IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, JUDY CODDING, AND MICHAEL WROTNIAK, Petitioners, *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, Department 11, Respondents, and JAMES J. COTTER, JR., Individually And Derivatively on Behalf of READING INTERNATIONAL, INC., Real Parties in Interest.	District Court No. A-15-719860-B, jointly administered with No. P-14-082942-E and No. A-16-735305-B

PETITION FOR WRIT OF PROHIBITION
OR, IN THE ALTERNATIVE, MANDAMUS

With Supporting Points and Authorities

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PETITION FOR WRIT OF PROHIBITION
OR, IN THE ALTERNATIVE, MANDAMUS

Petitioners Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding, and Michael Wrotniak (collectively, "Petitioners"), each of whom are currently members of the Board of Directors of Reading International, Inc. ("RDI" or "the Company"), seek a writ of prohibition preventing the respondent court (the "District Court") from enforcing its December 20, 2016 written order denying Petitioners' motion for summary judgment on Plaintiff James J. Cotter, Jr.'s ("Plaintiff") breach of fiduciary duty claims and reinstatement demand arising from his termination as RDI's President and CEO.

The District Court's ruling (1) held, for the first time in any jurisdiction, that a terminated corporate officer such as Plaintiff has standing to maintain a derivative action asserting breach of fiduciary duty claims against a board of directors arising from his removal, even though Plaintiff's claims are entirely personal, supported by no other RDI stockholder, contrary to the Company's Bylaws and the discretion afforded by Nevada to corporate boards, and have been routinely rejected by other jurisdictions; (2) allowed the possibility that, as a remedy for Plaintiff's alleged breach of fiduciary duty relating to his termination, RDI's current CEO and President could be removed by the Court, and Plaintiff

reinstalled in those positions, against the wishes of the Board, the Company, and its investors after the passage of over 18 months and counting; and (3) compelled Petitioners Codding and Wrotniak to continue to defend themselves against Plaintiff's termination claims, despite the fact that they were not members of RDI's Board at the time of Plaintiff's firing.

These rulings cannot be squared with Nevada statute, the State's common law, or its longstanding corporate policy; in fact, these rulings have no precedent in the laws of any jurisdiction. There is not a single case anywhere—let alone in Nevada—in which: a terminated officer was allowed to derivatively assert breach of fiduciary duty claims arising from his or her removal; a board's decision to terminate an officer was made subject to any "fairness" review (let alone Delaware's "entire fairness" test); the firing of an officer has been determined to be a breach of fiduciary duty; or a former CEO has been reinstated as a remedy for a purported breach of fiduciary duty.

To allow a terminated officer such as Plaintiff (whose personal interests so clearly conflict with those of other stockholders) standing to derivatively assert such a dangerous cause of action and to seek such an invasive remedy, as the District Court has done, would be bad policy. It would subvert the broad discretion afforded corporate boards under Nevada law; force the Nevada judiciary to micromanage the unique judgments that corporate boards must make regarding

the performance of their officers; implement an unworkable, after-the-fact, mindset-based test that is entirely subjective; add uncertainty in the marketplace as to board oversight of companies' business affairs and management succession; and make Nevada law substantially less favorable to directors and stockholders than the law of any other jurisdiction. Allowing any fiduciary duty claim to proceed against defendants who were not yet board members (and thus not fiduciaries) during the relevant time period is similarly contrary to well-established law.

In the alternative, Petitioners seek a writ of *mandamus* directing the District Court to (1) vacate its December 20, 2016 written order as it relates to Plaintiff's termination claims and reinstatement demand; (2) hold that Plaintiff does not have standing to derivatively assert breach of fiduciary claims arising from his termination; (3) hold that the remedy of reinstatement is not available to a terminated officer in the context of an alleged breach of fiduciary duty; and (4) grant summary judgment to all Petitioners on Plaintiff's unsupportable fiduciary duty claims arising from his removal as President and CEO of RDI (including Petitioners Codding and Wrotniak).

DATED this 31st day of January 2017.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS MCEACHERN, JUDY CODDING, and MICHAEL WROTNIAK are individuals.

Petitioners have been represented in this litigation by H. Stan Johnson of COHEN|JOHNSON|PARKER|EDWARDS; and Christopher Tayback and Marshall M. Searcy of QUINN EMANUEL URQUHART & SULLIVAN, LLP.

DATED this 31st day of January 2017.

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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in the Business Court." NRAP 17(a)(1); NRAP 17(e). In addition, this case presents issues of first impression on matters of statewide importance. NRAP 17(a)(13)-(14). Additionally, this Court should retain this matter because another writ involving the same case is presently pending before it, Case No. 71267.

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Under penalties of perjury, the undersigned declares that he is counsel for the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 31st day of January 2017.

H. Stan Johnson

Subscribed and sworn to before me
this 31st day of January 2017.

SARAH GONDEK
Notary Public-State of Nevada
APPT. NO. 16-3009-1
My Appt. Expires 06-27-2020

Notary Public

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MEMORANDUM OF POINTS AND AUTHORITIES

Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding, and Michael Wrotniak ("Petitioners"), each of whom are currently members of the Board of Directors of Reading International, Inc. ("RDI" or "the Company"), petition this Court for a writ of prohibition or, alternatively, mandamus against the District Court's December 20, 2016 written order denying Petitioners' motion for summary judgment as to Plaintiff James J. Cotter, Jr.'s ("Plaintiff") breach of fiduciary claims and demand for reinstatement.

Plaintiff, a stockholder in RDI and its former CEO, has brought a derivative suit to recover his job. In so doing, Plaintiff has a clear conflict of interest with RDI's other stockholders, on whose behalf he purports to bring his suit. Rather than seeking to redress a purported harm common to all stockholders, Plaintiff's claim is entirely personal. Petitioners have brought this writ because the District Court has allowed Plaintiff's suit to proceed, ruling—***for the first time in the history of any state's corporate law jurisprudence***—that a terminated corporate officer has standing to bring a derivative suit based on his own termination, and may seek his own reinstatement as a remedy.

Courts in other states, recognizing an inherent conflict of interest in former officers asserting derivative claims arising from their terminations, have steadfastly refused to allow such claims. The District Court's ruling is the first in ***any***

jurisdiction to do so. This creation of such new "law" is highly questionable in light of persuasive precedent, which—at the very least—counsels against allowing a terminated officer to derivatively bring claims arising from that termination.

Derivative standing for a terminated CEO seeking reinstatement also directly contradicts Nevada public policy. Allowing such suits makes Nevada substantially less favorable to directors and, given the inherent costs, uncertainty, and management disruption that ensue, less favorable to stockholders than any other state. It reverses the Legislature's longstanding policy aimed at making Nevada the pro-business "domicile of choice for corporations around the world," and transforms every officer termination into a potential fiduciary duty dispute—opening up the unique judgments of corporate boards regarding their officers to an unworkable, after-the-fact review by Nevada courts and juries focused on board members' subjective mindsets.

Importantly, Plaintiff has never disputed that the relief he seeks is personal and directly benefits only him; he merely urges that what is good for him ultimately benefits other RDI stockholders indirectly. But his own conduct illustrates the impermissibly personal nature of his termination claims, and how they have no place in a derivative action. Plaintiff is currently involved in three other disputes: an employment arbitration in California being conducted pursuant to his Employment Agreement, a trust litigation in California, and an estate

litigation in Nevada. In each of these other actions, Plaintiff has also raised the issue of his termination and pursued claims that it was improper, relying upon the same vituperative allegations as he does here. Moreover, no other stockholder, even those who brought their own (since-dismissed) derivative claims against RDI, supports Plaintiff's reinstatement as CEO. Indisputably, Plaintiff's personal interests materially diverge from other RDI stockholders such that he fails the most basic requirements needed for representative standing under Nevada Rule of Civil Procedure 23.1.

However, even if Plaintiff did have standing to bring a derivative claim arising from his termination, the District Court's ruling incorrectly ***allows for a reinstatement remedy that has never been recognized by any other court in the United States***. No court in any jurisdiction has ever allowed the possibility that a corporate president or CEO could be reinstated, potentially years after his or her termination and long after the appointment of a successor, as a remedy for an alleged breach of fiduciary duty. In denying Petitioners' motion, the District Court put RDI, its stockholders, and its current CEO in a precarious situation: it left open the possibility that, upon the conclusion of trial, RDI may be immediately compelled against the wishes of its Board and stockholders to remove its current CEO and reinstate a divisive, inexperienced, and poor-performing CEO—one who had only been in the position for only 10 months and has already been out of the

job for 18 months. Numerous other courts have rejected reinstatement as a plausible remedy, given the myriad of supervisory and management problems it entails. Allowing the possibility of this unwarranted equitable relief, in the context of the undisputed irreparable hostility between the parties, is bad policy not supportable under Nevada law.

Finally, it is undisputed that Petitioners Codding and Wrotniak were not RDI Board members at the time of Plaintiff's June 2015 termination. Each joined months later, in October 2015. Despite the fact that they were not fiduciaries of the Company during the relevant time, the District Court failed to grant them summary judgment with respect to Plaintiff's termination claims. Even in the event that Plaintiff had standing to derivatively assert viable fiduciary duty claims arising from his termination, there is no basis in law or fact to allow those claims to proceed against Petitioners Codding and Wrotniak.

For the reasons set forth above, the writ petition should be granted.

ISSUES PRESENTED

1. Did the District Court err as a matter of law when it determined that Plaintiff, the former CEO and President of RDI, had standing to derivatively assert breach of fiduciary duty claims arising out of his own termination against the Company's Board of Directors, where no other stockholder has supported his action, where courts have routinely held that the termination of an officer by a

board of directors cannot support a breach of fiduciary duty claim, and where Nevada's statutory scheme and longstanding corporate law policy counsel against allowing a deposed officer to derivatively maintain such a claim?

2. Did the District Court err as a matter of law when it ruled that extraordinary injunctive relief in the form of reinstatement may be available to a terminated officer of a Nevada corporation in the context of a fiduciary breach claim?

3. Did the District Court err as a matter of law when it refused to grant summary judgment in favor of directors Judy Codding and Michael Wrotniak with respect to Plaintiff's fiduciary duty claims arising from his termination when neither director was a member of RDI's Board at the time of Plaintiff's firing?

FACTS RELEVANT TO UNDERSTANDING THIS PETITION

A. Plaintiff Becomes President and CEO of RDI

RDI is an internationally diversified company, incorporated in Nevada, principally focused on the development, ownership, and operation of cinema exhibition and real property assets in the United States, Australia, and New Zealand.[1] It has a market cap of approximately $400 million, an estimated 3,800 stockholders, and over 2,300 employees.[2] Plaintiff claims to be both a holder of

[1] Vol. 3 App. 731 (3/7/14 RDI 10-K).
[2] *Id.* at 732-33, 738, 756-57.

non-voting shares of RDI stock and a co-trustee of a trust which owns a large number of the Company's voting and non-voting shares.[3]

Plaintiff was appointed President of RDI in June 2013,[4] in connection with which he and the Company executed an agreement dated June 3, 2013 (the "Employment Agreement") that governed Plaintiff's service "in the capacity of President."[5] The Employment Agreement provided that Plaintiff would not receive any damages in the event of a "for cause" termination.[6] In the event that Plaintiff was terminated without cause, he was entitled to receive 12 months of compensation and benefits following notice of his termination; however, the Employment Agreement provided no relief other than the monetary damages specified, and contained no provision allowing for Plaintiff's reinstatement or any other form of specific performance by RDI.[7] The Employment Agreement also contained a mandatory arbitration clause covering "[a]ny dispute or controversy

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[3] Vol. 2 App. 336 (Second Am. Compl. ("SAC") ¶ 17). The question of whether Plaintiff is actually a co-trustee of this trust (and actually has any authority over the RDI voting stock that it holds) is an issue of disputed fact not relevant for the purposes of the present petition. That issue is being resolved in a separate trust litigation in another jurisdiction between Plaintiff and his sisters, Petitioners Ellen and Margaret Cotter, in which Plaintiff is attempting to use his allegations in this case as grounds for the removal of Margaret and Ellen Cotter as trustees. *See In re James J. Cotter Living Trust*, Case No. BP159755 (Cal. Super. Ct., Cnty. of L.A.).

[4] Vol. 3 App. 565-66 (Pl.'s 5/16/16 Dep. at 30:25-31:4).

[5] Vol. 3 App. 721 (Emp. Agmt. §§ 1-2).

[6] Vol. 3 App. 723 (Emp. Agmt. § 10).

[7] *Id.*

arising under this Agreement or relating to its interpretation or the breach thereof."[8]

Following the emergency health-related resignation of his father, James J. Cotter, Sr., from his positions as CEO and Chairman of RDI's Board, Plaintiff was elected CEO of the Company on August 7, 2014.[9] Plaintiff was elected as CEO pursuant to the Company's Amended and Restated Bylaws, which provide: "Any person may hold one or more offices and each officer shall hold office until his successor has been duly elected and qualified or until his death or until he shall resign or is removed in the manner as hereinafter provided for such term as may be prescribed by the Board of Directors from time to time."[10]

The Amended and Restated Bylaws of RDI further provide: "The officers of the Corporation shall hold office at the pleasure of the Board of Directors. Any officer elected or appointed by the Board of Directors . . . may be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof . . . ."[11] Plaintiff has admitted that the terms of his Employment Agreement continued to apply during his tenure as RDI's CEO.[12]

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[8] Vol. 3 App. 724 (Emp. Agmt. § 13).
[9] Vol. 4 App. 975 (8/7/14 RDI Bd. Mins.).
[10] Vol. 3 App. 712 (RDI Bylaws art. IV, § 1).
[11] Vol. 3 App. 713-14 (RDI Bylaws art. IV, § 10).
[12] Vol. 3 App. 565-572 (Pl.'s 5/16/16 Dep. at 30:25-37:9).

B. Plaintiff Is Terminated by the Company's Board of Directors in June 2015 and Brings This Action

After holding meetings to explicitly consider whether to continue Plaintiff's at-will employment on May 21, May 29, and June 12, 2015,[13] RDI's Board—by a 5-2 vote—decided to remove Plaintiff from his position as RDI's President and CEO on June 12, 2015.[14] Directors/Petitioners Margaret and Ellen Cotter, Guy Adams, Edward Kane, and Douglas McEachern voted in favor of Plaintiff's termination.[15] Directors William Gould and Timothy Storey voted against the termination of Plaintiff at that time, while Plaintiff "refused to vote."[16] Following Plaintiff's removal, Petitioner Ellen Cotter was elected Interim CEO and President of RDI,[17] positions to which she was appointed in a permanent capacity on January 8, 2016.[18]

At the outset of the Board's first meeting to discuss his job performance, held on May 21, 2015, Plaintiff—through his personal attorney—threatened to file a lawsuit based on purported breaches of the fiduciary duties of care and loyalty against each Board member in the event that they decided to terminate his

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13 Vol. 4 App. 982-994 (5/21, 5/29, 6/12/15 RDI Bd. Mins.).
14 Vol. 4 App. 993-94 (6/12/15 RDI Bd. Mins.).
15 *Id.*
16 *Id.*
17 Vol. 4 App. 921 (6/18/15 RDI 8-K).
18 Vol. 2 App. 288 (5/18/16 RDI DEF 14A).

employment or remove him from office.[19] Plaintiff also separately pressured various Board members personally during the board review process, stating that they could "not fire him as C.E.O." and telling them that if they were "to vote to fire him, he would sue [them] and ruin [them] financially."[20]

As he warned, Plaintiff filed this lawsuit on June 12, 2015 (the very day he was terminated) against each of the five directors that voted in favor of his removal, in which he asserted, *inter alia*, both personal and derivative claims arising from his termination, and demanded reinstatement as RDI's President and CEO.[21] Since filing his initial suit, Plaintiff has twice amended his claims, has removed the personal employment claims (as such matters were determined by the District Court to be subject to arbitration under Plaintiff's Employment Agreement), and has added Directors Judy Codding and Michael Wrotniak (both of whom were added to RDI's Board after his termination) as defendants to all counts.[22]

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[19] Vol. 4 App. 983-84 (5/21/15 RDI Bd. Mins.).
[20] Vol. 2 App. 478-79 (4/29/16 Adams Dep. at 426:19-427:9); Vol. 3 App. 524-25 (5/6/16 McEachern Dep. at 78:14-79:2); Vol. 4 App. 988 (5/29/15 RDI Bd. Mins.).
[21] Vol. 1 App. 182-231 (Compl.).
[22] Vol. 1 App. 182-231 (First Am. Compl. ("FAC")); Vol. 2 App. 329-385 (SAC).

C. The District Court Denies Petitioners' Motion for Summary Judgment on Plaintiff's Termination and Reinstatement Claims

Neither the claims asserted by Plaintiff nor the subject of his termination are unique to this case. Rather, there is also currently pending a California trust litigation, a Nevada estate litigation, and a private arbitration proceeding—all of which relate to Plaintiff's Employment Agreement, the contested control of RDI, and purported misdeeds related to Plaintiff's termination.[23]

Given this clear overlap, RDI initially sought to have this case dismissed via a motion to compel the arbitration of all of Plaintiff's claims pursuant to the mandatory arbitration clause in Plaintiff's Employment Agreement.[24] The District Court denied this motion on September 1, 2015, finding that, to the extent that Plaintiff may have derivative claims as an RDI stockholder rather than an employee, they do not "arise from or relate to" his Employment Agreement and thus are not issues subject to arbitration. [25] Given numerous conflicts of interest between Plaintiff and all other RDI stockholders whom he purports to represent in his derivative claims, Petitioners then filed a motion to dismiss, arguing that

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[23] *See, e.g.*, Vol. 5 App. 1185 (trust petition seeks to have Ellen and Margaret Cotter removed as trustees of the James J. Cotter Living Trust, including because "they orchestrated a boardroom coup with their control over the Trust and Jim Sr.'s estate and terminated Jim Jr.'s employment with RDI"); Vol 9 App. 2181-2215 (James J. Cotter, Jr.'s First Amended Counter-Complaint in arbitration).

[24] Vol. 1 App. 55-76 (RDI's Mot. to Compel Arbitration).

[25] Vol. 1 App. 160-61 (9/1/15 Hr'g Tr. at 9:21-10:1).

Plaintiff lacked standing and was not an appropriate representative plaintiff under Nevada Rule of Civil Procedure 23.1.[26] Accepting all allegations in Plaintiff's Complaint as true, the District Court subsequently denied Petitioner's motion to dismiss.[27] Discovery then proceeded in this matter.

In keeping with the governing case schedule, Petitioners moved for summary judgment on Plaintiff's termination claims and reinstatement demand on September 23, 2016, arguing among other things that: (1) reinstatement was not an available remedy as a matter of law; (2) Plaintiff lacked standing to maintain his derivative action with respect to his termination claims and reinstatement demand; and (3) Directors Codding and Wrotniak, who were not Board members during the relevant time, were not proper defendants with respect to Plaintiff's termination claims.[28]

In opposing Petitioners' motion, Plaintiff did not point to any evidence that he had been a competent CEO, or that his reinstatement was supported by any other stockholder of RDI, or that his reinstatement would benefit any stockholder other than himself. He did not argue that his reinstatement would in any way

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[26] Vol. 4 App. 77-133 (Pet'rs' Mot. to Dismiss).
[27] Vol. 1 App. 177-78 (9/15/15 Hr'g Tr. at 15:24-16:3); Vol. 1 App. 233 (1/19/16 Ct. Mins.).
[28] *See generally* Vol. 2 App. 386 – Vol. 5 App. 1198 (Pet'rs' Mot. for Summ. J.); Vol. 8 App. 1824-1943 (Pet'rs' Opp'n to Pl.'s Mot. for Summ. J.); Vol. 8 App. 1944-1975 (Pet'rs' Reply in Supp. of Mot. for Summ. J.).

advantage the Company, nor did he contest that his termination was within the power and authority of RDI's Board. And Plaintiff did not dispute that he is in a different and conflicted position from other stockholders.[29]

Instead, Plaintiff urged that his termination claim should still be treated as a derivative claim because, he argued, the RDI Board of Directors did not act in a disinterested fashion when it terminated him. Plaintiff suggested that he was actually terminated in a "boardroom coup" because he failed to settle an ongoing trust and estate litigation with his sisters, Ellen and Margaret Cotter, involving control of the estate of Plaintiff's father, James J. Cotter, Sr. and a trust into which Mr. Cotter, Sr.'s RDI shares are to ultimately pour.[30] Plaintiff claims that any consideration of this purportedly external factor by the RDI Board with respect to

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[29] In connection with their motions, the Petitioners/Directors who voted in favor of Plaintiff's termination on June 12, 2015 set forth substantial evidence indicating that Plaintiff was removed for numerous reasons, including that he lacked significant experience in areas critical to RDI (which he failed to rectify); as CEO, he demonstrated a lack of understanding of key components of the Company's business; teamwork and morale was poor under Plaintiff's leadership; Plaintiff acted in a violent and abusive manner to RDI's employees as well as his fellow Board members; Plaintiff could not work with key executives in or affiliated with RDI (such as his sisters, Ellen and Margaret Cotter); Plaintiff was not making sufficient progress to rectify his deficiencies, which had necessitated the appointment of an ombudsman to assist him in March 2015; and Plaintiff repeatedly rejected compromises that would have allowed him to continue as the Company's President and/or CEO under a revised management structure that would have made him subject to greater supervision. (Vol. 2 App. 399-406; Vol. 8 App. 1832-42, 1957-65.)

[30] *See, e.g.*, Vol. 7 App. 1613-17 (Pl.'s Opp'n to Pet'rs' Mot. for Summ. J.).

his termination was "unfair" and represents a breach of Petitioners' fiduciary duties of care, loyalty, and disclosure.[31] Plaintiff contends that, as a result of the trust and estate litigation, Ellen and Margaret Cotter were inherently interested in the decision to fire him; Plaintiff further asserts that Director Kane was not independent in making the termination decision because of a close friendship to the Cotter family, and Director Adams was beholden to the Cotter family as the result of financial ties to certain Cotter family entities separate and apart from RDI in which he either had an investment interest or from which he received income.[32]

During a hearing on October 27, 2016, the District Court issued an oral ruling denying in full Petitioners' motion for summary judgment with respect to Plaintiff's termination claims and reinstatement demand.[33] The District Court decided that a terminated officer had standing to derivatively sue a Nevada board of directors for a breach of fiduciary duty arising from his or her termination. In reaching this conclusion, the District Court ruled that there was an issue of fact concerning the disinterestedness of certain RDI directors in relation to the termination and reasoned that, under this Court's decision in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), directors "lose a lot of protections"—

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[31] *Id.* at 1617-18.
[32] *Id.* at 1620-23.
[33] Vol. 9 App. 2138, 2156-60, 2170 (10/27/16 Hr'g on Mots. at 117:9-11, 135:4-139:1, 149:8-19).

including the presumption of business judgment under NRS 78.138(3)—in the context of an officer termination if they are purportedly interested or not independent.[34]

As a result, the District Court concluded, the decision of a board member who votes to terminate an officer may be subject to a fairness review of "what an appropriate board would do . . . in making a decision."[35] In denying Petitioners' motion, the District Court also implicitly recognized the possibility that Plaintiff could be reinstated as RDI's President and CEO (and the current President and CEO terminated) as a result of this litigation, and extended liability relating to Plaintiff's termination to individuals who were not even on RDI's Board at the time of his removal. The District Court confirmed these rulings in a written order issued on December 20, 2016.[36]

WHY WRIT RELIEF IS APPROPRIATE

This Court has original jurisdiction to issue writs of mandamus and writs of prohibition. NRS CONST. art. 6 § 4; *see also* NRS 34.160, NRS 34.330. A writ of mandamus serves to "compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion," while a writ of prohibition "serves to stop a

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[34] *Id.*
[35] *Id.*
[36] Vol. 9 App. 2177-2180 (Order re: Pet'rs' Summ. J. Mots.).

district court from carrying on its judicial functions when it is acting outside its jurisdiction." *Emerson v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011) (internal quotations and citation marks omitted).

Both mandamus and prohibition are appropriate in this case. This Court has emphasized that "[m]andamus is an appropriate vehicle to challenge the district court's denial of summary judgment," *Laakonen v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*, 91 Nev. 506, 508, 538 P.2d 574, 575 n.2 (1975), especially where "summary judgment is clearly required by statute or rule, or an important issue of law requires clarification." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 125 Nev. 449, 453, 215 P.3d 697, 700 (2009) (considering writ following denial of partial summary judgment motion because petition "raise[d] an important issue of law and public policy"); *Anse, Inc. v. Eighth Jud. Dist. Ct. of State ex rel. Cnty. of Clark*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008) (same).

Similarly, this Court has routinely exercised its discretion and considered "petitions arising out of the summary judgment context . . . which presented serious issues of substantial public policy, or which involved important precedential questions of statewide interest." *Poulos v. Eighth Jud. Dist. Ct. of State of Nev. In & For Cnty. of Clark*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982) (collecting cases). And this Court has regularly intervened by writ where

"the issue is one of first impression and of fundamental public importance," or it "will mitigate or resolve related or future litigation." *Williams v. Eighth Jud. Dist. Ct. of State, ex rel. Cnty. of Clark*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011) (internal quotations and citation marks omitted).[37]

These factors are clearly satisfied in this case. Here, this Court is faced with purely legal questions of first impression with widespread application that require immediate clarification. The District Court concluded that Plaintiff has standing to derivatively assert a breach of fiduciary duty claim arising from his own termination against RDI's Board of Directors—a personal claim that no other stockholder supports. The conclusion that Plaintiff has standing and can proceed with his derivative claim, despite inherent conflicts of interest, is an especially significant question of first impression given that no court—especially in Nevada—has ever determined that a board's decision to terminate a corporate officer may constitute a breach of fiduciary duty. Nor has any court ever subjected

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[37] *See, e.g., Sonia F. v. Eighth Jud. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009) (exercising discretion to entertain writ petition to determine whether NRS 50.090, Nevada's rape shield law, applies to civil cases); *Sims v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 125 Nev. 126, 129, 206 P.3d 980, 982 (2009) (exercising discretion to entertain writ petition to determine whether NRS 178.415(3) allows defense counsel to introduce independent competency evaluations during competency hearing); *Walters v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011) (exercising discretion to entertain writ petition to determine whether the NRS 40.455(1) requirement that a judgment creditor apply for a deficiency judgment within six months was satisfied by motion for summary judgment).

a board's decision to terminate an officer to any "fairness" review, let alone an "entire fairness" review. The District Court's ruling, which is the first of its kind, substantially impacts the interpretation of Nevada's business judgment rule, NRS 78.138(3), and calls into question the scope and meaning of NRS 78.139 and NRS 78.140—which set forth the only instances previously recognized in which board members of a Nevada corporation could lose the business judgment presumption.

If it is indeed the case that, under Nevada common law, directors who make the operational decision to remove an officer may be subject to breach of fiduciary duty claims in derivative actions by the deposed officer, they must be made aware of this pitfall. Moreover, companies that are incorporated in Nevada, and companies considering incorporation in Nevada, need to know whether the price of doing business as a Nevada corporation includes that risk that Nevada courts, unlike the courts of other jurisdictions, will micromanage a corporate board's decision to remove an officer, and possibly penalize directors for doing so. The need for clarification on whether such an unsuspected danger lurks under common law for Nevada corporations and their directors, in contrast to Nevada's clear statutory scheme, makes this issue of corporate law a serious matter of substantial public policy and worthy of a definitive ruling by the State's highest court.

Not only does the District Court's ruling threaten to reverse decades of business-friendly corporate laws enacted in Nevada (leaving board members of

Nevada corporations more exposed than directors of companies incorporated in any other state), no court has ever reinstated a former CEO as a remedy for a purported breach of fiduciary duty. Given that the District Court recognized reinstatement as a viable remedy, waiting for an appeal at the conclusion of the case is "not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330. Not only do Petitioners face the time, inconvenience, and threat of proceeding to trial on claims that have never been recognized, Petitioner Ellen Cotter—the current CEO and President of RDI—faces the imminent danger that she will be removed by the District Court and replaced against the will of the present RDI Board by Plaintiff James J. Cotter, Jr. at the conclusion of trial. As such, an appeal from a final judgment after trial would not afford Petitioners an adequate legal remedy.

Finally, given that Plaintiff is seeking equitable relief and considers all of his claims interrelated,[38] Plaintiff's lack of standing with respect to his derivative action is case-dispositive. This provides yet another reason why judicial economy would be served by this Court entertaining this writ petition at this time.

[38] Vol. 7 App. 1612-13 (Pl.'s Opp'n to Pet'rs' Mot. for Summ. J.); Vol. 9 App. 2126-2133 (10/27/16 Hr'g on Mots. at 105:13-112:12).

STANDARD OF REVIEW

"Questions of law are reviewed *de novo*." *State Indus. Ins. Sys. v. United Exposition Servs. Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993); *see also Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Op. 13, 319 P.3d 618, 621 (2014) ("Statutory interpretation and application is a question of law subject to [this Court's] de novo review, even when arising in a writ proceeding."). As this Court has emphasized, "deference is not owed to legal error." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) (citation and internal quotation marks omitted).

REASONS WHY THE REQUESTED WRIT SHOULD ISSUE

I.
PLAINTIFF LACKS STANDING TO MAINTAIN HIS DERIVATIVE ACTION RELATING TO THE TERMINATION OF HIS EMPLOYMENT

Petitioners respectfully submit that there should be a clearly-enunciated rule in Nevada that former officers such as Plaintiff do not have standing to derivatively assert breach of fiduciary duty claims against corporate board members who vote in favor of their removal. This case illustrates exactly why such a clear rule is necessary and already implicit within Nevada law.

A. Plaintiff, as the Former CEO and President of RDI, Is Pressing His Own Interests at the Expense of RDI and Its Stockholders

It is not seriously disputed in this case that Plaintiff's interests materially diverge from RDI's stockholders, in whose name he purports to bring this

representative action. Plaintiff fails the Rule 23.1 factors required for derivative standing, and the District Court's refusal to recognize this fatal flaw was reversible error.[39]

"Because of the fear that shareholder derivative suits could subvert the basic principle of management control over corporation operations, courts have generally characterized shareholder derivative suits as a remedy of last resort." *Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010) (citation omitted). In light of "the extraordinary nature of a shareholder derivative suit," a purported derivative plaintiff must satisfy several "stringent conditions" in order to bring a

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[39] At the pleading stage, the District Court (accepting all allegations as true) determined that Plaintiff had standing to assert a derivative action on behalf of RDI itself and its shareholders with respect to his fiduciary duty claims arising from his termination. However, the elements of standing are not merely pleading requirements but, rather, are an "indispensable part of the plaintiff's case," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 122 S. Ct. 2130, 2136 (1992); *see also Canadian Commercial Workers Indus. Pension Plan v. Alden*, No. Civ. A. 1184-N, 2006 WL 456786, at *10 (Del. Ch. Feb. 22, 2006) ("discovery" and "[f]urther development of the facts" may prove a plaintiff is "an inadequate derivative plaintiff"). At summary judgment, Petitioners again argued that, following discovery, it was clear that Plaintiff "does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association," Nev. R. Civ. P. 23.1, in bringing fiduciary duty claims relating to his termination and to the extent that he seeks reinstatement. The District Court's ruling otherwise was legally unsupportable, as it clear that Plaintiff has an insurmountable conflict of interest, and is actually pressing his own personal interests at the expense of RDI and its stockholders through this purported "derivative" litigation.

suit. *Id.* "It is possible that the inadequacy of a plaintiff may be concluded from a strong showing of only one factor," especially if that factor involves "some conflict of interest between the derivative plaintiff and the class." *Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL 1388744, at *41 (Del. Ch. May 9, 2006).

Here, at least four Rule 23.1 considerations—(1) the remedy sought by Plaintiff in this "derivative" action, including the magnitude of Plaintiff's personal interests as compared to his interest in the derivative action itself; (2) the existence of other litigation pending between Plaintiff and Petitioners; (3) Plaintiff's vindictiveness toward Petitioners; and (4) the degree of support Plaintiff is receiving from the stockholders he purports to represent—establish a conflict of interest that definitively undermines Plaintiff's attempted derivative standing. *See Energytec, Inc. v. Proctor*, Nos. 3:06-cv-0871-L *et al.*, 2008 WL 4131257, at *6 (N.D. Tex. Aug. 29, 2008) (setting forth relevant Rule 23.1 factors under Nevada law).[40]

[40] In addition to these Rule 23.1 factors, there is another consideration: Plaintiff refused to vote on the resolution to terminate his employment on June 12, 2015. *See* Vol. 4 App. 993-94 (6/12/15 RDI Bd. Mins.). There is a serious question as to whether a director/stockholder like Plaintiff who does not affirmatively contest a corporate action at the time (when he or she had the opportunity) has standing to challenge that decision at a later point in the capacity as a derivative plaintiff purportedly representing the company's stockholders. *Cf. Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 16, 62 P.3d 720, 730 (2003) (noting that "only a dissenting shareholder is usually permitted to maintain an action challenging the merger process").

First, the remedy sought by Plaintiff—reinstatement—is entirely personal. In pursuing a derivative action, Plaintiff "must not have ulterior motives and must not be pursuing an external personal agenda." *Id.* (citation omitted). But Plaintiff's action, by definition, is totally personal and shared by no other RDI stockholder: he is the person who is seeking to get his job back and, unlike Petitioners, he is truly on both sides of the "transaction." For instance, in *Energytec*, the court applied Nevada law and rejected derivative standing by a former CEO in a suit against his company, concluding that the CEO/plaintiff "has a personal economic interest in reversing the events leading to his removal," but the company's "shareholders do not share this interest, as they do not stand to regain past employment or company influence." *Id.* at *7.

In fact, even prior to his firing, Plaintiff repeatedly threatened RDI's Board of Directors with a derivative action to "ruin [them] financially" in order to dissuade them from evaluating his performance as the Company's CEO and President.[41] Other courts have found identical conduct to be "personal," and contrary to the conduct of (and the type of remedy sought by) truly-representative plaintiffs in a derivative action. For instance, in *Khanna*, the court found that a suspended general counsel could not maintain a derivative action because of

[41] *See* Vol. 2 App. 478-79 (4/29/16 Adams Dep. at 426:19-427:9); Vol. 3 App. 524-25 (5/6/16 McEachern Dep. at 78:14-79:2).

similar threats, which "demonstrate[d] a self-interested motivation that is not consistent with the continued pursuit of a derivative and class action by the plaintiff." 2006 WL 1388744, at *43. As that court noted, the derivative litigation was really "to provide leverage in his attempt to regain (and enhance) his position" after his removal—a result whose "benefit is directed almost exclusively, if not solely, to [plaintiff]." *Id.*; *see also Tankersley v. Albright*, 80 F.R.D. 441, 444 (N.D. Ill. 1978) ("[W]here it appears that the injury is directly suffered by an individual shareholder or relates directly to an individual's stock ownership, the action is personal."). Here, Plaintiff's personal dispute relating to his termination is not a harm suffered by RDI itself or any of its other stockholders, and is not a proper vehicle for a derivative action.

Moreover, the fact that Plaintiff is bringing his claims both directly (now in the arbitration proceeding) and derivatively is alone legally sufficient to establish that there is a *per se* "impermissible conflict of interest," and that there are improper "economic antagonisms" between Plaintiff and RDI's stockholders. *Priestly v. Comrie*, No. 07 CV 1361 (HB), 2007 WL 4208592, at *6 (S.D.N.Y. Nov. 27, 2007) (plaintiff could not advance both a direct and derivative claim for this reason); *see also St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688(SWK), 2006 WL 2849783, at *7 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct

claims in the same action face an impermissible conflict of interest.") (collecting cases); *Wall St. Sys., Inc. v. Lemence*, No. 04 Civ. 5299(JSR), 2005 WL 292744, at *3 (S.D.N.Y. Feb. 8, 2005) ("an individual shareholder has a conflict of interest, and therefore cannot adequately represent other shareholders, when he simultaneously brings a direct and derivative action . . . ."); *Tuscano v. Tuscano*, 403 F. Supp. 2d 214, 223 (E.D.N.Y. 2005) (same). For this reason alone, Plaintiff is an inadequate representative under Rule 23.1 and lacks standing to proceed on his derivative claims.

Second, in addition to this case, currently there is a California trust litigation, a Nevada estate litigation, and a private arbitration proceeding, all of which relate to Plaintiff's Employment Agreement, the contested control of RDI, and purported misdeeds related to Plaintiff's termination. "Ordinarily, other litigation, in and of itself, may warrant disqualification of a plaintiff from bringing a derivative suit where it appears that the derivative plaintiff instituted the derivative suit only as 'leverage' to further his individual claims." *Scopas Tech. Co. v. Lord*, No. 7559, 1984 WL 8266, at *2 (Del. Ch. Nov. 20, 1984).

Here, Plaintiff is clearly using this "derivative action as leverage to obtain a favorable settlement" in these "other actions" currently pending, *Recchion on Behalf of Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1315 (W.D.Pa. 1986), as he is asserting the same arguments in those cases as in this one, and using

this case as leverage in those actions. For instance, Plaintiff, in the trust litigation against Ellen and Margaret Cotter, has attempted to take control of the majority bloc of RDI's voting shares by using his allegations in this derivative suit to attempt to remove his sisters as trustees of the Estate of James J. Cotter, Sr.[42] "In such circumstances," where the overlap between suits is obvious, "there is substantial likelihood that the derivative action will be used as a weapon in the plaintiff shareholder's arsenal, and not as a device for the protection of all shareholders"; accordingly, "other courts have properly refused to permit the derivative action to proceed." *Owen v. Modern Diversified Indus., Inc.*, 643 F.2d 441, 443 (6th Cir. 1981) (citations omitted); *see also Davis v. Comed, Inc.*, 619 F.2d 588, 597 (6th Cir. 1980) ("This derivative action appears to be just one more skirmish in a larger war between Davis and some of the defendants, perverted into a weapon which, as its highest and best use, would be leverage in his other lawsuits."); *duPont v. Wyly*, 61 F.R.D. 615, 622 (D. Del. 1973) ("the many faceted relationship between Mr. duPont and UCC suggests that this suit may be an attempt to open still another front on a wide ranging battle having objectives unrelated to those shared by the class").

Third, in addition to his pre-litigation threat to use a derivative suit to "ruin . . . financially" any director that challenged his position, Plaintiff's allegations

[42] *See, e.g.*, Vol. 5 App. 1178-81.

demonstrate a strong personal animus towards Petitioners at the heart of his action.[43] Courts have determined that similar "unmistakable personal" allegations and comparable "vituperative epithets, pugilistic metaphors, and [extreme] descriptions" are indicative of an "emotionally charged feud" that is not the proper subject of a shareholder derivative action. *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992); *see also Love v. Wilson*, No. CV 06-06148 ABC, 2007 WL 4928035, at *7-8 (C.D. Cal. Nov. 15, 2007) (complaint filled with "gratuitous language" was sign of well-known "vindictiveness and animosity" between founders of The Beach Boys, and indication that one cousin could not maintain derivative action against others); *Khanna*, 2006 WL 1388744, at *44 ("the tangential and acrimonious employment dispute" between plaintiff "and his former employer" precluded derivative action).

Fourth, after over a year of discovery, Plaintiff has failed to identify a single RDI stockholder (other than himself) who actively supports his derivative action with respect to his termination claims or his demanded reinstatement. In fact,

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[43] *See, e.g.*, Vol. 1 App. 337, 341-42 (SAC ¶ 20 (accusing Director Kane of threatening "Corleone ('Godfather') style family justice"), ¶ 33 (admitting that Plaintiff "alienated his sisters"), ¶ 35 (labeling Director Margaret Cotter's handling of the STOMP matter, which resulted in a highly-favorable $2.2 million judgment for the Company, a "debacle")); *see also* Vol. 1 App. 201 (FAC ¶ 75 (alleging that Directors Kane and Margaret and Ellen Cotter "launched [a] scheme to extort [Plaintiff]"), ¶ 78 (accusing Director Adams, who has from time to time served as a stockholder activist member of various public boards, of consistently engaging in a "search for the next public company victim")).

significant RDI stockholders, unaffiliated with either side in this case, have gone on record to oppose Plaintiff.[44] Indeed, after initially bringing a lawsuit similar to that asserted by Plaintiff,[45] Whitney Tilson and Jonathan Glaser—who together control approximately 3.6% of the outstanding equity in RDI—publicly concluded after "extensive discovery" that RDI's Board "acted in good faith" in terminating Plaintiff, that their questions "about the termination of James J. Cotter, Jr." were "definitively addressed and put to rest," the Board "remains committed to acting in the interests of all stockholders," and that "[c]ontinuing" with any "derivative litigation would provide no further benefit."[46]

This resounding "lack of support" for Plaintiff's termination and reinstatement claims by relevant "non-defendant shareholders" is fatal to Plaintiff's attempted standing. *Love*, 2007 WL 4928035, at *6 (rejecting derivative standing, in part, for this reason); *see also Smith*, 977 F.2d at 948 (lack of "cooperation" or support from other shareholders undermined attempted derivative standing). Given that Plaintiff's action is entirely personal and supported by no other stockholder, Plaintiff is clearly an inadequate derivative plaintiff and lacks

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[44] *See* Vol. 2 App. 657-661 (5/25/16 Tilson Dep. at 150:6-154:23); Vol. 2 App. 670-675 (6/1/16 Glaser Dep at 154:13-19, 155:13-157:6, 160:10-19); Vol. 2 App. 688-695, 697-99 (6/6/16 Shapiro Dep. at 50:22-57:5, 187:19-188:14, 236:18-237:17); Vol. 5 App. 1075, 1087-1106 (T2's Interrog. Resp. No. 20 & Exs. A-B).

[45] *See* Vol. 1 App. 134-51 (T2's Compl.); Vol. 1 App. 234 – Vol. 2 App. 272 (T2's First Am. Compl.).

[46] Vol. 2 App. 327-28 (7/13/16 Joint T2 and RDI Press Release).

standing to maintain his termination claims and reinstatement demand. *See Aztec Oil & Gas, Inc. v. Fisher*, 152 F. Supp. 3d 832, 859 (S.D. Tex. 2016) (similar employment dispute was not a proper derivative action).

In addition to these typical Rule 23.1 factors, there is a further conflict of interest between Plaintiff and RDI's stockholders that is fatal to his attempted derivative standing. Since bringing this suit against the Company and its directors, Plaintiff has been regularly selling off his shares of RDI's stock—over 300,000 shares at present.[47] Plaintiff's sale of a significant amount of RDI shares indisputably depresses the stock's value, which is not in the best interests of its stockholders generally.

But the issues created by Plaintiff's sell-off go well beyond this. Other jurisdictions such as Delaware have established a prophylactic rule that representative plaintiffs (such as Plaintiff purports to be) are prohibited from trading in the subject company's securities while their litigation is ongoing, as they have access to non-public information and such trading could undermine the integrity of the representative litigation process. *See Steinhardt v. Howard-Anderson*, CA. No. 5878-VCL, 2012 WL 29340, at *8-11 (Del. Ch. Jan. 6, 2012) (dismissing plaintiff with prejudice and both requiring monetary sanctions and self-reporting to the SEC for such trading); Donald J. Wolfe, Jr. & Michael A.

[47] Vol. 1 App. 33-54 (Pl.'s Form 4 filings with SEC).

Pittenger, 1-9 *Corp. & Commercial Prac. in DE Ct. of Chancery* § 9.03 (2015) ("As fiduciaries to the class," representative plaintiffs are "generally prohibited from trading in the defendant company's securities while the litigation is pending."); Guidelines to Help Lawyers Practicing in the Delaware Court of Chancery § II(7)(e)(iii) ("Particularly troubling have been situations when litigants have had access to confidential, non-public information about the value of a public corporation and have traded in the securities of that corporation.").[48]

Plaintiff, as a purported representative plaintiff in this action, has superior knowledge compared to those to whom he is selling RDI stock: specifically, he has sole knowledge of what he intends to do in this litigation (and in the trust litigation, and in the estate litigation, and in the arbitration). This provides him with an unfair advantage in the market over and above the access to information

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[48] *See also In re Netezza Corp. S'holder Litig.*, Consol. Civ. A. No. 5858-VCS, at 15 (Del. Ch. Apr. 6, 2011) (transcript) ("When you file a suit and you're purporting to represent a class, absolutely there has to be an understanding that you are not free to buy and sell securities in the same way that you were before."); *Berger v. Icahn Enters., L.P.*, Civ. A. No. 3522-VCS, at 59 (Del. Ch. Oct. 23, 2009) (transcript) (dismissing plaintiff with prejudice because it is inappropriate for a representative plaintiff to "get access to information that other people don't have and then deepen his investment at the expense of people in the class whose interests he represents"); *In re Netsmart Techs., Inc. S'holder Litig.*, Consol. Civ. A. No. 2563-VCS, at 13-14 (Del. Ch. Apr. 11, 2007) (derivative plaintiffs "lose that freedom" to "make [their] own trading decisions" once non-public information has been made available; further trading "is just not done," "is just not acceptable," and "is not stuff you mess around with"); *In re Netsmart Techs., Inc. S'holders Litig.*, Consol. Civ. A. No. 2563-VCS (Del. Ch. July 16, 2007) (order) (dismissing plaintiff from case with prejudice due to trading).

that he already has as a still-sitting member of RDI's Board. Plaintiff's willingness to take unfair advantage over other RDI stockholders by trading on this information or, at the very least, his complete disregard of the appearance of such impropriety further confirms the improper personal nature of this "derivative" action.

The District Court's repeated refusal to recognize these fatal flaws was legal error. Given that these issues separately and collectively undermine Plaintiff's standing to maintain his derivative claims relating to his termination and reinstatement, judicial economy counsels in favor of recognizing this case-dispositive problem now, in advance of any unnecessary and unwarranted trial.

B. Other Courts, Recognizing an Inherent Conflict of Interest in Former Officers Asserting Fiduciary Duty Claims Arising From Their Terminations, Have Refused to Allow Such Claims

Other jurisdictions, in light of the innate conflict of interest between the personal interest of a terminated officer and the class-wide obligations of those who actually have standing to assert derivative claims, have repeatedly rejected attempts by plaintiffs to use "an appeal to general fiduciary law" to transform cases involving the dismissal of an employee or officer into claims that a company's directors "breached a fiduciary duty as corporate officers" when effecting that termination. *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 190 (1989) (denying fiduciary duty claims asserted by operating manager and minority

shareholder upon his firing); *see also Hackett v. Marquardt & Roche/Meditz & Hackett, Inc.*, No. X02CV990166881S, 2002 WL 31304216, at *2 (Conn. Sup. Ct. Sept. 17, 2002) (rejecting breach of fiduciary duty claim, and holding that "the law of employment relations seems to provide sufficient protection for any civil wrongs" in the event of a purportedly unlawful termination); *Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 384 (D. Conn. 2012) (plaintiff's allegations of "breach of fiduciary duty" based "on her allegedly wrongful termination . . . fail to state a claim").

In denying Petitioners' motion for summary judgment and finding that Plaintiff had standing to proceed, the District Court became the first court ***in any jurisdiction*** to recognize the possibility that a terminated officer could maintain a viable derivative claim for breach of fiduciary duty against members of a board of directors arising out of his or her termination.[49] In contrast, Delaware courts have rejected similar breach of fiduciary duty claims by other terminated officers claims as a "novel argument," finding that there was "no case in support" of them even where the plaintiff—as here—was also a stockholder of the corporation. *Carlson v. Hallinan*, 925 A.2d 506, 540 (Del. Ch. 2006) (holding that plaintiff could not "articulate a theory as to how Carlson's removal as President . . . could be a breach

[49] *See* Vol. 9 App. 2126-27 (10/27/16 Hr'g on Mots. at 105:13-106:7) (Plaintiff and his purported "expert" agree that his claims represent "a case of first impression").

of fiduciary duty"); *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39-40 (Del. 1996) (no breach of fiduciary duty where stockholder was "an employee of the corporation under an employment contract with respect to issues involving that employment"). Other courts applying Delaware law have been equally emphatic that "there can be no breach of fiduciary duty stemming from the termination of [an officer's] employment." *Kasper v. LinuxMall.com, Inc.*, No. Civ. A. 00-2019 ADM/SR, 2001 WL 230494, at *3 (D. Minn. Feb. 23, 2001) (applying Delaware law in termination of company president).

In fact, virtually every court (other than the District Court) that has addressed the issue has barred breach of fiduciary duty claims against corporate directors arising from their decision to terminate the employment of an officer—even when those claims were asserted by officer/stockholders. These courts have consistently recognized that employment disputes in any form are entirely personal, and do not rise to the level of a fiduciary breach. *See, e.g.*, *Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (affirming dismissal of fiduciary duty claim that directors did not follow fair procedures in deciding to terminate stockholder/doctor's employment because "any injury caused by the termination decision itself would be an injury to his interests as an employee, not as a stockholder"); *In re U.S. Eagle Corp.*, 484 B.R. 640, 654 (Bankr. D.N.J. 2012) (a stockholder "who is also an employee cannot recover on a breach of fiduciary

duty claim when the claim is grounded solely in an employment dispute"); *Wall St. Sys., Inc. v. Lemence*, No. 04 Civ. 5299(JSR), 2005 WL 2143330, at *8 (S.D.N.Y. Sept. 2, 2005) (dismissing third-party claims against directors because "they are essentially employment disputes that cannot sustain a claim of fiduciary breach under Delaware law"); *Dweck v. Nassar*, No. 1353-N, 2005 WL 5756499, at *5 (Del. Ch. Nov. 23, 2005) ("[the shareholder's] allegations of wrongdoing in connection with her termination as President and CEO" by the Board of Directors "are insufficient to support a claim for breach of fiduciary duty").

The District Court's ruling neither cites to nor considers any of this contrary authority. These numerous and persuasive precedents—at the very least—strongly counsel against this State giving standing to deposed officers to derivatively bring termination-related fiduciary duty claims.

C. Recognizing a Deposed Officer's Standing to Derivatively Assert a Breach of Fiduciary Duty Claim Relating to His or Her Termination Is Bad Policy and a Drastic Break From Decades of Nevada Practice

The District Court's decision to award standing to a terminated officer in order to derivatively assert fiduciary duty claims arising from his termination is also bad policy. The District Court's decision potentially impacts every decision made by a Nevada director, as well as the corporate governance and internal operations of every Nevada corporation.

If enshrined, the District Court's ruling threatens to transform ***every*** termination of a corporate executive from a personal dispute into a derivative attack on a board's exercise of its fiduciary duties—a result that would force Nevada courts to become frequent arbiters months (or, in this case, years) after the fact of the unique judgments a board must make regarding the effectiveness of its officers. And if some non-transactional notion of "independence" or "bias" or lack of "disinterest" is applicable to operating decisions, including the termination of an officer (as the District Court suggests), then as a practical matter there will always be sufficient questions of fact such that there will never be a quick resolution of this issue in the Nevada system. This threatens to unnecessarily clog the dockets of courts in this State with lengthy and costly employment-related derivative suits to the detriment of stockholders, who may be footing the bill for the defense of personal litigation purportedly brought on their behalf. Indeed, the defense of Petitioners in this "derivative" litigation has already cost RDI and, by implication, its stockholders, in excess of $10 million, and the directors who participated in the decision to remove Plaintiff have now spent over 107 collective hours in deposition as a result of this case.

Allowing deposed officers standing to bring termination-related fiduciary duty claims also flies in the face of the long-held maxim that boards, rather than courts, are "optimally suited . . . to selecting, monitoring, and removing members

of the chief executive's office," and are owed deference so that they may "replace an underperformer in a timely fashion." *Klaassen v. Allegro Dev. Corp.*, C.A. Case No. 8262-VCL, 2013 WL 5967028, at *15 n.8 (Del. Ch. Nov. 7, 2013) (citations omitted); *see also Mannix v. Butte Water Co.*, 854 P.2d 834, 842 (Mont. 1993) ("the determination to terminate an officer is a *subjective* one for the *board of directors* to make," not the court) (emphasis in original); *Treadway Cos., Inc. v. Care Corp.*, 638 F.2d 357, 381 (2d Cir. 1980) ("Questions of policy or management . . . are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint.") (citation omitted).

Moreover, as noted above, no other jurisdiction has recognized such a claim. Establishing the District Court's ruling as Nevada common law would contravene the State Legislature's longstanding policy commitment and unmistakable goal of making Nevada an attractive and highly-favorable place in which to incorporate. For over 25 years, the Legislature has sought to overhaul Nevada's corporations law in order "to make Nevada a more favorable place to conduct business and to attract new business into the state." *See* Mins. of H'rg of the Nev. State Leg. Joint S. & Assemb. Comms. on Jud. (May 7, 1991) (account of testimony of Secretary of State Cheryl Lau regarding the enactment of NRS 78.138(2) and (4)-(5)).

Indeed, in 2001, Nevada moved even further toward the pro-business end of the spectrum, adopting the exculpation provision now codified at NRS 78.138(7) to

"updat[e] and upgrad[e]" the Nevada corporations statute "to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country," and to "guarantee that Nevada was the 'domicile of choice' for corporations around the world." Mins. of Hr'g of the Nev. State Leg. Assemb. Comm. on Jud. (May 30, 2001) (reporting statement of Senator Mark James, Committee Chairman); *see also, e.g.*, Mins. of Hr'g of the Nev. State Leg. S. Comm. on Jud. (May 22, 2001) (reporting prediction of Senator James that the proposed amendments would "take Nevada in a new and positive direction as a state that is business friendly" and that Nevada would "be the number one state in the country for a business to incorporate and operate in, or to have as its corporate domicile"; further reporting Mr. Fowler's belief that the proposed legislation "show[ed] a further movement in this direction, to make Nevada a friendly place for a corporation to put its charter and to do business").

Affirming the District Court's ruling and recognizing the standing of a terminated officer to derivatively bring a breach of fiduciary duty claim stemming from his or her termination would paradoxically make Nevada among the most hostile states to corporations and their directors. The resulting micromanagement by Nevada courts and second-guessing of purely operational decisions by a corporate board would be unprecedented, and would significantly deter corporations from incorporating in Nevada. Indeed, removing a corporate board's

broad discretion to terminate its officers when it chooses, and instead reviewing its termination decision under a subjective mindset-based test belatedly implemented by a court, as the District Court has, would raise a cloud over almost every officer termination (considering that officers are typically stockholders), throw the authority of Nevada boards into confusion and disarray, and effectively require every officer termination in Nevada going forward to be subject to judicial review.[50]

For all of these reasons, including to avoid making Nevada law ***substantially less favorable*** to directors than the law of any other jurisdiction, this Court should decline to adopt the District Court's ruling and should reject any decision that would make Nevada the first and only state to allow terminated officers standing to derivatively assert fiduciary duty claims relating to their removal.

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[50] Relatedly, Nevada policy has long favored the arbitration of disputes. *See Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) ("There is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism."); *Int'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988) ("Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration."). To allow terminated officers to bring derivative claims relating to their removal, as the District Court has done, would allow an end-run around the effectiveness of arbitration provisions in executive employment contracts, as here. *See* Vol. 3 App. 724 (Emp. Agmt. § 13) (mandatory arbitration clause in Plaintiff's Employment Agreement covering "[a]ny dispute or controversy arising under this Agreement or relating to its interpretation or the breach thereof"). The lack of availability of arbitration to resolve executive employment disputes—such as the propriety of an officer termination—would also make Nevada a highly unattractive state of incorporation.

D. Nevada's Corporate Law, Which Recognizes That the Termination of an Officer Is an Operational Decision to Which the Business Judgment Rule Should Apply, Further Undermines Plaintiff's Standing

Plaintiff's ability to maintain his standing to derivatively assert breach of fiduciary duty claims arising from his termination is further undermined by Nevada corporate law, which provides that a board's decision to remove an officer is an operational decision protected by the business judgment rule—which, in practice, would be fatal to Plaintiff's attempted claim.[51] Though the District Court should have ruled as a threshold matter that Plaintiff did not have standing to assert his derivative claim, the District Court's failure to correctly apply Nevada law as it relates to the business judgment presumption was further legal error meriting reversal.

Plaintiff's entire termination argument rests upon his assumption that if any of the directors voting for his removal were not "independent" with respect to the Board's decision to end his employment, then all Petitioners automatically lose the presumptive application of the business judgment rule.[52] According to Plaintiff, in that event, *Delaware's* "entire fairness test"—rather than Nevada law—should be

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[51] Plaintiff did not contest that if the business judgment rule were to apply, his fiduciary duty claims arising out of his termination would fail as a matter of law. *See, e.g.*, Vol. 7 App. 1619-27 (Pl.'s Opp'n to Pet'rs' Mot. for Summ. J.).

[52] Vol. 5 App. 1225-29 (Pl.'s Mot. for Partial Summ. J.).

applied when evaluating any breach of fiduciary duty relating to his termination.[53] The District Court agreed when it denied Petitioners' motion for summary judgment due to "genuine issues of material fact" relating to potentially "interested directors participating in a process."[54] This ruling was erroneous as a matter of law in at least two respects.[55]

First, *Nevada law*—not Delaware law—governs Plaintiff's termination claim.[56] Nevada's business judgment rule, codified by statute, provides that "[d]irectors and officers, in deciding upon *matters of business*, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3) (emphasis added). Nevada's corporate law identifies only two situations where the business judgment presumption may be disturbed:

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[53] *Id.* at 1229-32.

[54] Vol. 9 App. 2138 (10/27/16 Hr'g on Mots. at 117:9-11).

[55] Plaintiff's allegations are focused on Directors Kane and Adams, and they are really about alleged "bias" (a concept foreign to Nevada corporate governance law), rather than whether they were "disinterested" and "independent"—issues relevant in Nevada only in the context of an extraordinary transaction (such as a merger) or situations where directors sit on each side of a transaction (and dollars move out of the company to the benefit of a director). Regardless, Directors Kane and Adams were disinterested and independent as a matter of fact and law with respect to their decisions to support Plaintiff's removal from office, and the Court's unsupported decision otherwise was incorrect. However, Petitioners do not seek a writ of petition and do not appeal this particular ruling by the District Court regarding their independence at this time. But, Petitioners submit, whether a director is "independent" or "disinterested" or even "unbiased" is not relevant under Nevada law in assessing a board's decision to terminate an executive.

[56] While Nevada courts may take into consideration Delaware precedents, such consideration is unnecessary here where there exists Nevada law.

(1) where directors take certain actions to resist "a change or potential change in control of the corporation," NRS 78.139(1)(b), 2-4; and (2) in an "interested director transaction," which may involve "self-dealing" between a director and a corporation, NRS 78.140. Plaintiff has conceded that "[b]y their terms, on their face, those two statutory provisions do not speak to circumstances other than those described" and are therefore not relevant to his termination claims.[57] But neither the District Court nor Plaintiff identified any Nevada statute or legal decision that has disturbed the application of the business judgment rule outside of these two situations. Nor have Petitioners been able to locate one.

The conclusion is simple: the RDI Board's business decision to remove a CEO was a purely operational decision that is one of those "matters of business" always entitled to the Nevada statutory presumption of reasonable business judgment under NRS 78.138(3). In Nevada, there is a marked contrast between "operational decisions," such as removing an officer or changing a marketing strategy, and "transactional decisions," such as where a director is on both sides of a particular transaction. The latter may be subject to closer scrutiny, including a "fairness" test (which looks at whether a deal was fair to the company), while the former retain the business judgment presumption at all times. This is fully consistent with the wide discretion afforded to corporate boards under Nevada law

[57] Vol. 7 App. 1624 n.4 (Pl.'s Opp'n to Pet'rs' Mot. for Summ. J.).

on matters that determine the course of the company, *see* NRS 78.120, 78.135, 78.138; whether or not to sell the company, *see* NRS 78.139; and the limitations on liability, *see* NRS 78.037, 78.751, 78.7502. As Nevada corporate policy, these statutes are designed to vest decision-making in the board, and to protect directors who are called upon to make these decisions (usually working on a part-time basis, sometimes with less-than-perfect knowledge, and typically for not much money). *See also* NRS 78.138(7) (providing additional legal protections to directors with respect to potential personal liability).

Second, there is not ***a single case*** in which ***any court*** (let alone a Nevada court) has subjected a board's decision to terminate an officer to Delaware's "entire fairness" test. Delaware itself has applied its "entire fairness" test only in inapposite situations, such as where a board is alleged to have breached its duties when faced with a corporate merger or sale, or where there is an accusation that corporate assets have been misused—noticeably absent is any case law in which the employment of an officer is at issue. *See, e.g.*, *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000) (proposed sale of corporation); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (two-stage tender offer/merger transaction); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) (merger); *Venhill Ltd. P'ship v. Hillman*, C.A. No. 1866-VCS, 2008

WL 2270488, at *22 (Del. Ch. June 3, 2008) (partner accused of improper investments and misuse of trust assets).

Other jurisdictions have recognized that it makes no sense to apply Delaware's "entire fairness" test to an employee termination, which is not an extraordinary transaction or a "transaction" in which one or more directors sit on the other side of the deal. *See Nahass v. Harrison*, C.A. No. 15-12354-MLW, --- F. Supp. 3d ----, 2016 WL 4771059, at *5 (D. Mass. Sept. 13, 2016) (questioning how the "entire fairness" doctrine ever "would apply to employment decisions," and rejecting fiduciary duty claim by officer terminated by company's directors). Indeed, Delaware's "entire fairness" test is concerned with whether "the transaction was the product of both fair dealing and fair price." *Cinerama*, 663 A.2d at 1163; *see also Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006) (describing the "fair dealing" standard as "simulating arm's length-bargaining"). But it is difficult to image how an "arms length-bargaining" standard would apply to a termination case (*i.e.*, whether it would extend to all employees, or just executive officers), and fairness of the price is not a relevant consideration in the removal of an officer—there is no price to review other than the price that was negotiated at the time of the executive's hiring (*i.e.*, severance benefits).

Delaware's "entire fairness" test is also not consistent with Nevada law. For instance, the Delaware test is an objective standard, *see In re Orchard Enters., Inc.*

S'holder Litig., 88 A.3d 1, 30 (Del. Ch. 2014) (outlining contours of the "entire fairness" test), while under Nevada law a director is bound only to exercise his or her duties in subjective good faith. *See* NRS 78.138; NRS 78.140. Moreover, the only "fairness" test recognized under Nevada's corporate law occurs in the context of an interested director transaction (where the director is in fact on both sides of the specific transaction being reviewed), and that "fairness" test evaluates whether "[t]he contract is fair as to the corporation at the time it is authorized or approved." NRS 78.140(2)(d). It would defy logic to imply a more stringent standard for operational decisions like the termination of an executive (*i.e.*, Delaware's "entire fairness" test) than there is under existing Nevada statute where a director sits on both sides of a specific transaction (*i.e.*, the NRS 78.140 "fair as to the corporation" analysis).

This Court's decision in *Shoen*, the sole authority on which the District Court relied, is not to the contrary. The District Court assumed that, under *Shoen*, whenever there are "factual issues on interested-disinterested" directors with respect to any corporate action, including an employee termination, the business judgment presumption may be lost and a trial required.[58] This misreads *Shoen*. As an initial matter, *Shoen* was confined to the NRS 78.140 context. It involved allegations by stockholders that various directors of AMERCO failed to properly

[58] Vol. 9 App. 2156-60, 2170 (10/27/16 Hr'g on Mots. at 135:4-139:1, 149:8-19).

supervise or willfully disregarded their duties with respect to unfair transactions between the corporation and entities owned by executive officers of the company. *See* 122 Nev. at 626-631, 137 P.3d at 1174-1179. Indeed, in *Shoen*, this Court specifically emphasized that it was addressing "when an interested fiduciary's transactions with the corporation are challenged," and that it was doing so "[w]hen evaluating demand futility." *Id.* at 640, 137 P.3d at 1184 n.61. Neither situation is present here, where the merits of Plaintiff's attempted termination claim are at issue. *Shoen* does not apply outside of "interested director" transactions (as recognized by NRS 78.140), or to situations other than demand and demand futility, which applies to a procedural step and provides no basis for finding ultimate liability. In short, *Shoen* does not upset the statutory business judgment presumption on regular "matters of business" (such as the firing of an officer), and it in no way adopts Delaware's "entire fairness" in any situation. The District Court's misreading of *Shoen* was plainly wrong, and cannot support its holding.

Because the business judgment rule would apply under Nevada law in the event that an officer's termination is contested, and no more stringent test exists under Nevada law to evaluate the removal of an officer by a board of directors, Plaintiff lacks standing to proceed derivatively with respect to his termination claims in this case. The District Court's holding otherwise was legal error meriting

reversal and the granting of Petitioner's motion for summary judgment on Plaintiff's termination claims and reinstatement demand.

E. Plaintiff Also Lacks Standing to Derivatively Assert His Fiduciary Duty Claims in Light of the Right of RDI's Board to Remove Him at Any Time, With or Without Cause

Finally, Plaintiff's lack of standing to proceed derivatively with his termination claims and reinstatement demand in this case is confirmed by the broad discretion afforded to RDI's Board under Nevada law, and the Company's specific Bylaws allowing for his removal at any time, with or without cause.

A Nevada corporation is a product of statutory and contract law. The statute is NRS Chapter 78: Private Corporations. The charter and bylaws are the contracts among the stockholders of a corporation. *See* NRS 78.060, 78.120, 78.135. "[U]nder Nevada's corporations laws, a corporation's board of directors has full control over the affairs of the corporation." *Shoen*, 122 Nev. at 632, 137 P.3d at 1178 (citation and internal quotation marks omitted); *see also* NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter, or the articles of the corporation, the board of directors has full control over the affairs of the corporation.").

Under Nevada law, corporate officers such as a CEO or President have no vested right to remain in their position. Rather, officers serve only "for such terms and have such powers and duties as may be prescribed by the bylaws or

determined by the board of directors," and an officer may be subject to "removal before the expiration of his or her term." NRS 78.130(3)-(4); *see also Cooper v. Anderson-Stokes, Inc.*, 571 A.2d 786, 1990 WL 17756, at *2 (Del. 1990) (table) ("[T]here is no vested right to retain one's office in the face of a properly executed removal."). RDI's Bylaws mirror NRS 78.130, and expressly provide that Plaintiff served solely "at the pleasure of the Board of Directors," such that he could "be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof."[59] Not surprisingly, Plaintiff's Employment Agreement was consistent with RDI's Bylaws, as it similarly recognized that the Board had an undiminished right to terminate him "with cause," in which event he was owed no relief, or "without cause," in which case he was due a specified sum.[60]

It is nonsensical that Petitioners, by terminating Plaintiff's employment as an officer, could have breached a contract with RDI's stockholders and abrogated any of their fiduciary duties if the Company's Bylaws allowed the Board to terminate Plaintiff at any time, for any reason, and a majority of the entire Board voted to do so—which is what indisputably occurred. Indeed, other jurisdictions repeatedly have found that actions explicitly authorized by statute or a corporation's bylaws

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[59] Vol. 3 App. 713-14 (RDI Bylaws art. IV, § 10).
[60] Vol. 3 App. 723 (Emp. Agmt. § 10).

may ***not*** be subject to a fiduciary challenge. *See, e.g.*, *Nahass*, 2016 WL 4771059, at *6 (in addressing "Breach of Fiduciary Duty" argument, finding that terminated officer could not maintain a breach of fiduciary duty claim where his termination was authorized under "the Bylaws"); *In re U.S. Eagle Corp.*, 484 B.R. at 654 (removal of officer could not be a breach of fiduciary duty where "Delaware General Corporation Law provides for removal . . . with or without cause"); *cf. Goldstein v. Lincoln Nat'l Convertible Sec. Fund, Inc.*, 140 F. Supp. 2d 424, 438 (E.D. Pa. 2001) (plaintiff could not maintain fiduciary duty claim "[g]iven the express statutory authorization for the Board's action" to adopt staggered elections), *vacated in part on other grounds*, 2003 WL 1846095 (3d Cir. Apr. 2, 2003).

If the removal power within a corporation's bylaws allowed the termination, as it did here, courts have stressed that "[t]he motives for the acts of a board of directors, when lawful, are not properly the subject of judicial inquiry." *Zannis v. Lake Shore Radiologists, Ltd.*, 432 N.E.2d 1108, 1110, 104 Ill. App. 3d 484, 487 (1982); *see also New Founded Indus. Missionary Baptist Ass'n v. Anderson*, 49 So.2d 342, 344 (La. Ct. App. 1950) (holding, where plaintiff sought a review of the merits of his removal as president, "a court has no right or jurisdiction to review the discretionary action of the board in removing an officer, unless the contract rights of the person removed are involved"). The leading treatise on the subject is

in agreement, providing that "where a bylaw provided that any officer might be removed by a majority vote of the entire board whenever the best interests of the company require it, it was for the directors to determine what was in the best interests of the company; the courts will not interfere unless for fraud or illegality." 2 Fletcher Cyc. Corp. § 363 (2016); *see also id.* § 360 ("a court has no right or jurisdiction to review the discretionary action of the board in removing an officer, unless the contract rights of the person . . . are involved").[61]

Here, because the Board had an ***express, unrestricted right*** to terminate Plaintiff's employment at any time, for any reason, under both Nevada statute and RDI's Bylaws, as a matter of law Plaintiff lacks standing to derivatively assert his claims that the Board somehow breached its fiduciary duties and violated a fundamental covenant between the Company and its stockholders as a result of Plaintiff's termination. The District Court's contrary ruling was legal error that warrants immediate reversal.

II.
REINSTATEMENT OF A TERMINATED OFFICER IS NOT AN AVAILABLE REMEDY AS A MATTER OF LAW OR EQUITY

The District Court's refusal to grant Petitioner's summary judgment motion as it relates to Plaintiff's requested reinstatement relief was also legal error

[61] As noted above, the contract rights of Plaintiff under his Employment Agreement with the Company are being adjudicated in an arbitration concurrent with this action.

meriting reversal, as such reinstatement (which would require the immediate termination of RDI's existing President and CEO, Petitioner Ellen Cotter) is not available as a matter of law—even assuming *arguendo* that Plaintiff had standing to derivatively assert viable claims for breach of fiduciary duty stemming from his termination. Neither Plaintiff nor the District Court has identified a single case ***in any jurisdiction*** in which a former President or CEO has been reinstated as a remedy for a purported breach of fiduciary duty. To do so here would be entirely improper.

Plaintiff's Employment Agreement with RDI, which relates to his duties as President and which, according to Plaintiff, continued to apply when he became CEO,[62] provides that Plaintiff was due twelve months of "compensation and benefits" following a termination "without cause," and nothing if he was terminated for "cause."[63] Nowhere does the Employment Agreement give Plaintiff the right of reinstatement or any other right of specific performance against the Company. "It is hardly controversial to recognize that an order of specific performance is rarely an appropriate remedy for breach of an employment agreement." *Cedar Fair, L.P. v. Falfas*, 19 N.E.3d 893, 897, 140 Ohio St. 3d 447, 451 (2014). The result should not be different here: Plaintiff's attempt to achieve,

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62 Vol. 2 App. 565-72 (Pl.'s 5/16/16 Dep. at 30:25-37:9).
63 Vol. 3 App. 723 (Emp. Agmt. § 10).

via this derivative action, a reinstatement remedy beyond what is available under his Employment Agreement is legally unsupportable.

"[G]enerally, equity will not assume jurisdiction for the purpose of reinstating a removed officer." 2 Fletcher Cyc. Corp. § 363. "An equitable action does not lie where the officer was removable without cause," *id.*, as Plaintiff was pursuant to RDI's Bylaws, which provided that he "may be removed at any time, with or without cause."[64] There are also "strong policy reasons" for the "general rule against compelling an employer to retain an employee," especially if such reinstatement—as here—is "against [the employer's] wishes." *Zannis*, 392 N.E.2d at 129, 73 Ill App. 3d at 905. Plaintiff's reinstatement "would involve difficulty of supervision," *Cedar Fair*, 19 N.E.3d at 898, 140 Ohio St. 3d at 452, and there are significant questions counseling against reinstatement with respect to how "a large business entity" like RDI could "properly function" if it was "force[d]" to "reemploy an unwanted senior officer" like Plaintiff "after it had obviously moved on." *Id.*

Moreover, corporate officers have no "vested right to serve out the remainder of their terms." *Chesapeake Corp. v. Shore*, 771 A.2d 293, 345-46 (Del. Ch. 2000). Plaintiff had "no property right" in his positions as CEO and President of RDI, and—given the Company's Bylaws allowing termination at any time, for

[64] Vol. 3 App. 713-14 (RDI Bylaws art. IV, § 10).

any reason—if reinstated he "could immediately be fired for no reason or for any other permissible reason." *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 323 (1st Cir. 1989). This fact alone "support[s] a denial of reinstatement." *Id.*; *Leonard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 16 Cal. App. 2d 341, 344 (1936) ("Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act.").[65]

In addition, a "long period of time" has elapsed since Plaintiff's termination, over 18 months at the moment (far longer than his 10 months as CEO), which further counsels against Plaintiff's reinstatement. *Id.* at 324 (recognizing that "a long period of time" between "discharge" and "entry of judgment" weighs against reinstatement); *Nance v. City of Newark*, Civ. No. 97-6184 (DMC) (CCC), 2010 WL 4193057, at *2 (D.N.J. Oct. 19, 2010) (same). This is especially true given that RDI has moved on from the issues encountered during Plaintiff's tenure, now has several new directors serving on the Board, and its own uninterested stockholders recognize that Plaintiff's reinstatement would merely perpetuate a "divided company."[66]

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[65] Moreover, only the current directors of RDI are defendants in this action. It is possible that, between this time and any actual reinstatement, the composition of the RDI Board may change, with new members joining and current Petitioners leaving. Any order by the District Court could not bind future RDI directors not before it, and thus it is difficult to see how a reinstatement order could be structured or enforced.

[66] Vol. 2 App. 657-661 (5/25/16 Tilson Dep. at 150:6-154:23).

Finally, reinstatement is neither proper nor legally available where, as here, there is "irreparable animosity between the parties." *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 373-74 (3d Cir. 1987); *Robinson v. Se. Pa. Transp. Auth., Red Arrow Div.*, 982 F.2d 892, 899 (3d Cir. 1993) (same). Neither Plaintiff nor Petitioners dispute that there is "substantial animosity between the parties," including, in particular, between Plaintiff and his sisters; "the parties' relationship [is] not likely to improve"; and "the nature of [RDI's] business require[s] a high degree of mutual trust and confidence," which is "noticeably lacking." *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1066 (8th Cir. 1988).

These factors, both individually and in sum, render Plaintiff's requested reinstatement inappropriate and untenable as a matter of law. The District Court's refusal to grant summary judgment on the issue of reinstatement—leaving the Company, its investors, and Petitioner Ellen Cotter in the lurch pending the close of trial—was plain error and represents the kind of dangerous decision that, if enshrined, would certainly dissuade companies from incorporating in Nevada.

III.
DIRECTORS CODDING AND WROTNIAK, WHO WERE NOT ON THE RDI BOARD AT THE TIME OF PLAINTIFF'S TERMINATION, CANNOT BE LIABLE FOR ANY FIDUCIARY BREACH RELATING TO THAT DECISION

Even assuming *arguendo* that Plaintiff had standing to maintain a viable claim for breach of fiduciary duty arising from his termination against certain board members, it is beyond dispute that his claims against Petitioners Codding

and Wrotniak should be barred as a matter of law. Neither Codding nor Wrotniak was a member of the RDI Board at the time of Plaintiff's termination on June 12, 2015: Ms. Codding joined the Company's Board months later, on October 5, 2015, while Mr. Wrotniak joined on October 12, 2015.[67]

It is black-letter law that "officers and directors become fiduciaries only when they are officially installed," and do not possess any fiduciary duties before they have "obtained fiduciary authority." *In re Walt Disney Co. Deriv. Litig.*, No. Civ. A. 15452, 2004 WL 2050138, at *4 (Del. Ch. Sept. 10, 2004). "[A] director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve that transaction was wrongful." *In re Tri-Star Pictures, Inc. Litig.*, Civ. A. No. 9477, 1995 WL 106520, at *3 (Del. Ch. Mar. 9, 1995).

Because Codding and Wrotniak were not involved in the decision to terminate Plaintiff, and were not fiduciaries of RDI at that time, they cannot be liable for Plaintiff's breach of fiduciary claims as they relate to his removal as President and CEO. The District Court's failure to recognize this and grant them summary judgment (as they so moved) was legal error and merits immediate reversal.

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[67] Vol. 2 App. 289, 291 (5/18/16 RDI DEF 14A).

CONCLUSION

The District Court's ruling recognizing the standing of a deposed officer to derivatively assert breach of fiduciary duty claims arising from his or her termination finds no support in Nevada case law or statute (or the laws of any other state). Its holding also would frustrate the public policy objectives reflected in Nevada's corporate laws, and undermine the State Legislature's longstanding effort to make Nevada an attractive place in which to incorporate. The District Court's determination that Plaintiff had standing to bring such a claim is belied by the State's strong business judgment rule as it relates to ordinary operational decisions undertaken by a corporate board, and the broad discretion afforded to RDI's Board to terminate Plaintiff any time, for any reason.

The District Court's related conclusion that Plaintiff's reinstatement as CEO and President of RDI remains an available remedy, and its refusal to grant summary judgment in favor of Petitioners Codding and Wrotniak, who were not members of the RDI Board during the relevant time, are similarly unsupportable as a matter of law. Immediate reversal is warranted.

DATED this 31st day of January 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 13,571 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of COHEN|JOHNSON|PARKER|EDWARDS, that in accordance therewith, I caused a copy of **PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, MANDAMUS** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA EMAIL and US MAIL on January 31, 2017

Judge Elizabeth Gonzalez
Eighth Judicial District Court of
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VIA EMAIL and ELECTRONIC MEANS through the District Court's Wiznet E-Filing system on January 31, 2017, to the parties listed below:

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