the non-Cotter directors in determining whether and how to respond to the offer made their respective decisions largely, if not entirely, on their understanding of what Ellen and Margaret wanted." So to respond to the individual defendants, the offer is the ultimate kind of entrenchment and abdication of fiduciary responsibilities. That is exactly the nature of every claim made in this case. That it gives rise to a different category of damages doesn't mean that it doesn't belong in the case. It's the same kind of conduct, and we're entitled to cover all of it that exists, not have some of it that closes the loop excluded from the case.

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And the interested director defendants take issue with the allegations of the second amended complaint about that series of events, and to do that they cite a press release they issued. Well, interestingly enough, the second amended complaint alleges that the press release itself is misleading.

Prejudice. Delay alone without some substantive prejudice accompanying is insufficient to serve as a basis to deny a motion to amend. The circumstances with which the parties are faced here are due largely, if not entirely, to the defendants themselves. They delayed the production of documents by five months. They delayed depositions. I had to bring motions to compel before they even scheduled depositions. We've run around the country for three straight months in places where neither Mr. Ferrario nor his partners nor I live deposing these people. We're not still not finished. We have five depositions that haven't been completed, some of them even started, one of which is Mr. Tompkins, for whom I've been asking since mid May. Mr. Ferrario I believe made good-faith efforts to produce him. Mr. Tompkins since hired his own counsel and tell me there are going to be privilege issues they're going to have the Court resolve before he'll be produced.

The document production, by the way, has been ongoing. Since the April production of the 20,000 documents -- 20,000 pages by the individuals they've produced 15.

Last comment, the second amended complaint pleads as to each matter on which a claim is based, demand futility. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Ferrario.

MR. FERRARIO: Your Honor, I'm going to cut to the chase on behalf of the company. This case has been a tremendous drain on company resources, as Your Honor can imagine. I mean, just harvesting documents --

THE COURT: I've been trying to get this case moving for almost a year.

MR. FERRARIO: Well, it has been.

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THE COURT: You guys are poky.

MR. FERRARIO: No. I would take issue with that. We are essentially done with --

THE COURT: I tried to set a preliminary injunction hearing to resolve all these issues a year ago.

MR. FERRARIO: It wasn't me, Your Honor. That wasn't me, as you recall, okay. We asked what was the -- what were the issues that were going to be resolved, and Mr. Krum couldn't even articulate that.

So here's what -- here's where we're at. We have like four mop-up depositions to do. Two I think -- we have like an hour with Doug McEachern, and we have a half a day with the plaintiff, we have a half a day with Mr. Adams. Those are all in the process of being set.

Mr. Tompkins's deposition will go forward. We proposed a number of dates. Mr. Santoro's representing him. That shouldn't get in the way, okay.

The real issue is do we allow a change in the complexion of the case at this late date. There are certain claims that Mr. Krum articulated that have been in the case via the T2 complaint. Now, that case is in the process of hopefully being resolved. We have a hearing in front of Your Honor October 6th. So have there been questions raised in the complaint about hiring Ellen Cotter, have there been questions raised in -- not in the complaint, in the case about Margaret

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Cotter? Yes. Those were part of the T2 action in large part. But what's missing here from what is now essentially an employment case if Your Honor doesn't allow the amendment -- because that's really all it was. Mr. Krum himself said this was an equitable case so that his client could get reinstated. Now they're trying to take over the claims that were previously being prosecuted by T2. T2 has said, hey, we take a look at this, there's no reason to move forward. Now they want to basically take those claims and take them to the finish line. So from our perspective it does change the dynamic here. And what Mr. Krum didn't address is the fact that many of these claims that he wants to now bring arose after there was a significant change in the board. We have two new board members.

His demand futility allegations fall as a matter of law. You don't -- you can't say that Ms. Cotting is incapable of making a decision because she is the friend of the mother of his client, who also happens to be the mother of his two sisters. I don't think that satisfies -- which I haven't seen the case where friendship alone disqualifies you from making an independent decision when a demand is placed upon you. And that's really what's missing from his complaint, his proposed amended complaint.

So I can go through this, I can hack it all up, I can tell you when Rodniak was on the board, we can do all

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that. He talks about serial amendment. His client essentially gripes and challenges every decision made by the board, okay. So I suspect we'll be doing this again close to trial. We addressed this the last time we were here when I said, so, you know, is this just going to keep going with discovery, do we just keep opening depositions, do we go back now every time we make a decision and redepose somebody. At some point you have to have some structure to these proceedings. The structure comes from a demand to the board. That's the first thing.

So having said all that, because I know Your Honor's read this and you probably have your mind made up and I'm making record, here's what the company can't afford to have happen. We cannot afford to have a delay in these proceedings. They are a drain on company assets. This needs to be resolved. And if Your Honor does allow the amendment, we do not want there to be any delay in the trial. And --

THE COURT: It's set for November.

MR. FERRARIO: Which is set for November. So there's plenty of time --

THE COURT: Absolutely.

MR. FERRARIO: -- for us to accommodate whatever we have to do --

THE COURT: And any motion practice you need to do.

MR. FERRARIO: If Your Honor is so inclined to allow

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us that, yes, we can do all the motion practice --

THE COURT: Of course. You always get motion practice.

MR. FERRARIO: -- we can do all the motion practice we need to do. But in terms of -- and this is going to be addressed on Thursday. I will not be here. I'd prefer to have that hearing set for Friday, if we could. I have to be out state in a deposition.

THE COURT: Everybody okay with moving the hearing Thursday to Friday? Everybody nodded their head okay.

MR. KRUM: Your Honor, I don't know. I'm flying out on Friday. I do not know what time.

THE COURT: My hearings start at 8:30 on Friday.

MR. KRUM: I just need to check, Your Honor. I don't know.

THE COURT: Okay. Will you check?

MR. KRUM: Of course.

MR. FERRARIO: So I -- you know, I can slice this up. Mr. Searcy can talk to you about what's in his pleadings.

THE COURT: Well, but you used all the time.

MR. FERRARIO: Well --

THE COURT: He doesn't have any time left.

MR. FERRARIO: Give him a little bit. Look, this is -- look, with all due respect, Judge, this is a really serious matter, and we --

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THE COURT: I know it is, Mr. Ferrario.

MR. FERRARIO: -- we have worked very hard --

THE COURT: But do you remember what the standard is for me allowing amendments?

MR. FERRARIO: Your Honor, this is different. I know what the standard is for amendments, and I knew where you were headed when you said at least we're not doing this at trial. But I think here when you have a derivative case there is a different element that comes into play. This isn't a PI-type case or a simple auto case or breach of contract case where you might find another related claim. This is a derivative claim. And the predicate for any derivative claim is a demand upon the board. And we've had some significant changes to the complexion of the board going forward. It isn't the same board that existed in the summer of 2015. New people were added, people that don't have some of the same issues that the other directors had, people that don't have, you know, 50-year friendships, as he's alleged, things that we think are irrelevant at any rate and more than happy to address. But it is a different dynamic here.

So from the company's perspective if Your Honor does allow the amendment we would request that we maintain the trial date. And we will work with whatever deadlines. And Your Honor knows that I will do that, having lived through CityCenter, where there were some very difficult deadlines.

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We will work with any deadlines that Your Honor imposes so long as we can get this case to the finish line in November.

THE COURT: Thank you.

You may have a minute and a half, Mr. Searcy.

MR. SEARCY: Your Honor, thank you.

I just want to emphasize a point Mr. Ferrario made and that was made by Mr. Krum but is incorrect. That's the notion that somehow the director defendants delayed in providing discovery. In fact, Your Honor, we produced documents well in advance of depositions. As we set forth in page 11 of our brief, Your Honor, we provided Ellen Cotter for three days of deposition, Margaret Cotter for three days of deposition, Ed Kane for four days of deposition.

THE COURT: See, it's less effective for you guys to tell me the history of discovery when I'm doing all my own discovery, because I remember how many times you guys have been in here fighting. Anything else?

MR. SEARCY: Well, Your Honor, but the point is that my clients have done this in an effort to make that November trial date. So I --

THE COURT: We're going to make the November trial date. That's not the issue. Anything else?

MR. SEARCY: And, Your Honor, thank you. I don't need the rest of my time.

THE COURT: All right. The motion to amend is

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granted. I find that demand would be futile on the board under the circumstances. However, that does not preclude you from filing a motion to dismiss once it's filed relating to the other issues.

Anything else?

MR. FERRARIO: No. Thank you, Your Honor.

THE COURT: All right. So, Mr. Krum, can you tell us if you can come Friday?

Could you wait a minute while I do the last page and then I go back to --

(Pause in the proceedings)

THE COURT: Okay. Mr. Krum, what'd you find out?

MR. KRUM: The answer's yes. I can do that Friday morning.

THE COURT: Okay. So we'll see you guys at 8:30 Friday morning. The things that are on Thursday will be Friday. Whatever is on Thursday is now on Friday. That's --

MR. FERRARIO: There was one -- the motion to --

MR. KUTINAC: It was just signed yesterday, so it might not be in the system yet.

MR. FERRARIO: It was a motion to continue trial.

THE COURT: What?

MR. FERRARIO: I'd as soon deal with it now so she doesn't [inaudible].

THE COURT: I haven't read it, but you know what I'm going to do.

MR. FERRARIO: I know. That's what I told Mr. Krum. He's made his record.

THE COURT: No.

MR. KRUM: That was my response, as well.

MR. FERRARIO: Okay. All right. Friday?

THE COURT: So if you guys can come Friday, I'll see you then.

MR. FERRARIO: 8:30?

MR. KRUM: Friday at 8:30 will work.

MR. FERRARIO: Thank you, Your Honor.

THE COURT: Anything else? Have a lovely day. 'Bye.

THE PROCEEDINGS CONCLUDED AT 9:30 A.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

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Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

8/11/16

DATE

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Electronically Filed
11/01/2016 11:21:35 AM

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR. Plaintiff vs. MARGARET COTTER, et al. Defendants	CASE NO. A-719860 A-735305 P-082942 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:
JILL HAWKINS
District Court

TRANSCRIPTION BY:
FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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APPEARANCES:

FOR THE PLAINTIFF:	MARK G. KRUM, ESQ.
FOR THE DEFENDANTS:	H. STANLEY JOHNSON, ESQ. CHRISTOPHER TAYBACK, ESQ. MARK E. FERRARIO, ESQ. KARA B. HENDRICKS, ESQ. MARSHALL SEARCY, ESQ. EKWAN RHOW, ESQ.

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LAS VEGAS, NEVADA, THURSDAY, OCTOBER 27, 2016, 12:59 P.M.

(Court was called to order)

MR. FERRARIO: So we are going to get the preview; right?

THE COURT: What?

MR. FERRARIO: Are we going to get the order?

THE COURT: What order?

MR. FERRARIO: You said you were going to tell us how you're going to --

THE COURT: Yeah, I'm going to tell you what to do. Sit down. Sit down, Mr. Ferrario.

MR. FERRARIO: Well, there's just certain --

THE COURT: We're missing an important group.

MR. FERRARIO: That's true.

(Pause in the proceedings)

THE COURT: This is John Waite, our new probate law clerk. He is coming in here merely because this case sort of is probate.

W-A-I-T-E, correct?

MR. WAITE: Correct.

(Pause in the proceedings)

THE COURT: What time were we going to start?

MR. FERRARIO: You said 1:00, I thought.

THE COURT: I thought I said 1:00, too. I was going to do one motion, then I was going to go to a phone call at

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1:15, then I was going to go to the next motion, and then we were going to go to a bunch of motions.

MR. FERRARIO: I think you're going to your phone call.

THE COURT: We'll see. Kirkland and Hart couldn't do 1:00 o'clock, so we had to do 1:15.

MR. FERRARIO: So what's the first motion?

THE COURT: I'm not telling you till they get here.

Does anyone actually have a calendar of what's on today so when I tell Mr. Ferrario he's being a smart ass I can do it nicely?

(Pause in the proceedings)

THE COURT: Good afternoon, Mr. Krum. How are you today?

MR. KRUM: Good afternoon, Your Honor. I apologize to you and to counsel for being tardy.

THE COURT: It's okay. I want to start with the motion to reconsider or clarify order.

And, as I told you, you're not on a timer, but I expect you to still be concise in your arguments.

MR. FERRARIO: Are we stopping at 1:15?

THE COURT: Kevin will put them on hold or we'll call in and put them on hold. I want to get through one motion first. That was the plan.

MR. FERRARIO: Okay. Thank you, Your Honor.

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THE COURT: Do you have people attending by phone?

MR. FERRARIO: Excuse me?

THE COURT: Do you have people attending by phone?

MR. FERRARIO: No. Everybody's here this time.

MR. SEARCY: There's one attorney attending by phone. Shoshana's on the line.

MR. FERRARIO: Oh. Shoshana's on the line? I'm sorry.

THE COURT: Who's on the telephone?

MS. BANNETT: Good afternoon, Your Honor. This is Shoshana Bannett.

THE COURT: Lovely. Thank you.

MR. FERRARIO: Your Honor, since you advised us when you came out here that you had spent time reading the materials, which I advised everybody here you would do, I will be concise. Because I think in reviewing our motion for reconsideration there really isn't much left for me to say.

There is from our perspective a disconnect between the comments you made at the hearing where you ruled on Mr. Krum's motion to compel and then the order that came out. And so that is something that we're going to address. But, as Your Honor is aware from reading our pleadings, we think that the Court's order is disconnected from Nevada caselaw on the point and also disconnected from the statutes that govern in this arena. And, you know, as Your Honor can see from

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reviewing our pleadings, we did a comprehensive search for any case around the country that would somehow bear on this issue, and we could find nothing that would support the very broad ruling that was embodied in your written order.

The points I would like to touch on I think that perhaps got lost in the original briefing and argument is when you go to NRS 78.138 you have the presumption of the business judgment rule applying. And it's a presumption in Nevada. You don't have to invoke it. And that seems to be where I think we're getting off track here. No one has to invoke that protection. It's there. So you don't have to plead it, you don't have to assert it as an affirmative defense. It's a presumption in Nevada that applies statutorily. And the statute also goes on to tell you what a director and an officer can rely on in informing themselves. And when you get to the very end of Section 78.138(2)(c) I think we get to some of the operative language that may have gotten lost in the original briefing. It says, "A director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." So the inquiry is going into seeking the advice, do you have something in your head, Director, that would cause you not to rely on that advice that you're getting from an accountant, from an officer, from a

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lawyer. And that is a critical distinction from I think Your Honor's ruling. And the statute is specific as to where the inquiry begins and ends.

Also, if you go to the NRS Chapter 49, where the privilege results, there's no exception there that would cover this. In sitting down and trying to digest this Court's ruling it has the practical effect of precluding any director from ever seeking legal advice from an attorney in fulfilling their duties without risking that advice then becoming subject to discovery. And again, that's not found in any case, any article, any treatise that we can find. And it also -- your ruling puts the directors at odds with the company. And you're familiar with the Sands-Jacobs case.

THE COURT: Maybe.

MR. FERRARIO: It was your case, so I --

THE COURT: And the Wynn case you cited, I'm familiar with that, too.

MR. FERRARIO: You'd be proud to know I read it.

THE COURT: You should have lived it.

MR. FERRARIO: No. I -- well, I lived it vicariously. You remember we were here.

THE COURT: You were here, yeah.

MR. FERRARIO: Yeah. And, you know, the Nevada Supreme Court says who the holder of the privilege is in the Jacobs case, although the facts are a little different there.

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THE COURT: Not a former CEO.

MR. FERRARIO: Not a former CEO. But the court made it very clear that it's the corporation's privilege. And actually the statutes do that, as well. And so now you have a director who is presumed to have acted in good faith, so you don't need to invoke that. And that -- and again, I want to get to that point. That's different than the Wynn case. In the Wynn case they actually pled in the pleading that they relied on the report and the advice of counsel. That hasn't occurred here. No one has put that at issue.

THE COURT: That's why I asked you at that hearing and I said to I don't know if it was you or Ms. Hendricks, I said, now you guys need to make a choice.

MR. FERRARIO: But --

THE COURT: And I've been waiting for you to tell me what that choice is.

MR. FERRARIO: But what's the choice? I guess that's what we're --

THE COURT: Are you going to rely on advice of counsel for your directors in their business judgment rule defense?

MR. FERRARIO: Your Honor, we -- you see a number of lawyers sitting over here. We've all sat down and tried to role play how this would play out, okay. So here's -- if you ask a --

THE COURT: But you heard me ask that question during the hearing; right?

MR. FERRARIO: I did.

THE COURT: Okay.

MR. FERRARIO: And so we're trying to gain an understanding of where this goes. If a director is asked a question, what did you do, okay, in dealing with this issue, and let's just -- it's the hundred thousand exercise of the option, what did you do.

THE COURT: And that is the only issue which I have granted it, because that is the only issue on which I've been provided evidence that they have testified that they relied upon advice of counsel as their sole decision-making basis.

MR. FERRARIO: Your Honor, maybe we can cut this out. If Your Honor limits the ruling and it is that they relied solely --

THE COURT: Well, that's what the order says. It says on line 6, "Legal opinion referenced by Messrs. Kane and Adams in their deposition as having been relied upon relating to the 100,000 share option shall be produced by defendants, including," and I list a bunch of stuff. If any of that stuff was provided to Mr. Kane and Adams for their ability to review and rely upon, it needs to be produced. If it wasn't provided to them and it's simply the basis of counsel's work product, that's a different issue. But what I specifically said in

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line 6 of the order and the reason I didn't change it any more was because it was part of being relied upon. They can't rely upon it unless they give it to him.

MR. FERRARIO: You're right. And I guess so now if --

THE COURT: Or they tell him. I guess they could tell him.

MR. FERRARIO: They could tell him.

THE COURT: Yeah.

MR. FERRARIO: If the scope of the order is such that one of directors says, all I did was rely on advice of counsel, okay, I didn't do anything else, I think that raises a little bit different issue, although I'm not sure it would change my position. What we're concerned about is where you have directors considering a number of things, and part of that mix might be advice of counsel on a point.

THE COURT: Correct.

MR. FERRARIO: Okay. It might be a point of procedure.

THE COURT: Happens all the time, Mr. Ferrario.

MR. FERRARIO: Happens all the time. In that context I take it your order would not apply --

THE COURT: Well, it depends --

MR. FERRARIO: -- because it's not the sole basis.

THE COURT: Depends upon what the testimony is.

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MR. FERRARIO: No, I understand. And that's what we -- and we've gone through all --

THE COURT: And, as you know, I typically do an evidentiary hearing and I hear about what it is that the directors relied upon in making that determination, and based upon that mix of information I make a decision. But that's a fact-based decision based on case by case as it comes up. Here it was pretty clear that it was a solely based upon this opinion, this advice that was given. And I am not trying to require counsel to produce all of their work papers --

MR. FERRARIO: Well, that's how we interpreted it.

THE COURT: I'm not trying to do that. That's why I said the legal opinion referenced by them as having been relied upon shall be produced by defendants. And then I listed a whole bunch of things that could have been provided to them for them to review as part of their reliance upon that attorney's opinion.

MR. FERRARIO: Okay.

THE COURT: Or at least that was I was trying to make sure we did.

MR. FERRARIO: Well, when we read -- when we read the laundry list it appeared that, quite frankly, some of us here would be witnesses. And, you know, our work product, the dialogue we had internally, none of which was --

THE COURT: So how about I change the word "relied"

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to "provided to"?

MR. FERRARIO: I think if --

THE COURT: I don't know what word you want me to use there, but I used "rely" because that's what is important in me making the determination under the business judgment rule and the protection the directors are entitled to even if the lawyer's wrong.

MR. FERRARIO: Right.

THE COURT: And that's the important factor. They're entitled to that protection if it's a good-faith reliance and the didn't know any better and the lawyer was wrong.

MR. FERRARIO: You're correct. Actually, this is a good dialogue, because it gets back to what 78.138 says, which is the director would have to have knowledge concerning the matter in question, okay, that would cause that director not to be able to rely on the advice of counsel. That inquiry can be made without delving into the advice of counsel.

Now, if -- as we're having this dialogue it leads me back to kind of the Wordley case, where there they put the advice at issue, okay. They pled it. And again in the Wynn case as we read the briefs -- we're not as familiar with it as you are, we just read the briefs -- that's at issue -- it seems to be at issue there. Here --

THE COURT: It depends who you ask and when you ask

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them. Because it's changed over time.

MR. FERRARIO: Okay. But the briefing --

THE COURT: Sort of like this case. I asked them if they were going to, and then they thought about it and they made a decision.

MR. FERRARIO: Well, that was our take from the Wynn case, was that they were -- that they'd put it at issue. If -- but, again, if a director simply says, okay, that I -- in discharging my duty I consulted with counsel, okay --

THE COURT: Mr. Ferrario, I'm not going to talk to you about a hypothetical case. I am talking about the facts in this case where I have two witnesses who testified that their sole basis was they relied upon the representations or the opinion of counsel in making a determination. That's this case. That's the one I'm deciding.

MR. FERRARIO: I understand.

THE COURT: I'm not going to get involved with you in a hypothetical discussion. You can have that discussion in Carson City, if you want.

MR. FERRARIO: I'd prefer not to have to go to Carson City. And that's why I'm here doing -- having this --

THE COURT: I'm just telling you I don't want to discuss hypothetical questions on this issue, because I've tried to be very limited on a scope of this issue.

MR. FERRARIO: I understand. Okay. And that's

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helpful and it may help us in kind of narrowing the scope of the order. But I think the followup question from -- that's missing from Mr. Krum's examination has to do with whether any of those directors had any knowledge concerning the matter in question that would cause them not to be able to rely on that advice. That's the discrete inquiry that wasn't made there. And if the director says, I had nothing in my possession that would cause me to question what the attorney said, then in that context that's the end of the inquiry. The confidentially attorney-client communication should not have to be divulged. That's my point. Even in that case. And that examination didn't take place there.

THE COURT: Okay.

MR. FERRARIO: And so, you know, with that I'll answer any questions Your Honor has. Again, I think it was extensively briefed and it's -- you know.

THE COURT: It was extensively briefed. It was well briefed. It was very thorough. It just -- I -- there was clearly a miscommunication of some sort. And I thought I was really clear when I put that language in there, because I monkeyed with it a little.

MR. FERRARIO: Thank you, Your Honor.

THE COURT: Mr. Krum, did you want to say anything on this motion?

MR. KRUM: I do, Your Honor.

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THE COURT: Okay.

MR. KRUM: Thank you. Of course, the issue isn't an exception, it's waiver. That's what Kane and Adams did.

Second, with respect to 78.138 there was no further examination necessary. We have other evidence from a contemporaneous email from Mr. Kane in which he expresses reservations about whether Mr. Tompkins has answered the questions posed by the third compensation committee member, Mr. Storey. That's it for the law and the matters of that respect.

I want to make clear, however, Your Honor, that from our perspective this is not the same issue as it was from the perspective of the intervenor plaintiffs. For them the 100,000 share option was about whether they could secure control at the annual shareholders meeting. For us the developments of the 100,000 share option, meaning the communications that Tompkins had with directors, occurred at a point in time when Ellen Cotter and Margaret Cotter commenced the course of conduct, enlisted the agreement of Kane and Adams and McEachern that carry on to this day. So Tompkins, according to evidence in this case, chose the sisters' side. The evidence, by the way, is Mr. Kane's contemporaneous email. Mr. Kane also repeatedly expresses in email reservations about Mr. Tompkins serving in any significant role with the company. Mr. Tompkins, as it turned out, effectively became the

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consigliere to Ms. Cotter and starting with his advice to Ellen Cotter in March or April that she needed to exercise this option to ensure control of the company because there was the possibility that the shares held in the name of the Trust could not be voted or should not be counted. That was the beginning of this whole scheme to secure control.

So the point of these communications, Your Honor, is not confined to a question of whether there was a fiduciary breach by Kane and Adams in approving that option, which it is, it concerns that, but it goes to the bigger part of the case. And the reason for that, Your Honor, is the timeline. Because in March the five non-Cotter directors made Mr. Storey ombudsman with the charge to work with the three Cotters and report back periodically, and then they'd revisit the situation in June. But Storey quickly alienated Ellen and Margaret Cotter, prompting Kane to intervene. And Ellen and Margaret Cotter conferred with Tompkins, and we have these developments of the 100,000 share option and at more or less the same time Kane and Adams and McEachern agreed with Ellen to vote to terminate plaintiff. So it's actually a big, big part of the case in terms of what transpired at the outset. It's not just the issue that I think we perhaps led you to believe it was previously.

The legal issues I think I just spoke to briefly. And unless you have questions, I will step down.

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THE COURT: Thank you.

The motion for clarification is granted in part. If document or information was not provided to Mr. Kane and Adams, it does not fall within the delineated items that are included on the October 3rd order, okay.

Now, whoever's on the phone, we may lose you, because Kevin's now going to call in to my 1:15.

When you return from your five-minute recess we are going to go to Cotter's motion to vacate and reset pending dates and reopen discovery on order shortening time, fourth request.

(Court recessed at 1:22 p.m., until 1:26 p.m.)

THE COURT: Okay. Mr. Krum, you're up.

MR. KRUM: This is the motion to vacate, correct, Your Honor?

THE COURT: That is -- it's essentially a motion to continue trial.

MR. KRUM: Right. Thank you.

Well, as you saw, Your Honor, fact discovery isn't complete, and based on what's transpired in terms of how the defendants have failed to produce documents in response to your orders of March 30, it's not going to be complete. Expert discovery, were that the only thing we had to do, might be complete. We have some witness conflicts, and I may have a conflict. So let me talk about those four items.

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Well, August 3 one of the motions you granted was a motion to compel discovery regarding the offer. That included directing the defendants to produce a pretty finite set of documents and of the company to produce a Rule 30(b)(6) witness. The individual defendants other than Mr. Gould promptly represented that they would produce the documents and offered deposition dates a couple weeks hence, to which our response was, great, when will we get the documents because we need to review them to prepare, and, oh, by the way, when will we get the documents in response to the other order, which, of course, was the advice of counsel order that was just the subject of the last motion. There were no answers to that. And then ultimately those individual defendants didn't produce a single document regarding the offer. They said, well, the company will produce the documents.

So on September 15 the company produced a modest set of documents, but in our view, Your Honor, that production is incomplete for at least two reasons, one, the documents produced include board minutes of the of the single meeting from June, I think it was, at which the directors supposedly deliberated about how to respond to the offer. Those board minutes, Your Honor, include fairly detailed information that supposedly is taken from an oral presentation Ellen Cotter gave to the directors at that board meeting. In other words, the board members were given no written material before or at

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the meeting. The production is incomplete because it doesn't include whatever notes or information was used by Ellen Cotter to make that presentation, which, of course, is the very kind of information one would need to meaningfully test the company's Rule 30(b)(6) witness, as well as the three director defendants whose depositions have not been completed in terms of, well, did you understand this information, was it accurate, did you think about this, did you think about that. But we don't have that documentation.

Also, Your Honor -- and my comments now are predicated entirely upon a news article that came out a couple weeks ago; in other words, nothing I'm about to say is predicated on anything I've learned from my client or any documents that my client has received from the company, meaning it's not non-public information. And the news article a couple weeks ago reported that the offerors were back with what apparently is a somewhat revised offer, I believe, at least in terms of the participants. And so obviously, Your Honor, that situation continues to unfold, assuming that news article is correct, and theoretically, at least, there should be additional documents, starting with whatever the new offer is or the revised offer or whatever it is and continuing with whatever communications, if any, there are as among the director defendants.

So the document isn't complete, and when it is

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complete and when the documentation that's going to be produced in response to your modified order regarding advice of counsel, finally then we'll be in a position to resume or commence, as the case may be, and conclude these three director depositions, as well as the deposition of Craig Tompkins.

The other half of this, of course, as you full well understand given the last motion we had, is that the defendants haven't produced a single document that you ordered to be produced on the subject of advice of counsel. From our perspective there's nothing they argued in their motion to reconsider or clarify that they could not have raised following the hearing. They chose to wait until your order was signed on October 3rd and then file a motion, and it was just heard. So I don't know when we'll receive those documents. It may well be that counsel for the defendants, including the company, don't know what exactly they're going to produce, much less when. But obviously, Your Honor, I can't commence and conclude the depositions that remain, the percipient witness depositions that remain unfinished until we have that documentation and have time sufficient to prepare to use it.

That, Your Honor, is of no fault of plaintiff. It's -- we're in substantially the same position we were on August 30. We're in exactly the same position we were in

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September 15, and nowhere along the way were we in a position to resume and conclude these depositions. And if you recall, Your Honor, one of those depositions you ordered to resume, that is, with Mr. McEachern, with respect to that very subject, the offer. And I omitted him before, I think. So this is no fault of ours. And we could have proceeded with the depositions, but it would have been a waste of everyone's time, because we would have been back once or twice to order the same deponents to come back after the defendants produced the documents you ordered them to produce on August 30th.

Respectfully, Your Honor, the manner in which they've responded to these orders that you granted, the motions to compel you granted sure smack of gaming the system with the hope that the Court will let them get away with it so that the plaintiff's required to go to trial without the discovery you have ordered plaintiff to be provided. And so, again, the director depositions are Cotting, Adams, and McEachern. There's Craig Tompkins, who is obviously going to have a much different examination now when these advice of counsel documents are produced, and there's a 30(b)(6) witness who was identified to us a week or two ago as Ellen Cotter. Obviously from our perspective, Your Honor, the missing documents, being the two categories of documents and the offer that haven't been produced are critical to conduct the Rule 30(b)(6) deposition that's now Ellen Cotter that you

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ordered.

On the discovery front, if I've counted correctly -- or on the expert discovery front there are a total of ten experts. Five of ten have now been deposed. Two of those depositions were postponed because of conflicts. These guys are apparently all very successful, Your Honor. They're available one or two days each month, and that's made it difficult for all counsel to schedule and proceed with those depositions. And if you want to hear about the subject of whether we've been proactive or dilatory, let me just tell you what my week went like last week. Monday I was in New York for an expert deposition, Tuesday I was in Boston for an expert deposition, Wednesday I was in Philadelphia for an expert deposition, Thursday I was back in New York for an expert deposition, Friday I was here in court. Saturday and Sunday I was with my family on the East Coast. Monday I came to Las Vegas, Tuesday I went to Los Angeles for an expert deposition on Wednesday, and came back last night. We're working pretty hard, Your Honor. We have little time and difficult scheduling. The experts are not all in Las Vegas, nor are they all in Los Angeles, where counsel for the interested director defendants presume to require them to proceed initially.

In any event, Your Honor, we have five more to go, and we may or may not get them done between now and the date

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of the trial stack, because it's going to require a lot of flying around, L.A. for two or three of them, Palo Alto, and I forgot where else, Your Honor.

The opposition filed by the company asserts that plaintiff's motion does not detail why in the last two months virtually none of the discovery plaintiffs demanded in August was not completed. Well, sure it does. I just discussed that, Your Honor. They didn't peruse the documents.

The company also argues that the foreseeability of the need for additional discover is extremely questionable. Respectfully, that ship has sailed. Your Honor granted motions to compel, you ordered discovery. We're entitled to receive it. The fact that they don't provide it doesn't mean that they now can effectively not provide it because the time for us to get it and use it is insufficient. The interested director defendants assert that, quote, "Since the previous motion to vacate plaintiff has refused to schedule percipient witness depositions." That's flat out false, Your Honor. What they're talking about were these blatantly and overtly disingenuous offers by Mr. Searcy to produce witnesses without telling me whether and when he'd produce the documents. I didn't just fall off the turnip truck. I'm not going to Los Angeles to commence a deposition that I can't complete because they didn't produce the offer documents and they didn't produce the advice of counsel documents.

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Counsel for the individual defendants claim that plaintiffs delay the start of expert witness discovery. That's false, too. What happened --

THE COURT: So how many percipient witnesses are there? I've got the list of directors, I've got the list of experts. How many percipients are there that aren't directors?

MR. KRUM: Tompkins I think is it, Your Honor.

THE COURT: But he used to be a director.

MR. KRUM: No. He's a -- he has an odd position of non-employee counsel. They want to make him general counsel.

THE COURT: All right.

MR. KRUM: Kane objects, my client objects.

THE COURT: But I have him in category of important people.

MR. KRUM: Right.

THE COURT: So I've got him on the list with those company-related people. I've got the experts there are five people. How many percipients are there that aren't your employee-director-related people in 30(b)(6)?

MR. KRUM: I think -- unless I've forgotten, Your Honor, it's the five, the three directors, Tompkins, and the 30(b)(6).

THE COURT: Okay. So this is the only one. So you don't have any other percipient witnesses?

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MR. KRUM: If there is, Your Honor, it can only be a person or two that I've forgotten. But I don't recall any as I stand here.

THE COURT: Okay.

MR. KRUM: The -- what happened on the experts is they just sent out a notice and said, come to Quinn Emanuel in Los Angeles, have this guy from Boston and this person from Philadelphia and this person from New York all show up. They didn't call me, they didn't email me. And, of course, that came in the midst of summary judgment papers or something, and so, of course, that didn't come fast. We didn't produce them then. We ultimately worked out a schedule, and the only delay, if you want to call it that, Your Honor, was an extension of one week in providing rebuttal reports from the 18th of September to the 25th. And that was suggested by counsel for the interested director defendants, not by counsel for plaintiff. We agree.

We have one other extant scheduling conflict. The plaintiff and Ellen and Margaret Cotter are in trial in the California Trust action on November 14 and 15, and November 28th through December 1. And then finally I'm obliged to observe that I have a potential debilitating conflict that either will arise or won't, which I've previously mentioned to counsel and the Court, and it's one over which I have limited control. I'm trying to resolve it, but it hasn't been

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resolved. So that issue remains outstanding.

Unless you have questions, Your Honor, I have nothing else on this motion.

THE COURT: Those were my questions for you.

MR. KRUM: Thank you.

THE COURT: Oh. Wait. I do have one more. Here's my note. When is the Trust action in California scheduled to be completed?

MR. KRUM: I don't know the answer to that, Your Honor. What I can tell you is they have dates either this week or next week, I think, and --

MR. FERRARIO: There's no set time for it. They're being -- they're getting fill-in dates.

MR. KRUM: They have dates.

THE COURT: I've never practiced in California, so I have no idea what that means.

MR. FERRARIO: He says they started -- well, go ahead. When did they start?

THE COURT: What is it?

MR. TAYBACK: They have a schedule of dates and the judge says that when we finish is when we finish and I'll give you dates as we go along. But I think it's --

THE COURT: But when do they start?

MR. TAYBACK: They've started.

MR. FERRARIO: They're like the Show Canada trial.

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It keeps going.

MR. TAYBACK: And as they don't complete -- as they don't complete testimony, then he schedules other dates.

THE COURT: I stuck my tongue out at Mr. Ferrario. That is not a judicial activity. I'm sorry. I lost my judicial demeanor. Thirty-five trial days over a year and a half because I can't get people to come to court. It's okay. It worked out. I wrote a decision, it's going up on appeal, something will happen.

So they're at the pleasure of the fact finder, who is a judge --

MR. TAYBACK: Correct.

THE COURT: -- in California, who is doing it based on their own availability and schedule.

MR. KRUM: Well, the lawyers have negotiated the schedule.

MR. TAYBACK: With input from the lawyers and the witnesses.

THE COURT: Right. No. They --

MR. FERRARIO: The judge will send out dates, they get together, and then they pick.

MR. KRUM: My understanding, Your Honor, is --

THE COURT: But they're never enough to finish. It's not like a jury trial where we go till we're done whether we're going to be able to or not, because we don't take a

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break for a jury.

MR. TAYBACK: Correct. They take a lot of breaks. Judge takes a lot of breaks for his other matters.

MR. KRUM: It's five days at least that I just identified. I think there are other additional days. And if they can finish in that time, then the matter is submitted to the judge, who has, I've forgotten, 30 days or 60 days to render a decision.

MR. TAYBACK: That's right.

THE COURT: Something like that. Okay. Thank you. That was my last question for you.

Mr. Ferrario.

MR. FERRARIO: Your Honor, I'm going to kind of reverse engineer this. You told us the last time we were here that we weren't going to go on the 14th because --

THE COURT: I did. Because of my murder case.

MR. FERRARIO: Right.

THE COURT: And you heard me say that to Lenhard. Or you weren't in here, but Mr. Krum heard me say it to Lenhard.

MR. FERRARIO: Right. So --

THE COURT: And then he wouldn't take me up on the dates I gave him.

MR. FERRARIO: Who, Lenhard?

THE COURT: Lenhard.

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MR. FERRARIO: Well, what dates are you -- what dates are you thinking?

THE COURT: I can't give you dates, because you're a jury trial. I have to be able to finish you, and you tell me you're three weeks. So I have to have three weeks in a row. That's the problem with being a jury trial. With being a bench trial like [unintelligible], if you don't finish on that third day, then I'll pick another day like the judge in California, and we'll finish you up.

MR. FERRARIO: We're aware of that. So --

THE COURT: That's a problem.

MR. FERRARIO: It is. What we can't have is a six-month continuance. And --

THE COURT: So do you want the reality of my life after January 1st? I don't have a courtroom anymore.

MR. FERRARIO: What?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Where are you going?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Why? Because you've been elevated?

THE COURT: I'll be on the tenth floor with no courtroom.

MR. FERRARIO: Doesn't Judge Togliatti have a courtroom?

THE COURT: Judge Togliatti has a courtroom. She's not the chief judge.

MR. FERRARIO: Oh. Really? You're not going to be here?

THE COURT: No, Mark, I will not be here.

MR. FERRARIO: I don't even understand this. I mean --

THE COURT: I have to go to the tenth floor.

MR. FERRARIO: I understand that. But why can't you come up here and try cases?

THE COURT: Because somebody will be here in my courtroom with my criminal and civil docket, with the exception of my Business Court cases.

MR. FERRARIO: Well, then how are we going to have a jury -- where are we going to have the jury trial?

THE COURT: Yes. That's why we're having this discussion. Because I'm going to have to --

MR. FERRARIO: Do we still have the CLC?

THE COURT: No, we do not.

MR. FERRARIO: Oh. Don't laugh at that.

THE COURT: And besides, the electrical load on the building would be insufficient for your case.

MR. FERRARIO: Not for this one. We're only plugging in computers. All right. So -- right.

THE COURT: There's a disagreement on this side whether the electrical there would be good enough even if we

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had access to it. And we do not have access to it.

MR. FERRARIO: Okay. Then that moots it.

THE COURT: Okay.

MR. FERRARIO: Look, I'm assuming we'll get a courtroom. I guess we can't have --

THE COURT: Yes, I will get a courtroom. But that's why it requires us to be ready, no changes, everything's going when we move.

MR. FERRARIO: And I want to address that. I'm not going to get -- we put in there what happened. You know, quite frankly what we're saying is kind of a continuing pattern. In the summertime we accorded plaintiff an extension of some deadlines, the expert discovery and that, and Your Honor will remember that. So the reason we got pinched on some of this is because of the courtesies that defendants accorded the plaintiff. And then that rolls into other things. Be that as it may, we have limited discovery to complete. McEachern's deposition won't even be a half day. Adams won't be a half day.

THE COURT: Adams?

MR. FERRARIO: Kane won't be a half day.

THE COURT: Tompkins?

MR. FERRARIO: Tompkins will probably be a full day.

THE COURT: 30(b)(6)?

MR. FERRARIO: 30(b)(6) will be a half a day.

UNIDENTIFIED SPEAKER: It's limited to two hours.
THE COURT: Five experts, all --
MR. FERRARIO: Oh. It's limited to two hours. Excuse me.
THE COURT: I limited it to two hours.
MR. FERRARIO: And then --
THE COURT: Five experts all over the country.
MR. FERRARIO: Five -- these expert depos have been averaging -- I think the longest was about six, seven hours, and the others have been three, four hours, they haven't been that long.
THE COURT: So let me cut to the chase. When are you going to produce the rest of the documents that we discussed this morning and resolve the issue with Mr. Krum about whether he believes your last production pursuant to the order compelling you was sufficient or not?
MR. FERRARIO: I guess what I'm troubled with, and I talked to Ms. Hendricks, who's here, and she's been handling this primarily, there was no meet and confer. We did produce the documents relating to the May 31st expression of interest letter. That's what we were ordered to do. The points he making -- he says, well, this is an ongoing saga, okay. You know, another expression comes in here. He references what's in the paper. So when does it stop? I've already had that discussion with Your Honor. His client essentially objects to

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every decision that's made by the board.

THE COURT: Yes.

MR. FERRARIO: Taken literally, we will never get this case to trial, because there will always be something more for him to do. We complied with our obligation. There's been no meet and confer, we don't know what he wants. I don't know why he expects that we would just start voluntarily producing things as the company business continues in anticipation that he would just object. That makes no sense. So we have done what we're supposed to do. What we're seeing are delay tactics, which, quite frankly, the evidence hasn't turned out the way he wants, he doesn't want to go to trial. The company cannot afford to endure this burn rate anymore. It is a -- you know, it's a great company, but it is a drain on the company. And when I say burn rate I'm talking about not only money, I'm talking about the company resources the executives, everybody that's putting time into this.

I want to go back to this idea that somehow now he challenges the -- how the board handled the expression of interest, and he needs the documents. I have the minutes, and I could give them to Your Honor, but it's clear what happened there. There's no mystery. He has the minutes from the meeting. His client had, I would venture to say, through his position on the board virtually every document to the extent any were referenced by Ellen Cotter. He already had that

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stuff. He's been on the board. This isn't some outsider needing this material. He gets it. So what's happening is it's just -- it's a never-ending stream of requests for additional information, things he doesn't have, blaming people. And it's just got to stop.

So what we have is this. The five experts I think -- aren't they all set -- they're all --

MS. HENDRICKS: They're not.

MR. FERRARIO: They're not all set.

MR. TAYBACK: We've offered dates. We don't have dates.

MR. FERRARIO: We need to get those set.

THE COURT: You need to get them finished.

MR. FERRARIO: They'll be finished. None of them have been very long. This isn't -- these are not bomber depos. They've been going pretty quick. Mr. Tompkins is probably the single longest depo that remains to be taken. It'll be a day, I'm pretty sure of that. Everything else -- and really by agreement we agreed to finish the plaintiff's deposition in a half day. We may need more than that because he's now interjected additional issues in the case. But that will probably be done in a matter of three to four hours. So there really isn't that much left to do. That's what I want to bring to the Court's attention.

I don't think that we have to produce what the

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company is getting, and as referenced in the article that Mr. Krum said, and what the company's doing in, you know, the latest overture from the person that had the expression of interest. I don't think that's an ongoing obligation. He hasn't put that into issue in the case. And at some point we have to cut it off. You allowed him to put in the case what happened with regard to the May 31st letter. He has all of that material.

So we need a trial date as fast as you can give it to us. We can -- we can use the time that we had set aside for trial --

THE COURT: You're not done.

MR. FERRARIO: Huh?

THE COURT: You're not done.

MR. FERRARIO: Your Honor --

THE COURT: Okay. So wait. Let's stop. When are you going to produce the documents, or not, that relate to our discussion this morning -- or our discussion on Motion Number 1?

MR. FERRARIO: We will have a decision on that by tomorrow.

THE COURT: Okay.

MR. FERRARIO: At the latest Monday, but I think by tomorrow.

THE COURT: So if you're going to produce the documents, you'll produce them in a week or 10 days?

MR. FERRARIO: No. My recollection is -- I could be wrong, but I think it's one memo.

THE COURT: Great. That's easy.

MR. FERRARIO: That's it.

THE COURT: So if you decide to produce the document, it'll be done in a week or so. Then --

MR. FERRARIO: No. It'll be faster than that.

THE COURT: Okay. Then we have the depos that have been waiting for this to go, whether it's a good idea to await it or not is an entirely different issue.

MR. FERRARIO: That's Kane and Adams. That's --

THE COURT: That's six depos that may relate to. So those depos go forward. How long is it going to take to get those scheduled and taken?

MR. FERRARIO: My proposal would be this. We already blocked out the 14th for trial, I think. We use that time period --

THE COURT: Well, but you've got witnesses who haven't been as easy to get along with in life as you'd like.

MR. FERRARIO: No, that --

THE COURT: You don't just get to tell them to come. There was the one guy in San Diego who didn't want to go a half hour away from his house. I don't even remember which guy it was.

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MR. FERRARIO: He's Ed Kane. He's 80-some years old.

THE COURT: Right.

MR. FERRARIO: That was when he was -- look, I hope I have as much energy as he does when he's 80 years old.

THE COURT: Me, too.

MR. FERRARIO: But the fact is, sitting there a whole day, it's draining. So they control -- I'm not going to speak. They can talk about that. I don't think scheduling Mr. Kane, scheduling Mr. McEachern, scheduling Mr. Adams is going to be an issue. We already have a date --

THE COURT: And we've got Cotting, Tompkins, and the remainder of the 30(b)(6).

MR. FERRARIO: Won't be an issue. Mr. Tompkins is right here.

THE COURT: Good morning, sir. Or good afternoon, sir. How are you?

MR. FERRARIO: These are not going to be issues. I'm just saying.

THE COURT: So how -- I -- you and I have done --

MR. FERRARIO: Mr. -- let me --

MR. SEARCY: Your Honor, we blocked --

THE COURT: Wait. Wait, Mr. Searcy.

You and I have done enough litigation over the years that it never works that we set aside a deposition schedule

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where we have a week worth of witnesses that the witnesses all come when they're supposed to.

MR. FERRARIO: I -- I think we have the 14th blocked out. We don't even have to wait till the -- we have the 14th blocked out, okay.

THE COURT: Sure. So you think --

MR. FERRARIO: That gives us let's say 10 days. We should be able to knock out --

And I don't know if you can make your clients available.

MR. SEARCY: They've set aside that time period around the 14th, Your Honor, so they're available.

THE COURT: Really.

MR. SEARCY: And we should be able to stack these, because they're very short depositions.

MR. FERRARIO: They are short. And I know Ellen Cotter -- we've talked to her about -- because she's the 30(b)(6), and that's a two-hour depo, and she's, you know, as flexible as she can be running the company and all. And then we do have to accommodate her when she's in the trust litigation. But Mr. Krum's client has that same issue. So there's a couple days, I think the 14th, 15th, 16th they may be in trial down there. We can make all that happen.

THE COURT: Okay. So you get those depositions done say by -- you're done with that by Thanksgiving.

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MR. FERRARIO: Yes.

THE COURT: Best of all possible worlds.

MR. FERRARIO: Best of all worlds.

THE COURT: And then you've got the experts. How long is that going to take? Because the experts are harder to schedule.

MR. FERRARIO: How many are left to be set? I know my schedule had somebody in Palo Alto next week; right?

MR. TAYBACK: He hasn't accepted those dates.

MR. FERRARIO: Oh.

MR. TAYBACK: So we've offered dates for ours. We were waiting for dates from his. I think two weeks. Same time period.

MR. FERRARIO: I think we can do it.

THE COURT: You can't do them at the same time. So then how much longer is it going to take to finish up those five depos, five expert depos?

MR. FERRARIO: Well, we did five in like a week, so --

THE COURT: I heard the schedule that Mr. Krum just recited. And, yes, that was a tough schedule, but I'm glad you guys did it.

MR. FERRARIO: Right. I don't see why we can't have them done -- when's Thanksgiving, the 24th, 25th?

THE COURT: So that means you in the best of all

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possible worlds would be done the week after Thanksgiving, maybe by the 9th of December.

MR. FERRARIO: Yes.

THE COURT: I don't call in juries over the Christmas holiday, so there's no way given when you'd be finished I could try you on this stack even if I wasn't in my capital murder case.

MR. FERRARIO: Oh. What if we -- what if we were done by the beginning of December? I know you don't want to -- I agree, none of us want to be here having the jury glare at us over Christmas.

THE COURT: You're not going to be ready. You can't do it. I mean, you just can't physically do it.

MR. FERRARIO: Well, you know, when I said that to you in CityCenter when you told me to look at 3 million documents, I think you said, just do it.

THE COURT: I set five tracks of depositions in that case --

MR. FERRARIO: That's true, you did.

THE COURT: -- and I haven't done that in this case.

MR. FERRARIO: You haven't. If we got done -- but it is possible to get it done by the beginning of December. I mean, I'm not being facetious, because the depos haven't been as long as we thought. And if they've got control over -- well, they do have control over all the witnesses. So does

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Mr. Krum. We can finish Mr. Cotter, Jr., in a half day.

THE COURT: So let me go to another issue. So you know you took a writ; right? Or no. Mr. Krum took a writ, and there's a stay related to some documents that he has. Are you worried about those documents being available prior to you starting trial?

MR. FERRARIO: We've talked amongst ourselves, and if we can get the trial date, we're prepared to proceed with that writ pending and the stay in place.

THE COURT: Okay. So you're not really worried about those documents anymore.

MR. FERRARIO: No. I mean, we're worried about them, but it's not worth forgoing the trial and having this linger.

THE COURT: Okay. Mr. Krum --

Mr. Ferrario, was there anything else you wanted to say before I hear from Mr. Krum again?

MR. FERRARIO: No. I know Mr. Searcy had some things he wanted to say, Your Honor.

THE COURT: I've been grilling him when he's been sitting there the whole time.

What else, Mr. Searcy?

MR. FERRARIO: Have you got anything else, Marshall?

MR. SEARCY: I don't have much to add, Your Honor. You know, there was an issue that came up that Mr. Krum

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brought up concerning production of documents relating to the unsolicited expression of interest from the individual defendants. We don't have any documents. Mr. Krum has told me that his plaintiff doesn't have any documents from the meeting that's at issue. So it shouldn't be a surprise that there are no documents.

MR. FERRARIO: And we gave -- we gave minutes --

THE COURT: But you really hope that Mr. Ferrario and his people will turn over the documents; right?

MR. FERRARIO: Your Honor, I -- Ms. Hendricks -- Kara's here. We did on the --

THE COURT: Wait.

MR. FERRARIO: -- first expression of interest. He has them all. What he's talking about is Ms. Cotter gave a presentation. The presentation related to information that was already in his client's possession. That's the point I'm making.

THE COURT: I understand what you're saying.

MR. FERRARIO: Okay.

THE COURT: I know the issue when people remain on the board and they're still fighting among themselves they get the board information. It's amazing how that actually happens.

MR. FERRARIO: It does. You know, Your Honor, the only -- the only hiccup I see, and I don't think -- I don't

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think it's insurmountable, there's no reason we can't complete all of the let's call them fact witnesses that we mentioned here well before Thanksgiving. That's just not an issue. The experts are the only scheduling hiccup that I see. And I don't know how --

THE COURT: Have you taken all the plaintiff's experts, we're just waiting on the defense experts now?

MR. TAYBACK: They've gone back and forth.

THE COURT: So you've got some of each left.

MR. FERRARIO: Yeah. Jumping around.

MR. SEARCY: But I believe they're all in California, all the experts.

THE COURT: All the remaining experts?

MR. SEARCY: That's right.

THE COURT: Mr. Krum.

MR. KRUM: Thank you, Your Honor. Two or three points where I need to correct some misstatements. In fact, with respect to the news article -- not the news article, with respect to the subject matter of the news article that is a renewed revised offer or whatever it supposedly is. Mr. Ferrario and I spoke about that, and he initially suggested to me that he thought hypothetically for purposes of this public discussion today if that had occurred it might moot the discovery you'd ordered them to provide. And he hasn't understood on that position.

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Second, if there are any documents with respect to this supposed new offer, the offer described in the news article, they've not been provided to my client. Ellen Cotter has not provided him documents about that. So I don't know whether she -- if there are any documents, whether she's provided them to other directors, but my client has not received any such documents from her.

The other correction is if they produce a single memo in response to your modified order regarding advice of counsel, we will have to meet and confer, and we will be back. As our motion made clear, we cited to I think it was dozens of privilege log entries where the subject matter was identified as advice of counsel with respect to exercise of option, or words to that effect. Those are documents between Mr. Tompkins and Messrs. Adams and Kane that have been ordered produced by Your Honor, among others. So it's not one memo, okay. And I understand the process through which Mr. Ferrario and Ms. Hendricks have to go to confer with a client, and I'm sure they'll do it as diligently as they can, but it's not going to be that next week they produce one memo.

Finally, Your Honor, on the depositions, after a couple false starts we actually did pretty well scheduling percipient witness depositions. I was able to spend week after week in Southern California taking some of those depositions, and hopefully we'll be able to do that again with the percipient witnesses.

The experts are a different issue. The subject isn't -- the issue isn't how long the depositions go, it's travel to the cities in which no one except Angelinos live and then to the next city and so forth that turns what might be a three-hour deposition into not less than a two-day exercise.

And the other half of that, of course, is, as I mentioned earlier, these folks seem to be tremendously successful and terribly busy, because as to most of them they came up with one or two or three days or half days in a period of a month. But, you know, counsel will do what they can subject to the preexisting obligations of those experts. But to assume we're going to get those by done by December 1st or 9th or whatever is I think in all likelihood wishful thinking. Thank you.

THE COURT: So when do you really think it's going to be done, Mr. Krum?

MR. KRUM: Given the intervening Thanksgiving holiday, I think our goal should be before the year-end holidays. I can see some reasons that might not happen. When we actually suggested the end of January there were reasons for that. And the reasons were the kind of considerations we've discussed today, the intervening holidays, the schedules of all the people, the uncertainties that I've addressed. So if you want a date by which I'm reasonably confident it will

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be done, it would be approximately the end of January. The best-case scenario I think is the Christmas-New Year holiday.

THE COURT: Okay. Anything else?

Are there more documents than this one memo you've talked about?

MR. FERRARIO: There are documents on the directors privilege log I think is to what you're speaking; correct?

MR. KRUM: Correct.

MR. FERRARIO: And I thought that his motion was aimed at the memo that was prepared and I think given to Kane and Adams.

THE COURT: It was.

MR. FERRARIO: That's what I thought. I mean --

THE COURT: And I granted it.

MR. FERRARIO: As I'm sitting here, Your Honor, I don't know what's on the directors privilege log in terms of what may have gone back and forth. I know the memo of which he speaks. I actually think our office did it, quite frankly. That was what I was speaking to. I'm not conversant with these other --

MR. KRUM: The document to which Mr. Ferrario just referred is the document to which they referred in their proposed order. Your order obviously is different than their proposed order. Our motion was different than their proposed order. And, you know, the documents in the privilege log are

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either responsive or they're not. They're either covered by the order or they're not. Candidly, as I understand the facts, including the GET memo to which Mr. Ferrario refers, that's not it, as I understand.

THE COURT: My ruling only relates to the legal opinion that Mr. Kane and Mr. Adams got from GET.

MR. KRUM: No, Your Honor. If you look, you referred --

THE COURT: Mr. Krum, don't correct me.

MR. KRUM: I'm sorry.

THE COURT: And to the extent there are other communications related to that issue they're not necessarily precluded from production because I did not specifically address those. So what I'm trying to say is the work papers the Greenberg Traurig folks did are not part of what I've ordered produced, unless, of course, they were provided to Mr. Kane and Adams. You're now on a separate subject, which is the email communications by Mr. Tompkins; right?

MR. KRUM: Correct.

THE COURT: That's a different issue.

MR. KRUM: Well, that's not how we read your order. so perhaps we'll have to look back at that.

THE COURT: Well, it's a different -- it is a very different issue.

MR. KRUM: And I repeat nor is that how the motion

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was framed.

THE COURT: I understand how you framed the motions, Mr. Krum.

MR. KRUM: Okay.

THE COURT: So I'm not saying that Mr. Tompkins's memo may not have to be produced, but --

MR. KRUM: Right.

THE COURT: I haven't granted that relief to anybody at this point related to that memo. I haven't ruled one way or the other. You guys need to have that discussion, because that was not part of the advice of counsel issue that I ruled on.

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MR. KRUM: We did not understand that, Your Honor. So we'll have to have another conversation.

MR. FERRARIO: We will.

MR. KRUM: And the discussions we just had about the timetable are now going to be more optimistic, I suspect. In other words, we're likely back before you on those issues.

THE COURT: Maybe not. Maybe they'll produce them.

MR. FERRARIO: Judging from what you're telling us and who knows how long your capital case goes --

THE COURT: It's only got three more days.

MR. FERRARIO: Oh, that's all?

THE COURT: And then they decide whether I go to a penalty phase. So it's only a week or week and a half more.

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But the problem is I have to do this evidentiary hearing for a week before I can resume the trial, and then it may or may not include death, but I still have to have a penalty phase if they find him guilty of first degree murder.

MR. FERRARIO: So how long does all that take? Because I'm not --

THE COURT: Well, I'm doing the week of -- I have it written down in this handy chart here. The week of November 28th is when I'm doing the evidentiary hearing on intellectual capacity. And then the week of the 25th [sic] I resume the trial, and we anticipate being done with that and to the jury on the guilt phase by December 9th.

MR. FERRARIO: Okay. So --

THE COURT: And then if there's a penalty phase, it's like punitive damages.

MR. FERRARIO: Right.

THE COURT: You take a break, you start again, you do some more evidence.

MR. FERRARIO: So we're not -- well, it doesn't sound to me like you've got any time on the November stack anyhow given --

THE COURT: Well, if that case goes away, I do. But I don't know if that case will go away or not. And I won't know if that case goes away until close to December 1st.

MR. FERRARIO: Well, I think we will do -- I can say

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on this side of the table we'll do everything we can to get everything wrapped up by December 1st. So in the event you do have a slot open, that's fine. But I guess what we're afraid of is kind of getting caught in, you know, the regular flow of your cases and getting pushed way down the road. And again, I've said this, I sound like a broken record, we need to get this case resolved.

THE COURT: We all know that.

MR. FERRARIO: It's a significant matter to the company, it's significant to the individuals, it's significant to Mr. Krum's client. We've worked hard to achieve this trial date. There's very little left to be done, quite frankly. Again, the depos haven't been going as long as we thought, and even the expert depos, Your Honor, I mean, they were -- Mr. Searcy took Mr. Steele's depo. It was less than three and a half hours, I think. You know. So everybody's being efficient, everybody's going after it. What's the next date you could give us where we could have a block of three weeks?

THE COURT: I can't tell you that right now. I can tell you that I will see you for a status check on December 1st, and you may appear by phone if you are out and about taking depositions. We can do a telephonic appearance to find out where you are on the deposition trail, where you on finishing, and what it looks like both from my side and from your side about that issue. But I can't tell you right now what I'm going to be able to do for you. I'll be able to tell you on December 1st.

MR. FERRARIO: All right. We understand. I mean --

THE COURT: So, I mean, if you -- I can't call a jury in over the holidays.

MR. FERRARIO: We understand that.

THE COURT: And I'm not going to have a jury start two weeks before Christmas and then take a break for two weeks before we finish. I'm not going to do that, either.

MR. FERRARIO: I don't think anybody here would want that.

THE COURT: And you're not going to be done until the first week of December, it sounds like, even on the best-case scenario.

MR. FERRARIO: Well, I think that depends on what you do with the next batch of motions.

THE COURT: Well, I'm ready to go to those in a minute. Are you ready?

MR. FERRARIO: I think we are.

THE COURT: Okay. So, Mr. Krum, your motion is granted to the extent you have sought a motion to compel and received relief or not related to that, to the extent it relates to the Tompkins information that is currently on the directors privilege log, and to the extent you need to complete the depositions of Kane, Cotting, Adams, McEachern,

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Tompkins, the 30(b)(6), and the five experts.

MR. KRUM: I think I understand, Your Honor.

THE COURT: And the goal is to get them done ASAP. I am hopeful you have them done by December 2nd, but I'm not issuing that order, because I don't have enough information about the schedules of the folks, and I don't want to force people who have availability problems to be available that quick. Okay. So we're going to have a status check on resetting your date for December 1st at 8:30.

So that means I can go on to motion Number 3 on my list, which is the claims related to the purported unsolicited offer. And you guys can tell me when you're ready for a break, since we don't have a jury and we have a lot of flexibility. You just tell me, and I'll take a break.

MR. TAYBACK: We will, Your Honor. On our side we will.

Our motion for partial summary judgment on the unsolicited offer I think is pretty straightforward on the briefing, which is to say -- and this is -- this is one of the curiosities of this case which Mr. Ferrario referred to. It's a case that's moving and being litigated in real time. So we are seeing actions and events that --

THE COURT: Every M&A case I have with offers is like this. Now, this is a little different, but, you know, it happens all the time. We deal with it.

MR. TAYBACK: It's a little different --
THE COURT: I know.
MR. TAYBACK: -- but it's also not really a true M&A case.
THE COURT: I know.
MR. TAYBACK: This is a letter that was received unsolicited that is not even in and of itself an offer. And as -- that is to say, it couldn't be accepted. It was an invitation to negotiate, to do due diligence, and to meet. But it's not the valid -- it's not a valid legal basis for a claim. And you don't I think need to look any further than the argument that was just made by Mr. Krum about the other things that he wants, referring to the public article and the idea that there's an additional letter and he has not -- his client has not received it. The fact is that if there is a dialogue, even if it's a subsequent letter following on the heels of what is clearly not an offer that could have been accepted, there's no way to stake out a claim that it's a breach of fiduciary duty by any director to have done something different, to have not done something more.
We'll start with the fact that there's certainly no obligation to have purported to accept something that couldn't be legally accepted. And the letter isn't terribly long or terribly complicated, but it isn't an offer. It's an invitation to have a discussion about an offer that they hoped

they might be able to make at some point in time. That in and of itself can't be a basis for a breach of fiduciary duty claim, period, hard stop.

The other kind of what I'll call the collateral allegations for breach of fiduciary duty that he has surrounding that unsolicited letter are things like, gee, you know, the board didn't go out and hire an investment banker to do an analysis or study. There's no case cited by anybody, especially plaintiff, that stands for the proposition that a company has to do that, has an obligation to do that. The board knows what it knows about the value of the company. And it makes the decisions it makes about that. And when you have -- to add another layer to this, when you have a controlled company, that is to say a company where the majority, in this case a significant majority of the shares reside in -- with a controlled group, the fact is there is nothing that you can do that could require the sale of a company.

So that begs the question what is it that would be the damages, what would be the component of the wrong even if it was a breach, even if you could articulate that it was a breach of some fiduciary duty to have done something more with this offer -- this alleged offer. What's the harm to the company? Well, you can't say that there's harm to the company, because there's no obligation to have done anything. So there is no harm to the company. And if you were to say, well, damages per se aren't a requirement, because I know he's made that argument and he's talked about the right to seek equitable relief for breaches of fiduciary duty. If you get to the point where you say this is a breach of fiduciary duty, even though I believe there's no basis for it to be so, and you get to the point where you say damages are not required and it's a question of equity, what is that you would be compelling the board to do, to negotiate, to have a further conversation? That's not the role, really, of the Court. And, not surprisingly, you don't see cases where that takes place. You don't see courts compelling boards to hire investment bankers, to consider a letter, to respond in some particular manner. That essentially divests the whole responsibility of the board with respect to dealing with any kind of an inquiry like this to courts. And there's not a single case that does that. And that's for good reason, because that's the domain of the board. When and if something happens down the road when this runs its course, however that may be, and it has not, whatever that may be, if and then there's an issue, that would be perhaps arguably ripe for something then. But that's not here now. And, as a result, this claim is, A, premature and baseless under the law.

THE COURT: So would it be fair to say that your group of motions the have been filed that are all set today are attacking individual aspects of the alleged breaches of

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fiduciary duties?

MR. TAYBACK: Yes.

THE COURT: So you're picking every potential alleged breach they could have made and you want me to separate them out and decide which ones the jury will hear about and which ones they won't, as opposed to letting the jury hear and make a decision as to which rise to the level of the breach of fiduciary duty?

MR. TAYBACK: That's not exactly what I would say I'm asking Your Honor to do. What I'm saying --

THE COURT: Yeah, it is. That's exactly what you're asking me to do.

MR. TAYBACK: No, no. What I would say is -- I would certainly characterize it differently. I would say -- I'm not saying take it out, I'm saying it's not a breach. And if it's not a breach, then it's not a basis for a breach of fiduciary duty claim. It's different to say, we're going to litigate everything the company has done over the span of several years and we'll let the jury pick and choose what might or might not be a breach. He has articulated what he alleges are breaches, and we have filed motions for partial summary judgment saying that they are not. And we have attacked every single thing that he says is a breach on different grounds. But --

THE COURT: And so you don't think they're evidence

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of a breach whether they are in and of themselves a breach. See, there's a different concept that I'm trying to deal with as a trial judge than I think you're dealing with in your motions, which it's your job.

MR. TAYBACK: There's two issues. One is could it be a breach as a matter of law. And my answer to that question is no. The second question is is there evidence that it's a breach. And the answer to that is no, as well.

THE COURT: That's not what I said, Counsel. Is this activity taken with other activities evidence of a breach of fiduciary duty?

MR. TAYBACK: I understand his argument, plaintiff's argument.

THE COURT: That's not his argument. That's what trial judges think about.

MR. TAYBACK: The question -- it begs the question, though, is what is the breach. There has to be a specific thing that occurred that is a breach --

THE COURT: Uh-huh.

MR. TAYBACK: -- as opposed to saying, this is a course of conduct. And that's the way plaintiff has characterized it. And the course of conduct can be relevant to a breach --

THE COURT: Yes.

MR. TAYBACK: -- but it begs the question what is

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the breach, what is the breach. This is not the breach. This is not a breach. It's not a valid basis for a breach claim. And to say it might be relevant evidence of something else, some other breach, that's a decision you could make.

THE COURT: You're not asking me to exclude evidence of this, only to not instruct it or include it on a special interrogatory that it could be found an independent breach --

MR. TAYBACK: That's correct.

THE COURT: -- as opposed to evidence of breaches that have occurred.

MR. TAYBACK: That's absolutely correct.

THE COURT: I just needed you to say that, because that's not what your motion says.

MR. TAYBACK: I believe it's not -- I believe ultimately it wouldn't be relevant perhaps. But that's a different question. That's a different question. And that's not our motion. Our motion is to summarily adjudicate the basis of this unsolicited offer as being a breach.

THE COURT: There is no -- there is no allegation of the unsolicited offer as the breach of fiduciary duty claim. It is one of many things that are alleged as evidence of breach of fiduciary duty.

MR. TAYBACK: If I'm --

THE COURT: I pulled the complaint to read it again, because --

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MR. TAYBACK: I did, too.

THE COURT: Okay.

MR. TAYBACK: And if in fact we misunderstood what his basis of the alleged breach is, then you're right, then it's not an issue, then it's not an alleged breach how we dealt with the -- how the company dealt with this unsolicited offer. It's merely evidence. But it's only relevant evidence if it relates to a breach. And certainly I think somewhere in our motions we address the thing that he says was actually the breach. But begs the question is what he's saying is the breach. What occurred that breached a fiduciary duty by individual directors, individual directors. For instance, Mr. Wrotniak, who's never even been deposed, who's seemingly collateral to every theory that's being proffered by the plaintiff, was in the room to discuss this particular unsolicited offer. What, if anything, did he do to breach any duty, and what is the relevance, I suppose, to address Your Honor's question, of how he did it to some other breach that is alleged but unspecified at least in our conversation right now as to what it is that plaintiff is saying breached a fiduciary duty to the company.

THE COURT: Okay. Anything else?

MR. TAYBACK: Only if you have questions, Your Honor.

THE COURT: I don't have any more. I asked you

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them.

MR. KRUM: Your Honor, as I see this motion, the partial issue is the one you identified. And it's not just this motion, it's arguably all of them. But it's certainly this one. It's certainly the executive committee motion. And I've said this. I said it when we moved for leave to amend. We pleaded the complaint this way, as you saw it. We haven't alleged 10 or however many isolated acts as individual unrelated fiduciary duty breaches. That's not the nature of the case. And in point of fact the offer issues in some respects sort of close the loop that begun with the seizure of control of the company. So I can go through that whole argument that you've obviously read and you understand better than I do, because you try cases all the time. It's an argument that is a practical, realistic, and legal issue from the perspective of trying a case, it's an argument that has a basis in the law of corporate fiduciaries.

THE COURT: So let me ask you a question. So you've got your couple of breach of fiduciary duty claims and your aiding and abetting claim, and it is your intention, I assume, to submit special interrogatories to the jury.

MR. KRUM: Yes.

THE COURT: What are you going to ask them?

MR. KRUM: Well, I need to finish the discovery. I'm not trying to be nonresponsive, Your Honor, but, for example,

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we're talking about the offer. I haven't deposed a single witness, so I can't tell you today whether I'm going to take the position that what transpired with respect to the offer is evidence only or is evidence and independent breach. Your question is a perfectly correct question. I acknowledge that.

THE COURT: Okay. So when after you finish the discovery are you going to be able to answer that question for me? Because that impacts like six of these motions.

MR. KRUM: That, Your Honor, is on our whole list of trial-related activities to perform. So obviously we'll turn to that as quickly as we can after we complete the discovery. Perhaps I can answer it when we speak on December 1st. I'll do my best.

And, by the way, I have all sorts of arguments here on this particular motion, a 56(f) argument about the facts and the law.

THE COURT: I know.

MR. KRUM: But I assume you don't need to hear those from me.

THE COURT: No. The reason I did this one next is because it's the most closely related to the 56(f) issues. And it makes it hard for you to finish when you don't have the last little bit of information, haven't finished the depos. But I was hoping you could tell me what questions you thought you were going to ask the jury.

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Okay. What else?

MR. KRUM: Well, Your Honor, so I'm going to skip over the 56(f) issues. You understand those. The facts here are rather curious. The board decided after an oral presentation from Ellen Cotter of information that we've seen only in lawyer-prepared board minutes that the company would not respond to the offer and would continue, according to their press release and 8K, on their independent stand-alone business plan, or words to that effect. But there isn't any. There is no long-term business plan. There's no long-term business strategy. And in fact, you may recall this, in the opposition to our motion to compel discovery regarding the offer the company argued, well, Your Honor, the document requests are overbroad, when they call for a business plan that's everything in the company. And, of course, the reason it was everything in the company is because there is none. And so I'm going to -- I'm going to try to answer the question you asked that I said I couldn't answer. I'm going to have to have some good questions at deposition about that. And other questions. So --

THE COURT: Okay. The request for 56(f) relief on the motion for partial summary judgment on the claims related to purported unsolicited offer is granted because the depositions have not been completed and the document has not yet been produced. I'm going to continue that motion till

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December 1st, where I will get an update on whether I need get a supplemental opposition from Mr. Krum related to those issues. I'm going to write 12/1 on here and hand it to John.

Okay. I have written down that I want to go next to -- hold on a second -- the motion on the independence issue.

You've got all of these motions, Mr. Tayback?

MR. TAYBACK: Mr. Krum and I, Your Honor.

The motion we filed on the independence issue we filed because we -- the complaint, the second amended complaint, it's an issue that seems to run like a thread through all of the allegations. And we've identified the many allegations that I think are made in the complaint in the first footnote of our reply brief where we say he's at least thrown out -- plaintiff has at least thrown out there the idea that somehow those actions are wrongful because a director or directors were, quote, unquote, "interested" or not disinterested in what was being discussed. And so as a starting point, though, there is no such thing as a generalized lack of independence as a theory under which one says that they breached fiduciary duties. The plaintiff -- and this really goes back to the question that we were just discussing and the question that you asked Mr. Krum when he stood up here, which is for the plaintiff to survive summary judgment he has to put forward specific evidence that shows that a specific board action -- and it's usually a transaction

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-- was affected by a specific board member's interest in that transaction to get -- to raise that as an issue that would get him to a breach of fiduciary duty and that it caused harm to the company. And here the plaintiff cannot do that. And he's had certainly ample opportunity, put aside the grant of a 56(f) motion with respect to the unsolicited offer.

With respect to the issue of independence that he says contaminated a host of board actions he's had ample opportunities to take discovery. And his theory is somewhat simple. His theory is if a board member voted on anything that plaintiff opposed, they lack independence. And you don't need to look very far into the history of this dysfunctional family relationship that permeates the company to know that that is true.

THE COURT: You guys want to try this case to a jury.

MR. TAYBACK: What's that?

You know that because if you look at Bill Gould, one of the board members that I don't represent, Mr. Gould in the vote that is sort of the starting point for plaintiff's attempt at making derivative claims out of a wrongful termination case, Mr. Gould voted not to terminate the plaintiff. Yet he remains a defendant because since then on numerous other board actions Mr. Gould has voted in a manner that plaintiff opposes. So plaintiff's conclusion is not that

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Mr. Gould is independent and therefore, you know, just acting in the best interests of the company as he perceives them whether he comes out on the same side or different sides as other directors, his conclusion is, no, Mr. Gould has been co-opted, co-opted and therefore he's not disinterested.

Mr. McEachern, who plaintiff at deposition when asked several different ways, which we quote verbatim in our brief, is asked whether he's independent. Well, plaintiff has no basis to say he's anything other than independent. And yet the whole theory of the case is, oh, Mr. McEachern, his views are tainted because he's also not independent, he's been co-opted somehow because he favors Ellen and Margaret Cotter, the two sisters, over the plaintiff, the brother.

Judy Cotting. She's biased because she's friends with plaintiff's mother and at one point a friend of hers asked for theater tickets from Margaret Cotter. Unclear whether those theater tickets were ever obtained. And she was -- offered to pay for them.

Mr. Wrotniak, again a person who's passingly mentioned in the complaint, though he's a defendant, has never been deposed, never sought to be deposed by plaintiff, says he lacks independence because his wife is friends with Margaret Cotter.

Mr. Kane, called Uncle Ed at various points in time by all of the three Cotter siblings, is biased because even

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though plaintiff was endeared to him and called him Uncle Ed, at some point he preferred Margaret and Ellen Cotter, he's biased against plaintiff in their favor.

Mr. Adams, because he had a preexisting business relationship with plaintiff's father which inured to his financial benefit because he earned money that he's still entitled to recover, albeit now through an estate because Mr. Cotter, Sr., is deceased, and therefore he's biased because the executor of the estate is one of his sisters.

These simply aren't valid bases for challenging the independence of the numerous actions that this board undertakes and that's undertaken over the couple years since plaintiff filed this complaint. His theory in short makes no sense, because none of the board votes that is -- that is alleged to be contaminated by alleged lack of independence of one or more of these directors actually matters; that is to say there are ample board members who took actions that in fact were indisputably independent. Mr. McEachern, Mr. Gould, you could go on, Ms. Cotting, Mr. Wrotniak. Except the termination claim. And I'll address that, as well.

Second, the things that the plaintiff points to as not being, you know, independent simply are insufficient as a matter of law. You know, the kind of family relationships. There's an email that we quote from Mr. Kane --

May I just grab my other binder?

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THE COURT: Sure.

MR. TAYBACK: -- dated May 27th. And this is -- the tone of the communications tell you all you need to know about whether or not -- whether or not the plaintiff really has a basis for contending that Mr. Kane lacks independence in making the decision he made, both to terminate and every subsequent board action on which he's voted. The plaintiff wrote to him on May 22nd, and -- him, Mr. Kane, and says, "Thank you for not pulling the trigger yesterday. I know I have lost your support. You are the most thoughtful director and the one with the most heart and emotion. I've made mistakes with my sisters and mother, they've made mistakes. It is now time for us to try to heal, and I need your help." He goes on to say, "I would like to sit down with you in San Diego for breakfast, lunch, or dinner Saturday, Sunday, Monday, whatever works. You are the only one I have now who can broker peace with the company and the family's interest in mind respecting what my dad would have wanted. There is a balance. If not, we will have war, and our company and family will be forever destroyed over the next week. I know I have one last shot and would like your help and thoughts." That's a -- to use a pun, a plaintiff plea from the plaintiff to Mr. Kane, who, because he ultimately voted the way he did, has now lost his ability to be independent.

The fact is the same is true when you look at the

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undisputed evidence regarding Mr. Adams. Mr. Adams worked with the plaintiff at the Cotter Family Farms for years. Plaintiff well knew Mr. Adams had business relationships with his father at the Cotter Family Farms and elsewhere. His net worth is almost a million dollars as a man of retirement age. Puts him in the top 1 percent of net worth earnings for a person of his age. The fact is there's no rule that says you have to have some liquid value in order to sit on a board. He gets paid board fees. Case after case says those aren't enough. His prior business relationships with the father, case after case says those kind of tangential relationships are not enough to challenge the independence of somebody.

There's no evidence, none that the plaintiff has put forward, that Mr. Adams stood to gain -- and this is really the key point, that Mr. Adams or any of the other directors stood to gain from the way in which they voted on the termination or on any other issue.

THE COURT: That's not the standard in Schoen, Counsel.

MR. TAYBACK: That's not the standard in Schoen, which is a pleading case that does not --

THE COURT: Schoen has like three cases that come from it. They call it different things at different times, but there's actually a trial part, trial decision.

MR. TAYBACK: There is. But the standard is whether

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or not -- when you're talking about the standard for -- with respect to get past the business judgment rule and whether or not that's the issue. There's a different question about what you get past -- there's a different question, rather. You don't have to decide whether or not you even get past the business judgment rule, whether independence has been adequately alleged. The question is has the plaintiff introduced any evidence, any admissible evidence that would allow you to find that he's not independent, as opposed to pleading. That is the standard for summary judgment, whether Schoen or any other. And that evidence is simply missing in this particular instance.

And when we go on and discuss specific decisions as we've done already with respect to the unsolicited offer and we'll do again with respect to our first motion on the termination, there are separate reasons independent of the question of independence and the business judgment rule for why those aren't actionable claims. But when we're looking at whether or not the plaintiff has introduced sufficient evidence to challenge the independence, whether you're talking about Mr. McEachern, Mr. Kane, Mr. Adams, Mr. Gould, Ms. Cotting, Mr. Wrotniak, those are separate questions that all need to be decided separate. And the evidence the plaintiff has put forward is nonexistent for some and simply virtually nonexistent for the rest.

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I have nothing else unless you have questions, Your Honor.

THE COURT: Hold on. I'm looking at my list. So has Mr. McEachern, Mr. Storey, and Mr. Gould had their depositions be completed, since they're not on my list of people who remain?

MR. TAYBACK: Yes. Mr. McEachern I believe there is a brief -- needs to be reopened, Mr. McEachern.

THE COURT: Okay. So my spelling of that name and what I wrote down on my Post-It note are not closely related. I'm now going to fix that. Okay. Thank you.

MR. TAYBACK: Anything else? No other questions?

THE COURT: Those are all my questions for you.

MR. FERRARIO: Your Honor, can I just -- we joined in that, I just want to point out a couple --

THE COURT: You want to say something, Mark?

MR. FERRARIO: Just very briefly.

MR. KRUM: Your Honor --

THE COURT: They're absolutely allowed to. They joined. They're a separate party.

MR. KRUM: They're a nominal defendant.

THE COURT: Mr. Krum.

MR. KRUM: Point of fact, we've gone through one's list. So I understand, Your Honor.

MR. FERRARIO: I can tell you that --

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THE COURT: Mr. Ferrario, don't be snippy. Just go.

MR. FERRARIO: I'm not.

I just would call to the Court's attention the caselaw we cited on page 4 of our brief and also the point we made on page 5 of our brief where -- and this goes to Mr. Tayback's point. May 8th, 2015, Cotter, Jr., certified that Director Adams himself was independent. The -- you know, the problem we have here, Judge, quite frankly, is trying to find some framework that you can analyze this case. Because -- and this will come up in other motions that are going to be argued. We can't find a derivative case that parallels this anywhere.

THE COURT: There are very few publicly traded dysfunctional family cases.

MR. FERRARIO: But my point is -- no, not very few. There are none --

THE COURT: Yeah. I know. It's --

MR. FERRARIO: -- that parallel this. None. As a matter of fact, you're going to hear this in the motion that's --

THE COURT: Because most of them aren't publicly traded. They keep them in the family and they hold them privately, and then when they don't get along it's not as big a deal with the SEC.

MR. FERRARIO: I don't know why it doesn't happen,

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but I'm going to tell you that I'm sure that -- well, actual, we got a case the other day from my partner in New York that deals with a controlled company, and it may find its way into the briefing here. But an interesting ruling where in the context of an offer of I think it was like $17 a share for stock, the controlling [unintelligible] says, we're not going -- we're not selling, we're not sellers. So they ended up doing a transaction at $13 a share. And you know what, the Delaware Chancery Court let that stand. And it was an interesting -- an interesting dynamic.

THE COURT: So here's the issue. In your case, which is different than any other case any of us have seen, it's not the controlling members who are a family who are fighting the outside world, it's the controlling members who were the family who were fighting amongst each other. That's the distinction here.

MR. FERRARIO: Well, that's interesting that you say that. And what happened here was there was a dispute between the controlling shareholders, no question about that, everybody knows that. But --

THE COURT: I'm including Mr. Cotter, Jr., as a controlling shareholder. He is.

MR. FERRARIO: No, he is. He's part of the family.

THE COURT: He's part of the family.

MR. FERRARIO: Just say the Cotters. There's a

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fight between the Cotters. What's not in dispute is it was impacting -- and this goes to the other motions, quite frankly, it was impacting the operation of the company. And in reply that we just filed in response to the motion regarding termination under no set of circumstances that I'm aware of or any case anywhere could you criticize this board for choosing two people over one when those two people had I think 25 years, maybe 30 years of experience. That -- in its most basic form, and it goes to the email that Mr. Tayback just cited. There's another email where Mr. Storey, who, you know, was the one who voted against it, says, we have three choices, we could fire one, we could fire two, we could fire all three. The board's faced with the situation they have to deal with. In an effort to get around this very basic decision that is central to the board's obligation, how do we get this company to run smoothly, that's embedded in Nevada law -- and we'll get to this -- in the bylaws, in the employment contract. How does he try to get around it? By creating a faux issue regarding independence. And that's kind of what I want to get to, and that's the purpose of this motion.

Look at the caselaw that we cite. You have to show something more than what he said. It has to be more than two women calling an 80-year-old man Uncle Ed. It has to --

THE COURT: So is it like sleeping on the blow-up

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couch or blow-up mattress in somebody's apartment in New York when they go to visit?

MR. FERRARIO: No.

THE COURT: It's not like that?

MR. FERRARIO: No.

THE COURT: Not like sharing pictures of the kids when they --

MR. FERRARIO: Absolutely not.

THE COURT: Okay.

MR. FERRARIO: You're talking sharing pictures with the kids. That's not material. There has to be something more than what we have here.

THE COURT: Don't you remember that other case we had?

MR. FERRARIO: I'm trying to think of which one that is.

THE COURT: Never mind. Keep going.

MR. FERRARIO: You know, Judge, again, we have scoured between all the firms all the cases we could find. There's nothing that parallels this. As the authorities --

THE COURT: No. Because usually the family sticks together. Usually the family does not let it devolve to this level where the publicly traded company is potentially at risk because they can't get along. I'm not saying the public is at risk here, because there's been a settlement with the T3 [sic]

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plaintiffs that resolved most of those claims.

MR. FERRARIO: Well, that's interesting, too. You get to that point, the people that theoretically were independent and wanted to take a look are not here. But the caselaw that we cite, a plaintiff seeking to show that a director was not independent must meet a materiality standard and show that the director in question's material ties to the person whose proposal or actions she is evaluating are sufficiently substantial that she cannot objectively fulfill her fiduciary duties. That is a high standard. It hasn't been met here.

And then there's cases applying Nevada law. The authorities we cited on the same page, it is well settled that a director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder. There's tons of cases, and we cited them. That friendship doesn't disqualify you.

So at the end of the day -- and it'll become crystallized in -- Mr. Krum is arguing this independence thing to then try to get to a doctrine that isn't even applicable in Nevada, the entire fairness doctrine. And it just doesn't apply here. And he gives you no cases, none, not one that says on these facts you can call into question a director's independence. And, you know, I get the fact that this man who was appointed to this position by his father, okay, who then

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gets fired is angry. He had an employment contract. He's got a separate arbitration going on over that decision. But here he's a derivative plaintiff saying that decision caused harm to the company. That is a much different dynamic. He's entitled to invoke whatever rights he has under the employment contract, which he has. But we're losing sight of the fact --

THE COURT: That's a different case. I'm not dealing with that. It's in arbitration.

MR. FERRARIO: This is a derivative case. He is speaking for all shareholders, saying, you caused -- this decision caused damage.

THE COURT: I'm aware of that.

MR. FERRARIO: And we'll get to that. There is no damage. Having said that, I wanted to point out those authorities. It's a high standard. He hasn't met it. Calling somebody Uncle Ed doesn't get it. And all of this stuff about Guy Adams, as Mr. Tayback said, he knew long before.

THE COURT: Anything else?

Mr. Krum. And after we finish this motion I think we're going to take a break.

MR. KRUM: Your Honor, I'm just going to speak to this motion.

THE COURT: Yes.

MR. KRUM: I'm not going to do as prior counsel did

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and argue other motions, as well.

As among the erroneous legal arguments in their seven summary judgment motions, this one, including the one Mr. Ferrario just articulated, is perhaps the most erroneous, this whole discussion about independence. But on Motion Number 2 it's procedurally deficient. You can move for summary judgment on a claim, you can move for summary judgment on an element of a claim. Independence is neither. Independence is a factual question that arises where directors seek to protect their conduct by invoking the business judgment rule.

Now, to illustrate how wrong they are I'm going to talk about something they raise in another point, another motion, which is that, according to them, the business judgment rule is actually not a presumption, it's a rule, because, of course, presumption is rebuttable. And we argue that it's rebuttable and we argue that one of the ways it's rebutted is to show a lack of independence or a lack of disinterestedness on the part of the decision maker.

THE COURT: Gosh, that's what the Nevada Supreme Court says.

MR. KRUM: Well, that's right. Mr. Ferrario obviously didn't have an opportunity to read our reply brief. And, you know, in fairness, I'm not so sure I got right [unintelligible] myself. So --

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THE COURT: It was a lot of material. It was very well briefed. Whoever your support staffs were, and I include this for all the different firms, they did an amazing job putting together the appendices and supporting information.

MR. KRUM: Thank you, Your Honor.

So it's not -- the subject of independence is not properly the subject of a motion for summary judgment as a procedural matter. Now, Mr. Tayback said there is no such thing as a generalized lack of independence. Well, if that's correct, that's another reason this is not a proper motion for summary judgment.

Now, here's what the law is. "Independence is a fact specific determination made in the context of a particular case." And how is it made? Ordinarily it's made when the finder of fact assesses all the evidence and determines whether in a particular set of circumstances a director had the requisite disinterest in this and the requisite independence. And they can take into consideration, for example, the kind of things that Mr. Ferrario says don't matter and are legally insufficient, which the cases may well say are legally insufficient in and of themselves. But when we present this case to the finder of fact, they may think it's significant that the Kane family and the Cotter sisters have holiday dinners together and that sort of thing. And so to suggest that they can somehow say to you because on a

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single discrete issue the close personal relationship between Cotting and Wrotniak, for example, and Cotter family members is in and of itself legally deficient doesn't acknowledge what the nature of this case is and what this motion is. It's a summary judgment motion. And I haven't deposed Ms. Cotting yet. We have statements from Mr. Cotter in his declaration about what she has said to the effect that as far as she's concerned nobody other than a Cotter family member should ever be running this company. Excuse me? What kind of decision is that? To whom does she owe fiduciary obligations? Is it the Cotter family, or is it all of the shareholders? And so perhaps while their cases may say that that relationship alone is insufficient, how can you adjudicate this on summary judgment?

And so I want to talk just briefly about a couple of matters that Mr. Tayback raised. So he read this email that Mr. Cotter sent to Mr. Kane in the middle of this series of events where Mr. Cotter had been told, you need to resolve your disputes with your sisters on terms satisfactory to them or you're going to be terminated. And so he wrote this email that Mr. Tayback read to Mr. Kane, and it sounded like he was making a personal plea. He was. In point of fact Mr. Kane's emails throughout and his testimony that we've included in this motion show that's how he acted. Mr. Kane consistently and repeatedly acted as a 50-year friend of the deceased James

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J. Cotter, Sr., and interacted with everyone else, the Cotter siblings and the board members, and made his decisions based on what he thought his 50-year friend, his lifelong friend wanted him to do. So of course plaintiff interacted with him, because that's how he acted. So I say rhetorically is that how a director of a public company acts, is that the basis on which you make decisions in the interest of the company and all of the shareholders? Well, you know, we think it shows a clear and compelling lack of disinterestedness. But I understand that you may think that matter goes to the finder of fact on this motion and Number 1, as well.

Mr. Adams. Now, I was prepared to make this argument without talking about any numbers, because I've been told to treat that information as confidential. So here's how I'm going to do it. There was a number mentioned about his supposed net worth. You saw our papers. He's 65 years old. He has no income, effectively no income other than the income from RDI and other companies controlled by the Cotter sisters. And if you'll look, Your Honor, for example, at our Exhibit 16, which is his sworn declaration from his Los Angeles Superior Court divorce, and you'll see on the appendix page 261 -- I'm very proud of my team for this; I will convey your comment, thank you -- and 262 it shows aggregate expenses of Mr. Adams and his then wife. Now, I acknowledge you have to go through those and try to figure out what he took and what

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she took, but just for ease of illustration, if you divvy up those expenses 50-50 and if he had no income from companies that the Cotter sisters controlled, he wouldn't make it to 75 before he was out of money. A man of 65 years of age in this country by actuarial standards is going to live beyond that. And a man with a financial background like Mr. Adams isn't going to live that way.

So, you know, Mr. Gould -- oh. And there was a statement made that everybody knew about Mr. Adams's financial dependence on the Cotter family. That is absolutely false. In point of fact what happened is that the morning session of the May 27th board meeting -- May 29th, I guess it was, Mr. Cotter, Jr., raised the issue because he'd learned facts in the preceding week or two, I think it was. So what was Mr. Adams's response? Did he say, sure, folks, here's my financial situation, and he told everybody? No. He refused to speak to it. Director after director acknowledged that in their deposition, that on the 27th of May the plaintiff said, Mr. Adams is financially dependent or he may be financially dependent on my sisters and he may not be independent for the purposes of this vote. Nobody, including Mr. Gould, required Mr. Adams to answer that question. They didn't do a thing. And Mr. Adams didn't answer it. He testified that, well, later he called some of the directors and talked about it. In, of course, as you saw from the papers, including Mr.

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Gould's summary judgment motion, when Mr. Gould actually apparently learned from Mr. Adams's deposition testimony in this case Mr. Gould offered the conclusion which he shared with I believe it was Ellen Cotter and Mr. Tompkins that he didn't view Mr. Adams as independent for the purpose of making any decision about Cotter family compensation. And Mr. Adams coincidentally resigned from the compensation committee.

So, Your Honor, the facts are at least material disputed facts, if not compelling facts, which I'll argue on Number 1, but the notion of independence, including with respect to Cotting and Wrotniak, is one that cannot be tested on an incomplete record.

THE COURT: Okay.

MR. KRUM: And so --

THE COURT: So those depositions are ones that are going to be scheduled to be completed prior to the deadline I've given you; right?

MR. KRUM: Ms. Cotting is, yes, correct, Your Honor.

THE COURT: Anything else?

MR. KRUM: No. Thank you, Your Honor.

THE COURT: Briefly, please.

MR. TAYBACK: Briefly, yes.

THE COURT: Just because I don't have the timer on doesn't mean I --

MR. TAYBACK: I understand. I don't intend to

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repeat myself.

The lack of independence is the sole basis to rebut the business judgment rule for plaintiff with respect to a whole bunch of allegations that are set forth in Footnote 1 of our reply. Summary judgment is proper where that's the case, where independence is the sole basis to rebut that presumption.

THE COURT: It's not summary judgment, but, yeah, I understand you're asking for a pretrial ruling or pretrial determination. But it's not supposed to be summary judgment on that kind of fact.

MR. TAYBACK: I would point Your Honor to the Khan case, which is from Delaware, and it's cited in our reply at page 3 along with several other cases where it is decided on summary judgment.

THE COURT: It's not summary judgment, Counsel.

MR. TAYBACK: The facts here with respect to what Mr. Adams's situation is, I believe we respond to those. The company applied the NASDAQ standards, that's undisputed, with respect to making a determination of independence. What happened subsequently in terms of what committees he sat on or didn't sit on, that's irrelevant to the question of whether independence existed for the specific board action that was contemplated and with respect to the question about depositions. And that is to say that each of those board

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actions needs to be determined independently from each other as to whether they are protected by the business judgment rule.

THE COURT: They absolutely do need to be done individually, which is problematic, since the depos aren't done. Don't you think?

MR. TAYBACK: Well, Mr. Wrotniak has never been deposed and has never been scheduled to be deposed and has never been asked to be deposed. And most of the depositions, honestly, are complete. So with respect to those individual defendants and with respect to those allegations that pertain to those defendants the matter is ripe for determination. And there's really been nothing with respect to say, for example, Mr. Wrotniak, although not exclusively him. But he's the most egregious example.

THE COURT: All right. Thank you.

Because of the request for 56(f) relief and the depositions that have not been concluded, I'm going to set the matter over to December 1st. I anticipate we will discuss whether I need a supplemental brief at that time.

It is my belief that the independence issue needs to be evaluated on a transaction- or action-by-action basis, because you have to separately evaluate the independence as related to each. And while there may be facts that overlap between different actions that apply to others, I can't evaluate it in a vacuum. So you're going to give me more information like I've asked for, Mr. Krum, okay, following the completion of that.

So we're going to take a short break. When we come back we are going to go to the one on the executive committee.

(Court recessed at 2:54 p.m., until 3:06 p.m.)

THE COURT: Okay. I said we were going to talk about the executive committee next; right?

MR. TAYBACK: Yes.

THE COURT: Let's talk about the executive committee.

MR. TAYBACK: I was going to start with Nevada Revised Statute 78.138(7) and say there's no evidence that can support a claim for the formation of an executive committee, because there's no misconduct. Now, in light of some of the earlier arguments I'm anticipating that maybe Your Honor and certainly plaintiffs will say, well, that's not an independent claim for the formation of an executive committee.

THE COURT: It's not pled as an independent claim.

MR. TAYBACK: I'm happy to have that be true. But that's not entirely the way we read the complaint. I don't think it's entirely clear. And in fact I will say when you asked, Your Honor, what is the question you're going to put to the jury --

THE COURT: Not the question, questions.

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MR. TAYBACK: Questions.

THE COURT: Because I anticipate there would be more than one special interrogatory submitted to the jurors.

MR. TAYBACK: And I anticipate -- well, I would like to anticipate that there wouldn't be any, but what I can certainly anticipate is that this would not be one, since he's apparently conceding that. However, where he can't identify one I do feel like we are reasonably prudent in attacking them all. Because as we stand here now virtually on the close of discovery he couldn't have articulated for you one of the things that he thinks he's going to ask the jury at the end of the close of evidence at a trial. And he wasn't very committal about whether or not the unsolicited offer would or would not be one of them. So at that point I feel like I do need to address the executive committee, because I don't know whether he's going to say it may or may not be one of them. If it's not, then it's not, and it'll be dealt with as a piece of evidence that may or may not be relevant to some other alleged breach of fiduciary duty, which is as yet unidentified.

But the fact is it's neither an independent claim, nor is it actually relevant evidence of any other wrong. And here's why it can't be that, can't be either. The fact is it's specifically authorized by Nevada law, the existence of an executive committee, and its specifically authorized by the

Reading bylaws. You can't take actions and say, oh, this is an entirely legal, entirely compliant organization that exists and is endorsed by Nevada law and endorsed by the company's bylaws, which set the parameters under which it must act. You can't say it's evidence -- its existence is evidence of some other, again unspecified, breach of fiduciary duty. And when you go further and say, well, what about the actions that that executive committee took, well, we then look at what is the evidence. And the discovery on the executive committee is closed. There is nothing -- we've done all of the depositions on that. And what are the actions? Well, they're setting the annual meeting date, they're effectively administrative. Plaintiff can't and has not identified one thing that it's taken action on that could possibly be a basis for a breach of fiduciary duty or relevant to a breach of fiduciary duty. So notably, understanding that, the simple fact is it's something that should be either adjudicated or conceded as not a part of this case.

With that I can sit down.

THE COURT: Because it's authorized by the bylaws, so everybody was acting within the scope of the bylaws. Whether it was utilized appropriately is a different issue. But the creation of it or the reestablishment of it, your position is since it's authorized by the bylaws it's not inappropriate.

MR. TAYBACK: The bylaws and Nevada law. And the law. And I would also say that as it was utilized my point is the only things that there are evidence about how it was utilized is the setting of the annual meeting date. And that simply isn't enough. Plaintiff may stand up here and say something else, but it'll be the first time we've heard that.

MR. FERRARIO: I just have just a couple points to add on. 78.125 is the Nevada law in this. It can't be any clearer. "Unless otherwise provided in the articles of incorporation, the board of directors may designate one or more committees which to the extent provided in the resolution or resolutions or in the bylaws of the corporation have and may exercise the powers of the board of directors in the management of business affairs of the corporation." The bylaws permit this. This committee was in existence -- we've all come to know a new term called "repopulated." You know, to be honest with you, Judge, I don't even know why we're talking about this executive committee; because when Mr. Tayback asked plaintiff what his gripe was and what decisions they had made he couldn't even articulate any. And Mr. Tayback spoke to -- when you asked Mr. Krum what questions are you going to ask the jury, that brought back, you know, on this one in particular, what are you going to ask the jury, what's the complaint here. And when Mr. Krum couldn't answer that question on your previous inquiry regarding the

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expression of interest it brought to mind a seminar given by one of your mentors, Mr. Jemison. I remember going to Rex's seminar, and he said, after you assess your case, your client tells you what you have, you look at the facts, the first thing you do right when you --

THE COURT: [Inaudible].

MR. FERRARIO: There you go. I didn't have to say it, did I?

THE COURT: Oh, you know, I knew what you were going to say.

MR. FERRARIO: All right. So --

THE COURT: Because I heard it as a young lawyer.

MR. FERRARIO: Yeah. And it's actually good advice. And the fact that you can't articulate now after discovery what you're going to ask the jury, whether it be through a special interrogatory or in the way -- or what you're going to put to the jury in terms of jury instructions really I think undercuts the validity of much of what Mr. Krum is arguing. But here, you know, there really just can't be any issue regarding the formation, repopulation, call it whatever you want, the existence of the executive committee.

THE COURT: Now Mr. Krum.

MR. KRUM: Well, Your Honor, we've actually covered this in some respects in terms of talking about trial and evidence and discussion and so forth. But this is an

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opportunity for me to speak to one of the other recurring mistakes in these motions, which is the assertion that because something is legally permissible it therefore cannot give rise to a fiduciary breach. And you obviously understand that, because you talked about the difference between the formation and the utilization of the executive committee. And so, you know, there's -- I've been doing this long enough, perhaps too long. The other day I dictated something about a 1979 case and noted to the assistant that I'd worked on the case. But one of my favorite quotes is from a '71 case, and I didn't work on that. "Inequitable action does not become permissible simply because it is legally possible." That's Shelby-Chris Craft. And we didn't -- we cited elsewhere, you know, the fairly fundamental legal precept, and that is there are two tests, is the act legally permissible, one, and, two, is it inequitable, is it actionable as a breach of fiduciary duty.

There's no claim here that the existence or formation, because it already existed, so I've said the same thing twice, the existence of an executive committee constitutes a fiduciary breach. And the reason the word "repopulate" has been used in this case is because it leads into the factual question of why did they activate and repopulate the executive committee. And there's claim that there's no evidence and I didn't ask some question. Well, I've been to these depositions. I asked lots of questions.

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And the answer to that question at the time as evidenced by contemporaneous emails from Mr. Storey was that the executive committee was a means to effectively preclude him from functioning as a director. I took his deposition in this case. His testimony was his view was that the purpose and effect of the executive committee was to preclude him and plaintiff as functioning as directors.

So we cited the law on page 18 of this particular opposition for the proposition that the right of a board of directors to delegate is not unlimited and that delegation by a board may give rise to a claim for fiduciary duty. Of course, this isn't delegation so much as it is appropriation. And so the issue raised by the executive committee is very much a factual issue unique to this case. I omitted to say, Your Honor, that the executive committee didn't just come out of the blue in the ordinary course of business here. This repopulation and activation of the executive committee was part of the seizure of control. It was part of the decision to terminate plaintiff to appoint Ellen Cotter interim CEO and to repopulate and activate the executive committee. The factual context makes perfectly clear that the utilization of the executive committee here was done for the purpose of excluding Storey and plaintiff. And we have the emails between Gould and Adams before the very first meeting talking about who's going to make what motion, who's going to second

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it. And Adams says, the other motion, and Kane says, what motion, and Adams says, the motion to appoint executive committee or interim CEO. It was all prearranged plan to seize control of the company.

Now, the facts also show that in October of 2014 Ellen Cotter made a proposal to some of the outside directors, and the proposal included an executive committee to which they would report instead of reporting to their brother as CEO. And that somehow didn't get traction and didn't come to pass then. But by the time of April, when they had Kane and Adams and McEachern lined up, would pick their side in the family dispute the executive committee came to be so that it could exclude plaintiff and Storey. And they say, well, they don't complain about anything they did. Well, first of all, Your Honor, it is sufficient to have misused the structure of an executive committee to exclude other directors. And second, the executive committee did do things. It set the annual shareholders meetings and the record date, unbeknownst to plaintiff. And the point of that was -- this was at the end of 2015, and they were still concerned -- in fact, they were more concerned that the intervening plaintiffs and Mark Cuban, who has something like 14 percent of the Class B voting stock were going to make a run for control of the company.

So the answer, Your Honor, is it's a factual question whether it gives rise to a fiduciary breach, and we

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will have to, as discussed, decide what exactly the special interrogatories are going to be. But it is absolutely, positively compelling evidence of what transpired here. It was a whole exercise to seize and perpetuate control. So it's not -- it's not -- you know, it's legal and therefore everything is copacetic is just wrong as a matter of law.

I don't have anything unless you have questions for me.

THE COURT: Thank you.

The motion related to the executive committee is granted in part. As to the formation and revitalization of the committee the motion is granted.

As to the utilization of the committee it's denied.

MR. KRUM: Point of clarification, Your Honor. By revitalization are you referring -- is that something different than -- that's activation? Is that what that is?

THE COURT: Activation. I think you called it repopulation, putting people on it. I'm not including utilization, which is the activities of the executive committee afterwards.

MR. KRUM: And utilization includes the purposes for which these other activities were done?

THE COURT: No. Formation and revitalization include a decision by the company, whether it's a decision by the company to make use of their previously dormant executive

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committee and to put people on that executive committee. What the committee did and the activities it did are still issues that remain for you to discuss whether those are breaches of fiduciary duty. Do you understand what I'm trying to say?

MR. KRUM: I think so. Last question on this. In the first half of that, the activization and whatever the other verb was, I could still introduce evidence of that in support of other claims?

THE COURT: Absolutely.

MR. KRUM: Very well.

THE COURT: Right. But it won't be one of the questions --

MR. KRUM: Understood.

THE COURT: -- you submit to the jury. Because I'm trying to narrow the questions you will eventually submit to the jury.

MR. KRUM: Understood.

THE COURT: All right. Did you have any questions?

MR. TAYBACK: No, Your Honor. I understand.

THE COURT: Okay. That takes me to the issue related to plaintiff's termination and reinstatement claims.

MR. TAYBACK: Sure. There are cross-motions on this issue.

THE COURT: I know.

MR. TAYBACK: Would you like to hear from one side

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or the other first?

THE COURT: I don't care.

MR. TAYBACK: I'll start.

THE COURT: Okay. I carried one box that only included briefs, not exhibits, home. The box was fairly full. I read almost every page that was in the box. Not every page. There were some declarations I skipped over.

MR. TAYBACK: You can mind the fact that I know Your Honor's very familiar and has read it. And in fact I'll say --

THE COURT: I mean, I agree with you that I read it all.

MR. TAYBACK: Well, I mean, I'm going to tell you why I hope you would agree with me, which is I'm going to start with -- I'm going to say there are three bases upon which I think this motion should be granted, Nevada law, the policy that underlies Nevada law, and the undisputed material facts that are presented in both motions. But I'll start by saying, though, when this case began I think we came before you and we said that the case appeared like an effort to turn a disgruntled terminated executive claim by -- with certainly an undercurrent of familial disharmony into a -- into a derivative case. And -- but we have the derivative case. That's what we're looking at right now. We're not looking at the Trust, we're not looking at the estate, we're not looking

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at -- as you pointed out, not looking at his employment arbitration. And I will say after however much discovery you've taken or how many documents it remains the same thing. It's an effort to turn something that's not a derivative case into a derivative case.

In Nevada law nothing comes close to a case that finds that there's a breach of fiduciary duty for terminating an officer. How could it violate a duty to the corporation when the termination of an officer is specifically authorized by Nevada law, specifically authorized by the bylaws, specifically authorized by the contract with that executive? In point of fact the -- given that there's no such case and in fact the termination for no cause is specifically contemplated and allowed at the discretion of the board, it can never -- terminating an officer can never meet the standard of liability for a director under the Nevada Revised Statute 78.138(7). All of that, all of those arguments, those legal arguments why it's just not actionable are totally 100 percent independent of the business judgment presumption. As a matter of law it's just not actionable.

And there's good reason for that. The policy that underlies those statutes and give rise to the bylaws and give rise to a contract that says you can terminate it at will for good cause or for no cause at all is because all CEOs -- almost all CEOs, at least in my experience, own some stock in

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the company. Wrongful termination would be converted into a potential derivative suit in the case of every single termination of an executive. And how would that be remedied? We were -- preparing for the hearing we were talking about amongst ourselves so what would be a remedy here if one could come up with the equitable remedy that Mr. Krum says on occasion at least he's seeking. Would it be for the Court to reinstate the plaintiff as the CEO? That is to say, would it be contemplated that the current CEO would be ordered to be fired? And what remedies, if any, would there be there, and what would be the terms of the continued management of a CEO restored who says that they were terminated and they shouldn't have been? The fact is it doesn't make sense when you start thinking about it. There's no way for that to work. And there's good reasons why there are in o cases, although there are surprisingly many cases where such a claim has been asserted or attempted. They're all dismissed out of hand either at a motion to dismiss or on summary judgment or for different reasons, either because there is no such basis for a claim or because in fact they invoke the business judgment rule or for other reasons, such as there's no damage, there's no harm to the corporation, it can never be proven that there's harm to the corporation of one executive being terminated versus another.

The third point here goes to the undisputed facts.

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And if you had to get there, and I suggest you do not even need to get to the question of the business judgment rule and the presumption under Nevada law, but the fact is it hasn't been rebutted and really can't be rebutted on these facts. There's arguments that have been made about Mr. Kane's alleged bias because he likes -- he preferred one sibling over another, there's arguments about Mr. Adams's alleged bias because of what they contend is a perception of where he would do better, with what executive in office. But the fact is that there's no basis for going beyond the nonexistence of a claim for a breach of fiduciary duty for the termination of an officer.

What the plaintiff wants to do and what they've made an effort to do is to try to say, hey, the business judgment rule gets thrown out the window and we should look at some other test that I will submit is one of the plaintiff's own making, an entire fairness test that does not exist in Nevada law. He uses the term "entire fairness." There is a term "fairness," which is used in some respects within Nevada, but it's limited, limited to instances where there's a transaction, for example, where a director is on both sides. Because the kinds of things you look at when you determine fairness in those settings are things like price and objective criteria that you can evaluate, not an operational decision, a subjective judgmental decision, the kind that is entrusted

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entirely to boards like the hiring or firing of a CEO.

And in fact I'll take it one step further. On the undisputed facts not only would you say that the defendants should prevail on partial summary judgment with respect to the termination claim, because there's no harm, it's not actionable, and there's no equitable way to actually accomplish what the plaintiff contends should be accomplished; but when you get to the facts -- in fact, even if you were to apply such a fairness evaluation, the facts are it was fair to the plaintiff. He understood the process. The process existed. If this were an employment case, that process would be more than adequate for the plaintiff to know he was on notice of what his deficiencies were and that in fact he did not -- did not rectify them and the board acted well within its discretion to terminate him, especially where the law, the bylaws, and his employment contract gave him the undisputed right and absolute right to do so for no cause at all.

The fact is the undisputed facts, the ones that the plaintiff cites and rely upon, support that decision. This family could not get along. There was a quote earlier about the communications between plaintiff and Mr. Kane, and there was a reference to an email with Mr. Storey, as well, where Mr. Storey says exactly as Mr. Ferrario said, look, I'm not sure we necessarily solve the problem by virtue of -- I'll say it's Exhibit 13, I'm not sure we necessarily solve the problem by terminating the plaintiff, we could terminate all three. And in fact that was a not unreasonable thing to contemplate. But contemplating something, contemplating alternatives and then making a decision is exactly what you entrust to boards. And this is the, the prototypical decision that a board must be entrusted with, that is to say, the decision to terminate a CEO. The fact is they can do it. Their agreements and the law say they can do it. The caselaw all says it can be done. And there's no analysis, no fairness evaluation, no determination about it being a question of fact for the jury, because there is no question of fact for the jury. It's permissible. And it's permissible for very good reasons.

THE COURT: Thank you.

Mr. Ferrario.

MR. FERRARIO: Very briefly, Your Honor.

NRS 78.130 speaks to this issue, refers the Court to the bylaws. And, as Mr. Tayback said, the bylaws here make it very clear that -- and even Mr. Cotter in his deposition acknowledged that he served at the pleasure of the board. You know, sometimes you get in cases like this and, you know, I appreciate that the Court at the beginning of the case when you were hit with a flurry of motions, one I filed to say this was an appointed matter, I don't know how your ruling would have been --

THE COURT: An emergency motion for a hearing on the

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probate case that we never had.

MR. FERRARIO: Emergency motion, probate case, Mr. Krum's initial request for injunctive relief, they didn't happen. You know, the intervention of T2, they're no longer here. And I appreciate that you -- you know, I may have disagreed with your rulings, thinking maybe you should have forced Mr. Krum to make a demand upon the board. But, having said that, you gave Mr. Krum every opportunity to develop his case. You gave him every opportunity to do discovery. You gave him every opportunity to try to find some law to support his position. And here we are theoretically on the eve of trial and he has found no law to support his -- I'm not aware of any case, I haven't seen a case from him that says you can disregard 78.130, you can disregard the bylaws of the company, and you can disregard the pleasure that the board included in the employment contract to fire him without cause. So that's something he signed up for. He can be fired for any reason or no reason at all.

And, Your Honor, you're aware of the law in Nevada. We're probably the most employer-friendly state in the country. You're familiar with the at will employment doctrine here. This isn't a situation where Mr. Cotter was fired because he's in a protected class or like Ponsock where he's a month away from getting his retirement in whatever that case was with Kmart.

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THE COURT: That was Ponsock. Good memory. Yeah.

MR. FERRARIO: It was Ponsock. So, you know, again, when we step back from this you're talking about the most significant decision that a board can make. I sit on a board of directors. I say that all the time, the most important decision we're going to make is hiring our CEO. There's no case that says a court should invade that province that's delegated to the board. None. And this gets to a point I wanted to make. These things that we're talking about have policy implications. They're broader than just this case. You know, we should be able to walk out of here as lawyers and, you know, learn from this and advise our clients. You know, I would always tell a board of directors when I'm talking to them, you have the discretion, the sole discretion to decide whether this CEO serves on this -- you know, in that capacity. I might be constricted by an agreement, there may be consequences that if he or she's terminated they might get severance, those types of things. But it's the board's decision on these bylaws pursuant to 78.130 to decide whether or not Mr. Cotter served in the position of CEO. And the board made the decision to terminate him, nothing more, nothing less. And if the sole reason the board decided to terminate him was because they thought by terminating him it would ease tensions within the company, that's okay. There's nothing that says you can't do that. And you can't morph this

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case into an entire fairness case where you have to evaluate price and all sorts of other things by simply touting lack of independence and all of a sudden jump into a doctrine that simply has no application. There's no case that's ever applied it.

We took the deposition of Justice Steele, who was opining on nothing but Delaware law, which befuddles me how he would even be an expert in Nevada. You know what, he's not aware of any case like this.

THE COURT: He's very well informed on Delaware law --

MR. FERRARIO: Delaware law.

THE COURT: Because he used to be a chief justice.

MR. FERRARIO: He did. And he had some --

THE COURT: He was on the Business Court before then -- the Chancery Court before them.

MR. FERRARIO: He was. And he had a young associate that did a good job of preparing a memo on Delaware law, which is like -- unlike any expert report I've ever seen. Because I'm sure your law clerk could probably go out and probably replicate that if you were so inclined to look to Delaware law. But we're in Nevada, we're not in Delaware.

So the point here is this. This decision that was made by the board was a decision vested solely in them. And you can't come up here and say, well, we need to look into

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their mindset and we need to -- independence and all to sidestep, you can't come in and start saying we've got to invoke the entire fairness doctrine, which I don't even know how it would work. And there's -- you have to have some basis to do that. There is no basis.

And I want to now end with what Mr. Tayback said. We're sitting there, and I said, what would be the remedy Your Honor would fashion, would Your Honor now become the board and fire Ellen, would Your Honor then say, Mr. Cotter, you're back in, and then are you going to then negotiate his contract. Or if you put him back in other his other contract where it says he could be terminated without cause, then the next day they just call him in and say, Mr. Cotter, terminated without cause, are we back here again? So I think when you're looking at these things you ought to look at the remedy. Because most of the time remedies make sense. The doctrine that leads to the remedy, it all kind of fits. It never makes sense here. The reason is courts don't go here.

And so, Your Honor, this motion should be granted.

MR. RHOW: Your Honor, I don't know if you're taking Mr. Gould's position on termination now, but he did have a brief on it. It wasn't --

THE COURT: But I thought his brief related to his motion. Does he have a separate brief on this issue?

MR. RHOW: Correct. You're right. I just wanted to

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make sure when you said the --

THE COURT: No. I've got his motion down as a separate number to hit.

MR. RHOW: Understood.

THE COURT: Is that okay?

MR. RHOW: That's fine, Your Honor.

THE COURT: If you want to chime in, you can.

MR. RHOW: If you have it somewhere else, I'm happy to address it then.

THE COURT: I do have it someplace else.

MR. RHOW: Understood, Your Honor.

THE COURT: Okay.

MR. KRUM: Mr. Ferrario said that the board's decision with respect to a chief executive is the most significant decision a board can make. Mr. Tayback said the same thing a different way. And yet, Your Honor, they're telling you that the board can never -- or directors can never be liable for breach of their fiduciary obligations in making that decision. Well, that's a non sequitur. Makes no sense logically, and it's flat wrong as a matter of law.

Mr. Ferrario said that Chief Justice Steele didn't identify a case, and I think Mr. Tayback argued that we didn't identify a case, a breach of fiduciary duty case like this. Chief Justice Steele in a somewhat self-deprecating and humorous way when asked that question said, well,

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notwithstanding the characterization of Delaware as having a -- I think it was a rich body of law, and he says, I don't know of a case like this, but there's always a case that is a case of first impression. Doesn't follow that the case hasn't been litigated before that that is because directors in making the most important decision they make cannot breach their fiduciary duties.

The business judgment rule is a rebuttable presumption, I said that earlier, where the decision of a board and any action qualifies as a transaction, where a decision is made by less than a majority of disinterested and independent directors there's a different standard. That's not inconsistent with Nevada law. We've covered that already. There's Nevada law on it, and in fact it's consistent with the statute they miscite, 78.140, which is not a definition of interestedness, it's not a limitation on 78.130. .140 is Nevada's statutory codification of a common exemption, common meaning prevailing among jurisdictions. It's a statutory carve-out of a common-law rule that interested transactions and decisions are void. But it sets out how you can make them fit that exception. And oddly enough, Your Honor, .140 comports exactly with what I said. One of the ways is to have the decision approved by a majority of disinterested and independent directors.

So when the business judgment rule is rebutted, as

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we've argued in this and several other briefs, the burden shifts to the defendants with respect to that particular set of circumstances to show the fairness, the entire fairness of two things, the process and the result, the objective entire fairness, not what somebody thought on the board, the objective entire fairness. And the reason for that is very simple and very logical. It's because a majority of the people who made the decision lacked disinterestedness, lacked independence, or both.

The facts here are incredible. The undisputed facts show that Adams, Kane, McEachern, Ellen and Margaret Cotter threatened plaintiff with termination as president and CEO of a public company if he didn't settle Trust and estate disputes with his sisters on terms satisfactory to them. The undisputed evidence shows they executed that threat when he failed to acquiesce.

We've talked about this a little before, and I'm going to refer to it. I'm not going to through all the evidence. The undisputed facts show that Adams is financial dependent on income from companies Margaret and Ellen Cotter control. That puts him squarely into the beholden category at a minimum with respect to any transaction or action that is of any import personally to Margaret and Ellen Cotter. Clearly getting rid of their brother was. In fact, the interested director defendants' opposition concedes that for the purposes

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of these motions they do not argue that Ellen and Margaret Cotter were independent. And we've talked about the facts with respect to Mr. Kane, and on this decision -- you know, I know you've read the briefs, so I'm going to resist the urge to go through his testimony about what he thought about who should control the voting trust, except to say he testified unequivocally that he understood what the deceased wanted, his understanding was the deceased wanted Margaret to be the sole trustee of the voting Trust and he acted accordingly. He acted to effectuate the wishes of his lifelong friend. And the point of that is two of the three people that voted to terminate Mr. Cotter are shown to lack disinterestedness, independence, or both. We only need to show one, Your Honor, because then it's a 2:2 tie. And under the law as we've briefed it and I've described it, the defendants in response to our motion and in support of theirs have to show the entire fairness of the process and the result.

I'm just going to take a couple minutes and just go through the short outline of the facts. In March 2015 the five non-Cotter directors appointed Director Storey as the ombudsman. You're familiar with that. On May 19th, two days before the first board meeting, the May 21 board meeting, special board meeting, supposedly, Ellen Cotter sent out an agenda, the first item of which was, quote, "status of president and CEO." And this isn't clear from our papers, I don't think, but you'll see when we get there, to the evidence, there were other items that talked about status of this executive and status of that executive. But as it turned out, the only one that was -- "status" meant "terminate" was the plaintiff.

Prior to the 19th, prior to her sending out that agenda, Kane, Adams, and McEachern had communicated with Ellen Cotter and with each other and reached agreement to vote to terminate plaintiff. So no vote happened at that meeting. That's the meeting where plaintiff raised the issue of Mr. Adams's independence, which nobody investigated, nobody insisted that Adams disabuse them of -- disabused plaintiff of a notion that Mr. Adams was financial dependent on the Cotter sisters. They just let him vote later, on June 12th.

So the meeting continues to May 29th. What happened between May 21 and May 29th? The lawyer representing the Cotter sisters in the California Trust action sends a document to the lawyer representing plaintiff in that action, here's a document your client needs to accept to avoid being terminated. So on the morning of May 29th plaintiff tries to discuss the document and negotiate terms with his sisters. They say, no, just take it or leave it. The supposed board meeting reconvenes. Lots of talk, it concludes early in the afternoon of the 29th. According to the contemporaneous handwritten notes of Tim Storey, which he confirmed in his testimony in this case, the three of them, Adams, Kane, and McEachern, told Jim Cotter, Jr., that, you have to go settle your disputes with your sister and if you don't we're going to reconvene at 6:00 o'clock tonight, the Friday before Memorial Day, telephonically, and proceed with a vote to terminate you.

So when they get on the phone at 6:00 o'clock Ellen Cotter reports that they have an agreement in principle, the lawyers will do documents and so forth. And then, of course, the next thing is on June 8th Jim Cotter, Jr., says, I can't agree to that. Ellen calls a board meeting on June 12th. They do what they threatened to do. They terminate him.

Now, their whole brief talks about what supposedly happened at that meeting. You know, these 13 hours of deliberation or some utter fiction of that nature. The undisputed evidence shows that prior to the first meeting those five people, the two Cotter sisters, Kane, Adams, and McEachern, had agreed to vote to terminate plaintiff. There's no process here, Your Honor. This was executing on taking control of the company and resolving a family dispute when the plaintiff would not acquiesce to doing so by agreeing to a document that, among other things, by the way, resolved the matters being litigated in the California Trust action and made Margaret Cotter the sole trustee of the voting Trust, one of the biggest points of contention.

So, you know, the briefing was somewhat like ships

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passing in the night. I wrote far less when I listened to the arguments than I normally did, but I do have one more thing. And that's on the remedy. This is on page 27 of our reply brief, and we've briefed it before. You've seen it. Courts may fashion any form of equitable relief as may be appropriate. When they aborted the CEO search and made Ellen Cotter the CEO I was dumbfounded, Your Honor. If I was -- you know, it was a good thing for the company that they were going to do a CEO search, they're going to bring in a CEO, they're going to act like a public company. And then they didn't do that. And as a practical matter it's no big deal. As a legal matter the Court absolutely can provide that equitable relief. Chief Justice Steele was asked about that, and he said the saying in equity, for every wrong there is a remedy. And with respect to this he said, it is void the action and order reinstatement.

And so the last thing on this particular motion to which I want to speak is the contention that, well, no, you can't order -- you can't or at least you shouldn't provide equitable relief because, you know, the Cotter sisters are controlling shareholders, they'll just undo it. Your Honor, that is a very, very telling statement. Because what it is is an unequivocal announcement that the Cotter sisters don't view themselves as having an fiduciary obligations as controlling shareholders. That's wrong as a matter of law, but clearly

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the manner in which they've conducted themselves throughout.

And, yes, the answer is were they to do that we'd be back and we'd be entitled to relief again. It's not a matter of the board substituting its judgment, it's a matter of the -- excuse me, the Court substituting its judgment for the board, it is a matter of protecting the interests of all RDI shareholders, the minority shareholders, who obviously don't exist in the decision-making minds of Kane and Adams and Margaret and Ellen Cotter. And that the brief says, well, you know, we're going to act like they don't exist again, simply confirms why it is equitable relief can and should be ordered. Thank you.

THE COURT: Thank you.

MR. TAYBACK: There are no other shareholders who are seeking to have the plaintiff reinstated or undo his termination. And to answer the question -- that's telling, by the way, and we make an argument about the plaintiff's inadequacy of understanding for this case based in part on that. But I'll say -- I'll start with this. If everything that Mr. Krum said is true were true, this motion should still be granted. And it's not --

THE COURT: I disagree with you, Counsel. Anything else?

MR. TAYBACK: Well, I would say yes. I would say why I think that that's true, which is to say that as -- from

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the first principles it's true that if it's the -- if it's the -- just because it is the -- one of the most important powers that a board has, it is one that there is a long record of allowing boards the entire latitude to terminate for no reason at all. And how it can ever be a breach of fiduciary duty when the law provides unequivocally that right to boards of directors is the reason that there is no case that supports the plaintiff's claim. The best case that he cites concludes with the language, "Plaintiffs have neither articulated a theory as to how the plaintiff's removal as president and director could be a basis for fiduciary duty claims, nor proved any such breach." And that's the best case they cite. The fact is the law is clear and unequivocal that there is no basis for a breach of fiduciary duty claim in Nevada and frankly or any other jurisdiction for this action.

MR. FERRARIO: Your Honor, just very quickly.

The bylaws parrot the employment contract, clearly states that Mr. Cotter held the position at the pleasure of the board of directors, could be terminated with or without cause at any time by a vote of not less than the majority of the entire board at any meeting thereof by written consent. This whole nonsense about process that we've been hearing is inconsistent with the bylaws. I don't know what process Mr. Krum thinks should be invoked. We haven't been able to get that from him. When we asked Mr. Storey what he was talking

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about in terms of process he was saying, well, he thought that the -- this mentoring process that had to be employed by the board prior to Mr. Cotter's termination should have been allowed to run its course. The fact that you have to mentor a CEO or ombudsman a CEO kind of tells you what was really going on there. And this is before the May event.

But I think the thing that's missing from Mr. Krum's argument -- and he talks about this unprecedented effort by the board to try to resolve this familial dispute, and he talks about that, but he doesn't go to the next step. The familial dispute was impacting the operation of the company. When that happens the board then has to deal with that. And that's what they did here. But he doesn't say that. He acts like the board came in as mediator for no reason to try to settle the Trust case. That's not what happened. He concedes that this familial dispute was impacting the operation of the company. So the board looked at its options and then what is in the record happened. And at the end of the day the board made a very basic decision, I'm going -- because the family dispute would not resolve despite the parties' best efforts, despite Mr. Krum's client at once agreeing to the terms of the deal and then reneging, despite his client enlisting the services of Uncle Ed and trying his damnedest to get this thing resolved, he couldn't do it. So the board then is left with the same situation that occurred before all of these

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meetings, three siblings who are fighting. And the board picks two Cotters over one. That's it. And that -- there's no case that he's -- he always talks about law, law. Where's the law that that decision could ever be challenged? And then what's the remedy he says that the Court could fashion? Because no matter how you cut it you would be substituting your judgment for the judgment of the board there, who is sitting there living with this day to day. And they look at it and because the underlying dispute doesn't resolve, they cannot afford, consistent with their fiduciary duties, to let that dispute impact the operation of this company. Had they done that, they would have probably gotten sued by T2 or by other folks, because then you would have heard the claim, you should have taken action. The only action that's left when the parties can't voluntarily resolve it is you have to do what they did, fire one, fire two, or fire all three. I submit they made the prudent decision. They took the ones with the most experience.

So matter how Mr. Krum wants to sidestep the bylaws, no matter how he wants to sidestep Nevada law, no matter how many times he's says there law to support this and then doesn't cite it, the simple fact of the matter is the board could have done this by simply calling a meeting and saying nothing other than, Mr. Cotter, you're terminated without cause, we don't have to have a reason to do it.

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And so the only way this claim could survive is for this Court to rewrite the bylaws, rewrite Nevada law, and import a doctrine into this case, the entire fairness, that has no application -- I can't find a case in Nevada, and I argued this in a case in front of Judge Scann a couple years ago, whether that doctrine even has any application in Nevada. It's an open question. He cites to 78.140 that deals with restrictions on transactions involving interested directors. What he doesn't say, that even in that context in Nevada if those holding a majority of the voting power approve or ratify the interested transaction, it's good. Nevada's adopted that statute. So even if this was an interested party -- even if there was lack of independence, the majority of those controlling the voting power voted to ratify that act. So there's just nowhere for him to turn here.

So, you know, again, Judge, these decisions have to apply just beyond this case. And, you know, of all the things that he's alleged here, from the beginning we've been saying this isn't a derivative case, there's no case he cites. Justice Steele certainly didn't come up with any. I don't remember Justice Steele saying for every wrong there's a remedy, because I don't know what the wrong is here. You got fired. You signed a contract that said they could fire you. That's not a wrong. And if he thinks it's wrong, he's got a remedy. Go to the arbitration. Here he's a derivative

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plaintiff. There's no wrong to the company for the company following the bylaws, following Nevada law, following the terms of the contract, and on these facts, taking them as he said, where people are fighting and its infecting the operation of the company for the board to say, I'm picking these two over that one. It's literally that simple.

THE COURT: Okay. Are you done?

MR. FERRARIO: Yes.

THE COURT: All right. The motion's denied, as there are genuine issues of material fact and issues related to interested directors participating in a process.

If I could go to the motion in limine related to plaintiff's experts.

So, for the record, in September of 2013 I spoke on a panel called Multijurisdiction Case Management Litigation Being Pursued in Multiple Forums with Chief Justice Myron Steele. I don't think it affects my ability to be fair and impartial, but I make that disclosure to you just in case you need it.

MR. SEARCY: Thank you, Your Honor. I'll try and go through the four experts that were touched upon in our motion in limine fairly briefly, because it's getting late.

THE COURT: And I've got to find them in the book. So you keep going.

MR. SEARCY: Okay. If the Court has any questions,

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please --

THE COURT: You keep going. No. There are no Post-It notes on this one.

MR. SEARCY: All right. I'll start --

THE COURT: I went through the Post-It notes already.

MR. SEARCY: I'll start with Justice Steele. His name has come up a couple of times today. I took the deposition of Mr. -- of Chief Justice Steele, the former chief justice.

THE COURT: They get to keep their titles when they retire here in Nevada.

MR. SEARCY: And by his own admission Chief Justice Steele agreed that he was submitting a legal opinion. It's not meant to assist a jury. What Chief Justice Steele did is he took the facts that were given to him by plaintiff and he assumed that they were true, and then he provided a legal analysis under Delaware law as to how he thought that might come out in a Chancery Court. He didn't look to Nevada law, he doesn't claim any expertise in Nevada law, he didn't conduct any research of Nevada law. His opinion in short, Your Honor, is really a research memo that's aimed to assist you, the Court, and not the jury. And because of the fact that Chief Justice Steele in a prior opinion simply assumed the facts, didn't have any expertise on the facts, didn't

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offer any opinion on the facts, didn't even go to ultimate facts, another court has already excluded an opinion just like the one he submitted here.

Now, Your Honor, if I may, from his deposition testimony Chief Justice Steele wrote -- or he said -- he testified about his opinion, "I'm definitely not impertinent enough to suggest what the Nevada court should do, nor am I suggesting that they would follow this pattern that's used in Delaware, just that this opinion is designed to be helpful to the court should the court choose to look at it and understand how the analysis would occur in Delaware. That's all. That's all I was asked to do." So, Your Honor, he's not providing anything that would be helpful to a finder of fact, and he's not providing anything to the Court that the Court can't do on its own. That's Chief Justice Steele.

THE COURT: So let's do all of them together.

MR. SEARCY: Okay.

THE COURT: Okay. Because then I'm going to ask Mr. Krum questions. Because I was wrong. I did have a Post-It note. Luckily, I found it.

MR. SEARCY: Moving now to the damages expert that plaintiff has put forth, that's Dr. Duarte-Silva, Dr. Silva -- or Duarte-Silva has literally just thrown out numbers. He's thrown out two numbers to say that the EBITDA of the company and the share price of the company haven't risen as much as he

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thought that they might if you compare them to what he considers to be the comparable companies. He doesn't engage in any sort of statistical methodology here, Your Honor. But more importantly, he doesn't seek to opine on any causal connection between the numbers that he throws out and what is being examined, namely, that is the term of Ellen Cotter as CEO. And when he was asked at his deposition, do you have any opinion on causation, he said, no. Do you agree that your opinion is not statistically significant; he agreed with that, Your Honor. So he has literally just thrown out large numbers without any causation connecting those numbers to any allegations in this case that will have no other purpose than to prejudice the jury. And, Your Honor, for those numbers to be presented to a jury plaintiff has to show that they encompass, they involve some sort of causation of damages. Otherwise it's just prejudicial. Otherwise it's irrelevant. And, Your Honor, that's Dr. Duarte-Silva. Do you have any questions on Dr. Silva?

THE COURT: Nope. So let's go to Spitz.

MR. SEARCY: Spitz. He's the expert on the CEO search. Mr. Spitz does not provide anything more in his opinion other than a subjective opinion. He doesn't cite to any literature about CEO searches, he doesn't cite to any standards, he doesn't even cite to his own personal experience, other than the occasional anecdotal way about how

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a CEO search would be conducted. Instead, what Mr. Spitz does is he provides credibility determinations, questioning the motives of various persons on the CEO search committee, various persons on the board, of Ellen Cotter that he's -- he has no expertise and shouldn't be able to provide those types of opinions anyway about the credibility of witnesses for a jury. He wasn't there, he wasn't involved in the CEO search. That's completely inadmissible. And in terms of what he opines on for the CEO search, notwithstanding his prior experience at Korn Ferry, he doesn't provide you with any standards, any methodologies, anything that shows a basis of expertise by which to judge the CEO search that was conducted.

Finally, Your Honor, that's expert Nagy. He was offered as a rebuttal expert. He is clearly, however, just a late-submitted report. His opinion went to the qualifications and salary of Margaret Cotter. That's not anything that was submitted in Mr. Osborne's report that he is supposedly rebutting. Mr. Osborne's report was instead confined to a one-time payment that was made to Margaret Cotter. Mr. Nagy's report clearly is not a rebuttal to that, and therefore should also be excluded as untimely. Thank you.

THE COURT: Are we still talking about Mr. Finnerty?

MR. SEARCY: Mr. Finnerty -- we've withdrawn our motion with regard to Mr. Finnerty.

THE COURT: Thank you.

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For what purpose are you offering Chief Justice Steele's conclusions?

MR. KRUM: The very same purposes for which they are offering two defendants -- two experts, Mr. Osborne and Mr. Klausner. And the difference between Chief Justice Steele on one hand and those two gentlemen on the other is that the analytical framework Chief Justice Steele offers is based on Delaware, and the analytical framework their experts offer is based on, so they say, industry practice. So Chief Justice Steele is not opining about Nevada law, he's not opining about the ultimate facts. The assertion that he was unfamiliar with the facts is incorrect, staggering, because he testified about what he did, which was read depositions, including the four half-day volumes of Mr. Kane and read the summary judgment motions. But, of course, that postdated his initial report. But what he does, Your Honor, is he explains an analytical framework based on Delaware law that could have been used by the director defendants at the time they were engaging in the activities in which they engaged, and could be helpful to the finder of fact, I submit, Your Honor, far more so than some assertion that, the boards on which I haven't done it this way, or, I haven't heard about it, or, this is what industry practice is, which is what Osborne and Klausner are saying.

It's undisputed that Nevada courts, like many other jurisdictions, may and do look to Delaware corporate law and

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jurisprudence for guidance in the absence of a Nevada law on point. You're going to -- we're going to have instructions about what Nevada law is, presumably, right?

THE COURT: Yes, we are.

MR. KRUM: And this is in effect opinions with respect to how it might have been done using a framework. But that doesn't go to the instructions, and as our summary judgment papers demonstrated, I hope, Nevada law is consistent with Delaware law insofar as there is Nevada law. It's an issue about which we've disagreed from time to time today.

The motion with respect to Chief Justice Steele also asserts some erroneous legal conclusions that are repeated in the summary judgment motion. And they challenge his opinions that are not about what Nevada law is by erroneous assertions of Nevada law. But the short answer, Your Honor, is he's speaking to exactly the same issues as Osborne and Klausner, which is what should the directors have considered, did they do it in a manner consistent with one case Delaware law and practice and another case industry practice, whatever that is, which I'll find out, I hope, when I take their depositions.

THE COURT: Okay. Anything else?

MR. KRUM: Not with respect to Chief Justice Steele.

THE COURT: Okay. Duarte-Silva.

MR. KRUM: Duarte-Silva. Exact same thing. He analyzed the same set of events, namely, the performance of

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RDI stock following the termination of plaintiff and under the guidance of Ellen Cotter as CEO that were analyzed by defendants' expert Richard Roll. The two of them reached different conclusions about what that performance showed. According to Professor Roll, based on his conclusions about that performance, there were no damages, there was no irreparable harm. Dr. Duarte-Silva says otherwise. In point of fact, he comes up with a number, which obviously has troubled the defendants.

So what we have here, Your Honor, is clearly expert testimony that the defendants acknowledge is appropriate, because they're offering the very same testimony but using a different methodology and reaching a different conclusion. And it's not appropriate, I respectfully submit, to make a decision on a motion of this nature that a methodology is unacceptable without hearing the witness himself describe it. And we haven't had that happen. So that's Dr. Duarte-Silva.

Richard Spitz. This is -- this is pretty easy, except for I don't have Mr. Osborne's report here, so I can't cite you to the exact line and page. But I can certainly provide it, because it's highlighted sitting in my office or my litigation bag or perhaps my closet when I unpacked the bag and got on the next plane.

Defendants effectively have invoked NRS 78.138.2(b) with respect to the CEO search by their use of an outside

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search firm, Korn Ferry. Setting aside the factual issues about whether they themselves undermine that by effectively firing Korn Ferry and aborting the search, Mr. Spitz is offered to testify about whether the search was conducted in a manner in which he as a search executive, a former Korn Ferry executive, would have conducted it and ultimately as to whether as a search process it succeeded or failed. And, yes, Mr. Ferrario's right, process is important. That's the basis on which the individual defendants are going to claim they fulfilled their duty of care. And in this instance Mr. Spitz is going to speak to the failed process. So he's going to go to the issue of their invocation of NRS 78.138.2(b). And I'm sure they're going to claim -- I know they're going to claim, we've seen it in the briefing, well, we didn't really terminate the process and it was all fine and we just made a decision and so we stopped. Well, okay. He's going to speak to how CEO searches go. We have percipient witness testimony from the Korn Ferry witness, which is, interestingly, pretty consistent with Mr. Spitz's opinions, but he goes to an issue that they're going to raise in this case. They have raised it. That's the point -- that was the very point from the outset of hiring a search firm.

Mr. Nagy -- I misspoke, Your Honor. It's not Mr. Spitz, it's Mr. Nagy who responds to a particular paragraph or two in the Osborne report. Mr. Nagy's an expert on real

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estate matters, including with respect to the qualifications of executives with responsibilities for development of real estate. As of March 2016 that's Margaret Cotter.

One of the matters as to which the director defendants' conduct is challenged is their decision to hire Margaret Cotter in March 2016 as the senior executive at RDI, a public company, responsible for the development of its valuable New York state -- New York City real estate. And this is in one of their summary judgment motions, Your Honor, under 6, I think, to compensate her in a manner that apparently reflects those responsibilities. And the Osborne report does in fact have a paragraph or two that refers to hiring Margaret Cotter in that position and paying her the money she's being paid. And the director defendants are going to defend their decision by relying on a third-party compensation consultant that advised the compensation committee regarding salary for the position. They, you know, had committees do it, they had the board approve it, and Mr. Osborne talks at length about this wonderful process. So Mr. Osborne's with Mr. Krum and not Mr. Ferrario about how important process is. And he talks about the process, he talks about the position, and among other conclusions Osborne reaches in his original expert report is that the compensation paid to Margaret Cotter is appropriate.

Well, that's -- what am I going to do, hire somebody

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that says the compensation committee exercise was a ruse? No. But how about this? Starting in the fall of 2014 all the way up to March of 2015 when they made the decision there had been discussions about what role, if any, Margaret Cotter would have in terms of the city's [sic] valuable New York City real estate. And from the fall of 2014 through at least the spring of 2015 most, if not all, of the five non-Cotter director defendants had articulated, orally and in contemporaneous emails, the view that Margaret Cotter did not have the qualifications to be the senior person in that role. As a matter of fact, undisputed fact, Your Honor, she has no prior real estate development experience. What is her job? She supervises their live theater operations, which amount to next to nothing. It's not even in the company's description of its two principal businesses. And she was there with her father, now deceased, in the early pre-development stages.

So Mr. Nagy's opinion is that Margaret Cotter is not qualified to hold the position she holds and that the compensation paid to her therefore is not appropriate. And he says, as to Osborne, Osborne neglects to address and analyze her qualifications or lack of qualifications. He says it's industry custom and practice for the two, qualifications and compensation, to be closely linked, it's my opinion that she's not qualified, and because she's not qualified -- I'm paraphrasing -- her compensation is not proper. He directly

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disagrees with one of the conclusions of Mr. Osborne.

THE COURT: Anything else?

MR. KRUM: No. Thank you.

THE COURT: Okay. Anything else?

MR. SEARCY: Yes, Your Honor.

A couple of points that lack of foundation raised in their argument just now in just responding to my reply, first there was the statement that Chief Justice Steele, the former Vice Chancellor, was familiar with the facts of the case. The deposition showed otherwise. And if I may also just read to you this portion of his deposition testimony, he assumed simply for this purpose, for his expert analysis that the allegations in the complaint were true. It's Exhibit A to our reply, Your Honor, at page 44, 19, through 45, 2, where I asked him the question, "I take it that in looking at the pleadings you assumed that the allegations contained in the pleadings were true; correct?" Answer, "Yes, that's correct." "As you might on a motion to dismiss, in other words?" "Very similar perhaps in Delaware, not quite as strict as a motion to dismiss, but very similar."

So it's clear that what Chief Justice Steele did is he provided a legal opinion based upon assumed facts about Delaware law. It's not going to assist a jury, and, to be honest, Your Honor, I don't think it will assist you any more than having a clerk do the same research if you're called upon

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to look at an issue of Delaware law for this case. So Chief Justice Steele's opinions should be excluded. He should not be able to provide testimony in this case.

With respect to Dr. Duarte-Silva there was never any statement made in the opposition just now or otherwise that Dr. Duarte-Silva has any information about causation. He doesn't show any causation, any connection between the big numbers that he throws out and any of the allegations in this case. And he doesn't even purport to. He admits that he doesn't have any information and not offering any opinion about causation of any damages.

With respect to Mr. Spitz you heard the argument. Mr. Spitz doesn't offer any analysis, he doesn't offer any methodology. You heard Mr. Krum make reference to a failed process. There's nothing, however, in Mr. Spitz's report that would lead you to know what a successful process would be, what's the methodology for that, what's the analysis for how a CEO search under Mr. Spitz's view is supposed to go. There's no comparison there. It's strictly for Mr. Spitz a credibility determination that he's making on the witnesses in this case. That's inappropriate. Mr. Spitz's opinions should also be excluded.

Finally, Mr. Nagy, notwithstanding the fact that plaintiff said he didn't have the papers here to show that it was actually a rebuttal, there wasn't a showing in their

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opposition, either, Your Honor, that Mr. Nagy's opinion was anything other than a late opinion and not a rebuttal to anything that was in Mr. Osborne's report. And so, as a result, Mr. Nagy's opinion should also be excluded.

THE COURT: Thanks.

The motion is granted in part. With respect to Chief Justice Steele, he may testify the limited purpose of what appropriate corporate governance activities would have been, included activities where directors are interested. It's on his list of things. He's got it in his list. Let me read it. Because I read it from your motion.

MR. FERRARIO: Did you read his report?

THE COURT: I didn't read his whole report. I read your motion. So here's what you say in your motion. I'm on page -- hold on, let me get there -- the one you did in small type. It's on page 6. To the extent he is talking about the interested and disinterested directors and the process that would be followed based upon the governance of an appropriate company for disinterested and interested directors, that testimony is permitted. And every one of these goes to that. I'm on page 6.

MR. KRUM: That's from his report, Your Honor. That's what they're quoting.

THE COURT: I know it's from his report. That's why I read that. Because it says, "Based on the facts as I

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understand them," which I assume to be Chief Justice Steele and not Mr. Ferrario.

MR. FERRARIO: We're lost here, Judge. Sorry.

THE COURT: Okay.

MR. FERRARIO: Where are you at?

THE COURT: So you understand how at least today I've told you that the issues as to whether people are interested or disinterested on particular actions or transactions is a factual issue that we may have to resolve later. The framework of what the appropriate activities for someone who is interested or disinterested are appropriate for Chief Justice Steele to talk about, and they appear to appear here on 1(a), 1(b), 2, 3, and 4. Because every single one of those talks about independent and disinterested or interested.

MR. FERRARIO: What Justice Steele says is if the jury finds that --

THE COURT: That is correct.

MR. FERRARIO: -- then --

THE COURT: "So here's an appropriate corporate governance activity for a corporation to find if directors are interested. You don't have the interested directors participate." Next step. "Okay. So how do you evaluate if they're interested or not?" "You do an evaluation to determine if they have a financial interest, if they have some other binding interest.

MR. FERRARIO: That's under Delaware law, though.

THE COURT: It's under Nevada law, too.

MR. FERRARIO: No. He's only testified under Delaware law.

THE COURT: Then tell me why these conclusions are not the same as what they'd be under Nevada law. I understand your problem and your concern, but the framework is --

MR. FERRARIO: Well, I'll tell you what. There's not a case in Nevada that uses the entire fairness doctrine. Not one.

THE COURT: It doesn't use that term. It says you evaluate the entire transaction.

MR. FERRARIO: What's the transaction?

THE COURT: In this case there are multiple different activities that we may be submitting questions to the jury on.

MR. FERRARIO: What's the transaction? Just speak to terminating the CEO. Is that a transaction?

THE COURT: Yes.

MR. FERRARIO: Then who's on --

THE COURT: It's an activity.

MR. FERRARIO: Who's on what -- wow. Where does activity show in the statute or in a case? This is part of the problem, Judge.

THE COURT: So, Mr. Ferrario, I'm back to the we're

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going to give the jury special interrogatories, I'm going to let Chief Justice Steele and your expert testify about what the appropriate activities for a company to use when they are faced with a situation of interested or disinterested shareholders and how they should govern themselves if we get to that point.

MR. FERRARIO: I think the problem I'm having here -- and I listened in for most of Justice Steele -- all of his deposition, quite frankly, and Mr. Searcy took it. It's this Court's role to say what law applies, not Justice Steele, and not an expert.

THE COURT: So do you want me to exclude your experts who are talking about industry practices? Because it's exactly the same thing on what appropriate corporate governance is.

MR. FERRARIO: Ah. No, that's different.

THE COURT: No, it's not different.

MR. FERRARIO: It's a completely different inquiry, because Justice Steele only opined on Delaware law, not specific practices employed -- Justice Steele's never been on a board. The only board he said he was on was some volunteer board, I think it was a volunteer board for what, a hospital or something?

MR. TAYBACK: Right.

MR. FERRARIO: He didn't come at this from an industry practice standpoint. He didn't say, I serve on a number of boards. He said, I am giving you --

THE COURT: It doesn't have to be industry practice. What I'm trying to say is I am comparing this to your industry practice experts. If you don't want any of them to testify, then I'm happy to go there. If your position is that I shouldn't let any of those folks testify, then we'll handle it through jury instructions. But that's not the position you're presenting me. You're presenting me in a case where you have experts on industry standards, and am I going to exclude someone who has information that may be of assistance to the jury in a limited framework, not the entire framework, not the memo, not what the law is, but what the options for a board are under the law.

MR. FERRARIO: But, again, the threshold issue there is what's the law. That's Your Honor's job.

THE COURT: Absolutely it's my job.

MR. FERRARIO: Okay. So he -- not Justice Steele.

THE COURT: I understand that.

MR. FERRARIO: So Your Honor has to say what the law is, then Justice Steele would then have to give his opinion. We're not there yet. That's what I'm saying. That was the problem with his --

THE COURT: No. Let me see if I can say it a different way. Boards and companies have certain corporate

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governance structures that they're supposed to follow when they have a --

MR. FERRARIO: I read the bylaws to you earlier.

THE COURT: Yeah. Well, okay. And when we are faced with a situation where a board has interested members, whether they're directors or shareholders participating in a vote, there are certain things that need to happen.

MR. FERRARIO: Depending on what the deal is.

THE COURT: Sometimes.

MR. FERRARIO: I mean, we have NRS 78.140 that talks about interested party transactions.

THE COURT: Yes, there are some --

MR. FERRARIO: That Justice Steele never read, by the way.

THE COURT: There are some interested-party transactions that are permissible under bylaws, but they have to be disclosed interested-party transactions; right?

MR. FERRARIO: 78.140 dictates exactly what --

THE COURT: Right.

MR. FERRARIO: -- has to happen, and they can become void or voidable.

THE COURT: Right. But --

MR. FERRARIO: I agree that that's Nevada law. He didn't even read this.

THE COURT: But let's go back to the Schoen case,

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okay. The Schoen case we have interested parties who may not be interested in a way that people would find under NASDAQ or SEC reporting requirements. But the Nevada Supreme Court found that for purposes of us discussing that case, at least at the pleading stage, those individuals were interested or at least were alleged to be interested, where it was very different than what you would see in a publicly traded case. You have a similarities here with people being called Uncle Ed, you have similarities in the way people are receiving their primary compensation. There are similarities here that lead me to believe that there are factual issues on interested-disinterested which may cause many of the activities that have occurred to be drawn into evaluation by an ultimate finder of fact.

My position is that they need to have expert opinions if they're going to evaluate what an appropriate board would do when they're faced with those interested-disinterested conflicts in making a decision. We can either have experts testify, or you can not have experts testify. If you don't want to have experts testify, then I won't let Justice Steele testify, and we won't have your guys testify. If you want experts to testify, he's going to testify, too; but he's going to be limited to appropriate corporate governance options when faced with interested-disinterested transactions, because that's what he talks about in his

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report.

MR. FERRARIO: I followed you all the way --

It's their experts, so they'll decide whether they want to call these other fellows.

-- until you got to the point of [unintelligible]. If you're saying that the actions of the board will now be evaluated under 78.140 --

THE COURT: I didn't say that.

MR. FERRARIO: I know. But that's where -- that's where -- I'm with --

THE COURT: You're making me pull out books. Because, see, I don't remember numbers. Hold on.

MR. FERRARIO: I was with you up to the point where what law is going to govern here. Because if it's 78.140, I have a framework of which I can look and we can then argue that.

THE COURT: Hold on a second. Let me go to 78.140 so you and I are talking about the same thing.

78.140 is not exclusive. Remember, the Schoen case goes beyond that. It's not exclusive. Or Americo or whatever we call it in the second or third case.

MR. FERRARIO: Americo, Schoen, whatever. I don't think --

THE COURT: Whichever decision of the group of multiple decisions it is.

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MR. FERRARIO: But that was a completely -- that was a different fact pattern. It had --

THE COURT: Absolutely.

MR. FERRARIO: It had nothing to do with hiring and firing of a CEO.

THE COURT: It was a very different fact pattern. I'm not saying it's the same. I don't have a lot of law in Nevada. I have to be instructed on the law I have, and then I've got to make a jump to where I'm going to get based on the law I have. And --

MR. FERRARIO: Well, actually, I mean, you could take another contrary position. I know you heard this in the Wynn-Okada case, but Nevada actually does have a pretty robust statutory scheme that was put in place to be more protective than Delaware, to actually shield decisions from courts, you know, back in '91 and I think '97.

THE COURT: Uh-huh. We did.

MR. FERRARIO: So we actually do have a robust body of law here, and it's called NRS 78. So that's why I point to 78.140. If we're talking about --

THE COURT: Mark, we all look at that, because that's what we look at. That's what governs our corporations. That's our corporate --

MR. FERRARIO: I agree.

THE COURT: But we have case decisions from our

Nevada Supreme Court that supplement the statutory language.

So I've made my ruling on that. If there's something else you want to talk about, I can talk about it as soon as I finish my 4:30 conference call with whichever group of folks needs to talk to me.

MR. SEARCY: Your Honor, if I may, we did have an additional point on Chief Justice Steele. However, I don't believe you rendered an opinion or gave a ruling on any of the other experts.

THE COURT: It's denied on all the other experts.

MR. SEARCY: Denied on all the others. All right.

THE COURT: So did you want to ask me another question on Justice Steele?

MR. SEARCY: No. But go ahead.

MR. RHOW: I was just going to say we -- actually, Mr. Gould, on Mr. Gould's --

THE COURT: You joined in that motion.

MR. RHOW: I know. But he also has his separate motion for summary judgment.

THE COURT: I'm not on your motion for summary judgment yet. It's still on my list.

MR. RHOW: Okay. I'm just making sure. You're asking if there's other things.

THE COURT: Well, yeah. There's a lot of other things.

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MR. RHOW: Understood.

THE COURT: But I'm running out of time.

MR. KRUM: Your Honor, what's going to be next? I'm running out of gas. I need to prepare.

THE COURT: I'm going to go to the Ellen Cotter appointment as CEO and compensation motion.

MR. KRUM: Okay. Thank you.

(Court recessed at 4:27 p.m., until 4:40 p.m.)

THE COURT: So we're on the issues related to appointment of Ellen Cotter, compensation of Ellen and Margaret Cotter, and those issues. And I think there's two or three different motions that are all interrelated on these.

MR. TAYBACK: These would be Motions 5 and 6, and there is a number of issues that are all interrelated.

THE COURT: Okay.

MR. TAYBACK: So I'll --

THE COURT: I'm not big on numbers, I'm big on subjects.

MR. TAYBACK: I understand. And I'll --

THE COURT: So it's hard for me on numbers.

MR. TAYBACK: I'll address them. There's probably four or five issues.

THE COURT: Okay.

MR. TAYBACK: Our motion that we entitled Number 5 was the CEO search and appointment ultimately hiring of Ellen

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Cotter. You know, I'll be relatively succinct here, which is to say it's the -- it's the tag-along to the firing of Jim Cotter, Jr. Like that, there's no case which finds a board liable for hiring a long-time executive who runs -- who has run for 16 years at the time of her hiring one of the primary two business lines of the company and had served as an interim CEO such that the board actually saw how she performed. And every director, excluding the plaintiff and Ellen Cotter herself, supported her hiring. The only attack on that decision is this kind of ongoing what I'll call amorphous and shifting claim that directors lacked independence. He hasn't articulated, other than the general claims of lack of independence, that a majority of the directors had some specific interest in the hiring of Ellen Cotter or lacked independence.

THE COURT: It's the majority of directors participating in --

MR. TAYBACK: Yes.

THE COURT: -- in a process, whether it's a decision or an action, that I have to evaluate --

MR. TAYBACK: Correct.

THE COURT: -- not the majority of all the directors.

MR. TAYBACK: Correct.

THE COURT: Okay.

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MR. TAYBACK: And so you're excluding only plaintiff and Ellen Cotter. The remainder of the directors -- okay. And the question, though, is what's the allegations that say that the vote of Michael Wrotniak, to take an example, or any director on any issue -- and now I'm going to look at this particular issue -- amounted to a breach of fiduciary duty. And there just isn't -- there isn't fact -- there aren't facts that have been proffered that say, you know what, with respect to this decision this director was -- lacked independence because of this. We've heard the generalized allegations that Guy Adams supported Margaret and Ellen Cotter because he thought that he might get paid, we've heard generalized allegations about some of the others, Uncle Ed Kane; but those generalized allegations of interest don't relate to the transaction that is being looked at. And I'll call it a transaction even though it's not a transaction, it's a decision.

THE COURT: And that's why I tried to use all sorts of different words, and I don't know which word to use, but it's an activity of some sort.

MR. TAYBACK: I agree with that. I do think that there's a difference, and so I've tried to be careful to not call it a transaction, because I think the law --

THE COURT: Yeah. Because they're not really transactions.

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MR. TAYBACK: Because they're not. And I think the law is different when it's a transaction, because the framework for evaluating interestedness, frankly, has more applicability when it's a transaction. That's what I say. And I see you shaking your head, but I do --

THE COURT: Yeah. I agree with you. It's a hard issue. That's why we're having this long afternoon and I didn't make you come on a motion calendar where you had 10 minutes to argue all 40 or so motions you filed.

MR. TAYBACK: The second point that I would make, and really the last point I would make, on the identification and hiring of Ellen Cotter is that the -- that the nature of the claim really only sounds, I think, in corporate waste. And the standard for determining corporate waste, that is to say, the decision I think is really I think inarguable that there's the kind of latitude one would have on these undisputed facts given who she was and her connection to the company that that's a reasonable decision.

The only question is this hiring and then termination of the external search firm, Korn Ferry. And there's an argument that's --

THE COURT: In mid search.

MR. TAYBACK: In mid search -- well, not mid search. At the point of which they made the decision.

THE COURT: Near the end of the search, yeah.

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MR. TAYBACK: At the point at which they made a decision. And whether there's -- I mean, I don't -- haven't seen any case or I haven't seen any theory where a company ever has an obligation to hire a search firm or to conclude the search once they've identified a candidate that they want to hire. The fact is that happens all the time. But whether it does or doesn't doesn't matter. Because, if you look back even to the plaintiff's hiring, there was no search. There wasn't a search firm at all. He was hired because he was the son of the founder. And he doesn't seem to be complaining about that. And so I don't know that the legal term is a pot-kettle issue, but it's definitely the pot calling the kettle black. The fact is they engaged an indisputably reputable search firm, they engaged in a search, and they decided on the sitting CEO, who they always are going to know better than an external candidate. That's not something that can be second guessed. And I don't think on these facts it should be second guessed. And to the extent it's a corporate waste claim the standard, as you well know, is quite high for that.

Do you want me to address the other issues, as well, while I'm up here?

THE COURT: Yeah. Because they're all interrelated.

MR. TAYBACK: Okay. The I'll call them the other four issues which are really the subject of our Motion Number 6 is the estate's exercise of options, the appointment

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of Margaret Cotter, compensation for Ellen Cotter and Margaret Cotter, and the -- there was an additional compensation voted for Margaret Cotter and Guy Adams.

Just to take them in order, with respect to the exercise of the -- the estate's exercise of options plaintiff really cites zero evidence. There's additional evidence that he's seeking regarding the advice of counsel upon which two directors sought. I don't know whether Your Honor's ruling with respect to 56(f) is going to apply here, but it would seem logically that your prior rulings probably dictate how you're going to come out on this one.

THE COURT: Maybe.

MR. TAYBACK: So I'm not going to spend much time on that -- or any more time. But I think that in fact the evidence, the undisputed evidence that's proffered supports summary adjudication of that as an issue.

With respect to the appointment of Margaret Cotter if you now say that it's the board's ultimate fiduciary duty to shareholders, including in this case this one shareholder who's been the terminated CEO, to not only evaluate the board's exercise of its fiduciary duties with respect to the hiring of the CEO or firing of a CEO, but now to subordinate executives, I think you're really entering the realm of micromanagement of a company.

The challenge here is she wasn't qualified because

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she hadn't engaged in sufficient real estate-related activities. The fact is, and the undisputed facts are, she'd been affiliated with the company as a consultant through her own -- her own consulting entity that was by contract with the company had been running their live theater business for years, for 15 years, I think. Even though he just -- said in a prior motion plaintiff's lawyer said, well, the live theater business isn't even one of the two main lines, the fact is when he tried to go around or fire Margaret Cotter because he believed she mismanaged other litigation related to a show called "Stomp," the fact is he described -- plaintiff describe it as one of the most significant lines of business that the company had, which was why he was so agitated with how he perceived she handled that litigation, which ultimately came out successful and vindicated her position all along.

THE COURT: And that was the litigation over the lease of the theater; right?

MR. TAYBACK: Exactly.

THE COURT: Okay.

MR. TAYBACK: My point is with respect to the hiring of Margaret Cotter she -- the record shows and we identified in our motion three or four relevant documents and facts that show she had ample qualifications to be responsible for the real estate side of the business. It's a reasonable decision. The generalized attacks on the independence of the directors

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who voted on that, who approved that don't warrant piercing into the facts to justify, you know, this decision is right or this decision is wrong at that level of decision making. It's a reasonable decision under the circumstances. It doesn't rise to the level of corporate waste, and it definitely does not satisfy -- based on the evidence that the plaintiff has proffered satisfy the high standard for director liability. And that's true for all of these.

With respect to the compensation decisions obviously the argument is the same. These are decisions made by and endorsed by a subdivision or subcomponent compensation committee, and it's done through ordinary channels. The undisputed evidence is with respect to Ellen Cotter and Margaret Cotter's compensation they hired an external firm, Towers Watson. Willis Towers Watson is actually the full name. And they came in they do a study and they say, we've looked at these companies and we think that for this purpose they are comparable and they should be -- kind of give you a guide for what range you fall within. And they fall well within that range. I think it's the 25th percentile. Just objectively looking at that determination and the process in which it made, the general allegations that a director was more or less favorable to one of them on that issue doesn't say that everything that happened then goes to a trial. I think the undisputed facts on that issue, the compensation

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decisions, warrant summary judgment.

The same is true with the one-time payment of $200,000 the Margaret Cotter which was intended and identified in the minutes, undisputed and not debated -- or rather debated, but not disputed, to compensate her for work that she did outside the consulting arrangement. She did work for a period of time with respect to -- ironically, given the plaintiff's contention that she didn't have experience -- with the land entitlements to one of the historical buildings that's being redeveloped in New York under her oversight.

And the same is true with respect to the single payment to Guy Adams. Interestingly, plaintiff himself approved a single payment to all the directors based on the extraordinary work they had done up to a point in time while he was the CEO. He approved that, including $75,000 to Tim Storey and $25,000 to the other directors because the tumult within the company and the family upon the death of the father warranted the directors frankly spending a lot more time on the business of the company than they had ever had to so before, and it justified that payment. Not extraordinary, well within the board's discretion. The generalized allegations that he's put forward about people be interested don't warrant overturning that. And the fact is this payment to Mr. Adams, who undertook a lot of other activities later on, the only difference between this one the one that he

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previously approved is, oh, yeah, he'd been terminated. So if there was anybody who was interested in that transaction that had an axe to grind, it was the plaintiff.

I believe that addresses all of the outstanding issues on the motions. So unless you have a specific question --

MR. FERRARIO: Your Honor, I think Mr. Tayback started off by saying --

THE COURT: Yes, I'm probably going to grant 56(f) relief if Mr. Krum asks it.

MR. FERRARIO: Okay. And that's -- because then otherwise we'll just come back and argue this, because --

THE COURT: I have that note here. I'm waiting for Mr. Krum to say it, and then I'm going to wait for him to say it and then once he says --

MR. FERRARIO: Fine. Then I'm going to be quiet. I would point out, though, that if you listen to the dialogue here -- and we'll -- I'll shut up after this.

THE COURT: No, you won't.

MR. FERRARIO: I will. It shows you why courts don't get involved. These are discretionary, because this isn't like --

THE COURT: Mr. Ferrario, I know why I don't get involved in management. I've managed them in settlement conferences as part of the resolution process of these things.

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I got stuck helping manage one, so I don't ever want to do it again.

MR. FERRARIO: Because this is not --

THE COURT: But I do want parties to be accountable and perform in a manner that appears to be consistent with Nevada law. So there may be something the parties decide to do between now and when I see them next.

MR. FERRARIO: It's the Nevada law we're waiting for, though.

THE COURT: But the Nevada law is the Nevada Supreme Court. And I keep telling you what I think the Schoen case says when you have interested directors.

MR. FERRARIO: Well, we're going to go back and read that. This isn't --

THE COURT: Interested directors, lots of -- you lose a lot of protections.

MR. FERRARIO: I think we'll be back.

THE COURT: And interested directors is a very intense factual analysis.

Go.

MR. KRUM: Thank you, Your Honor.

THE COURT: Are you going to ask for 56(f) relief?

MR. KRUM: Yes, Your Honor.

THE COURT: All right. It's granted on Motions 5, 6, and there was one other one related to --

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MR. TAYBACK: It's 3, Your Honor. It was related to the unsolicited offer I believe is the one you identified previously.

THE COURT: No. 5 and 6 were the only two we're talking about right now; correct?

MR. TAYBACK: Oh. Yes. Got it. Yeah. 5 and 6.

THE COURT: Okay. So 5 and 6. So there. It's 4:54.

So here's the question. What do you want to do with the rest of them? Is everybody agreeable the motions to seal that are on calendar today can be granted because they include confidential and significant financial information that needs to remain protected given the company's activities?

MR. FERRARIO: Yes, Your Honor.

MR. KRUM: Yes.

THE COURT: Okay. So all the motions to seal are granted. Or redact. Seal and/or redact.

So what do you want to do next? Because I've got through in almost four hours not much.

MR. RHOW: Everyone's looking at me. I would love to. I hope we're last and least in terms of liability.

THE COURT: Well, it's 4:55.

MR. RHOW: Yeah. So, look, I want it to be heard and I do want to argue it, but --

THE COURT: Okay. Well, but you're not the last

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one.

MR. RHOW: I understand. So --

THE COURT: I mean, I've got tons of them.

MR. RHOW: -- I don't want to be squeezed in --

THE COURT: But I am breaking at 5:00 o'clock, so you've got five minutes.

MR. FERRARIO: Do you want just come back on the 1st when we're going to come back anyhow?

MR. KRUM: I can't come back on the 1st.

MR. FERRARIO: Of December?

MR. KRUM: Oh. December.

MR. FERRARIO: I think that's when she reset --

MR. KRUM: Yes. Of course.

THE COURT: 12/1. 12/1.

MR. FERRARIO: We're going to get all this done, read, supplement, and come back on the 1st.

THE COURT: That was the hope. But I wasn't sure you were physically going to be here on 12/1. And here's the reason I'm not sure you're physically going to be here on 12/1. I don't have the same hope and security that you do in believing that everyone will appear for deposition in the fashion that you guys think they will. I just as a person who practiced in complex litigation with lots of people, I could never get them all to show up when they were supposed to. So -- as a judge I can't get them to show up when they're

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supposed to. I don't know if you heard the conference call I just had with my trial I finished two months ago. They still can't figure out when to come back for the post-trial motions.

MR. FERRARIO: We're going to get it done.

THE COURT: I don't believe you. So do you want to have a status conference where you guys together tell me whether you want to argue anything on 12/1, or not? Will you all get together and tell me that a couple days ahead of time so I can at least re-read what needs to be read before 12/1?

MR. FERRARIO: Yes.

MR. KRUM: Of course.

THE COURT: And if there are going to be supplemental briefs, that I can pull the supplemental briefs and read them?

MR. FERRARIO: Yes.

THE COURT: So when are you going to tell me that?

MR. FERRARIO: Three weeks out set a status conference?

THE COURT: No. I don't want you to -- I want you to do depositions. I don't want you coming back here. I don't want to see you for a long time.

MR. FERRARIO: What do you want, a week before the hearing?

THE COURT: I would like a few days, at least a few days before the hearing you to say, yes, Judge, we're coming

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and we're arguing A, B, and C --

MR. FERRARIO: Okay.

THE COURT: -- or, no, Judge, we're not coming, can you give us a new date.

MR. TAYBACK: I think a week before --

THE COURT: Well, let's see what you guys negotiate. I don't really care what it is as long as you do it a couple of days before.

MR. FERRARIO: We'll know by the 23rd.

MR. KRUM: What day is --

MR. FERRARIO: That's the day before Thanksgiving.

THE COURT: And you all will send an email copied on each other to my people saying, Judge, we're either coming on December 1 and here's what we're doing, or, we're not coming on December 1 and can you give us a different date.

MR. KRUM: Yes.

THE COURT: Plan.

MR. KRUM: Thank you, Your Honor.

THE COURT: Good luck on your discovery.

MR. KRUM: Thank you.

THE PROCEEDINGS CONCLUDED AT 4:56 P.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

10/31/16

DATE