IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.
72261

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 Party in Interest.	District Court No. A-15-719860-B, coordinated with No. P-14-082942-E and No. A-16-735305-B

APPENDIX TO WRIT PETITION
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also Aronson, 473 A.2d at 812 ("From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."). "[D]epending on the circumstances, allegations of close familial ties might suffice to show interestedness or partiality." *Id.* at n. 56. "[T]o show partiality based on familial relations, the [Plaintiff] must demonstrate why the relationship creates a reasonable doubt as to the director's disinterestedness." *Id.*

a. Ellen and Margaret Cotter Indisputably Lacked Independence and Disinterest.

As pointed out in the Motion (and as acknowledged by Defendants in their Motion for Summary Judgment No. 1), Ellen and Margaret Cotter lack disinterestedness and/or independence with respect to the challenged actions, starting with the threat to terminate Plaintiff unless he resolved the California Trust Action and other matters on terms satisfactory to Ellen and Margaret Cotter, and continuing thereafter with the termination of him on account of his failure to do so. While Defendants attempt to recharacterize the ultimatum they provided Plaintiff as a condition to remaining CEO, the undisputed fact is that Plaintiff was threatened with termination if he did not resolve trust disputes with Ellen and Margaret on terms acceptable to them and, when he failed to acquiesce, terminated. There is no credible argument that Ellen and Margaret Cotter could be characterized as disinterested or impartial in light of that.

b. Kane Lacked Independence and/or Disinterest.

While Defendants contend that Kane's quasi-familial relationship does not automatically render him interested or partial in the transaction, the facts are not limited to that relationship: the evidence shows is that Kane by word and action let his fifty-year relationship with James J. Cotter, Sr. ("JCC, Sr.") direct his actions and decisions as a Director of RDI. As pointed out in the Motion (and multiple other briefs submitted by Plaintiff), Kane is not only called "Uncle Ed" by Ellen and Margaret Cotter, he in fact acted as "Uncle Ed" throughout to effectuate what he thought were JJC, Sr.'s wishes that Margaret Cotter alone should control the Voting Trust. Kane claimed to understand the intentions of the JJC, Sr., namely, his belief that JJC, Sr. wanted Margaret Cotter to be the sole Trustee of the voting trust, and he (Kane) took steps to make that happen, including

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telling Plaintiff to accept the take-it-or-leave-it proposal provided by Ellen and Margaret Cotter. That was not the conduct of a disinterested and independent RDI director exercising disinterested business judgment in the best interests of RDI and its minority shareholder.

c. Adams Lacked Independence and/or Disinterest.

That Adams was neither independent nor disinterested is beyond dispute. Defendants cannot dispute that almost all of Adams' income is from RDI and other companies controlled by Margaret and Ellen Cotter. Moreover, Adams is approximately 65 years old, unemployed, and not independently wealthy. He therefore depends on income controlled by Margaret and Ellen Cotter to fund his retirement. This is particularly so in view of substantial annual expenses he disclosed in his declaration in his California divorce case. Adams is a poster child for a "beholden" director.

2. Defendants Have Not Met Their Burden of Proving the Entire Fairness of the CEO Removal.

As discussed above, where a challenged decision was not approved by a majority of disinterested and independent directors, the directors bear the burden of proving the entire fairness of the transaction in all its aspects, including both the fairness of the ultimate outcome and the fairness of the directors' dealings leading into it. *Shoen*, 122 Nev. at 644 n. 61, 137 P.3d at 1186 n.61. Under the entire fairness standard, the challenged action itself must be objectively fair, independent of the beliefs of the director defendants. *Geoff v. II Cindus. Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006*); see also Venhill Ltd. P'ship ex rel. Stallkamp*, No. CIV.A. 1866-VCS, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008).

Contrary to what director defendant Gould argues in his opposition (at 4:4-19), the challenged action is subject to a single standard, the entire fairness standard, not subject to separate standards for different director defendants. In this regard, Gould cites *In re Emerging Communications Inc. Shareholders Litig.*, No. CIV.A. 16415, 2994 WL 1405745, at *38 (Del. Ch. May 3, 2004) for the proposition that "[t]he liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are

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exculpated from liability for that breach, can vary for each director." Gould confuses the issue(s) in that case, which was what duties were breached (care, loyalty and/or good faith), with the issue of who bears what evidentiary burden. Where, as here, the plaintiff has shown that the challenged action was not approved by a majority of disinterested and independent directors, the plaintiff has rebutted the presumptions of the business judgment rule and it becomes the burden of the director defendants to show the entire fairness of process and the result. Determining what directors breached what duties (if any) is done in view of their respective showings under the entire fairness standard. [4]

As the fairness standard is an objective one, the Interested Directors' personal beliefs (supported by their own self-serving testimony) as to Plaintiff's performance or how he got along with his sisters ("executives") fails to satisfy their burden.

First, Defendants cannot meet their burden of showing that the process of removing Plaintiff as CEO was fair in all its aspects. The evidence shows that Ellen and Margaret Cotter, Kane, Adams, and McEachern had communicated and agreed, prior to the May 19, 2015 agenda Ellen Cotter distributed that listed "status of President and CEO" as the first item, to vote to terminate Plaintiff as President and CEO of RDI. It is undisputed that there had been no prior discussion at RDI board meeting of the possible termination of Plaintiff as President and CEO. There also is no dispute that, at the time, both Directors Storey and Gould objected to the lack of process. Storey used the term, "kangaroo court." Gould observed that all of the directors could be sued for breaching their fiduciary duties. While Defendants falsely claim 13 hours of deliberative process over the three Board meetings on May 21 and 29 and June 12, that is a fiction in light of the email correspondence plainly demonstrating that they had agreed on the result before the May

[4] Gould also cites three cases, including *In re Tri-Star Pictures, Inc.*, No. CIV.A. 9477, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995), for the implied proposition that failing to actively support the challenged action precludes liability. That proposition is mistaken, and is not supported by the cases cited. In fact, in those cases, what transpired is that the particular director defendant(s) did not participate in the challenged conduct at all, at least in one instance because they recognized that they had potential conflicts of interest. Parenthetically, that is exactly what Adams and Kane (and Margaret and Ellen Cotter) should have done here. To the point as to director defendant Gould, he neither recused himself from the process and termination vote, nor resigned in advance of same. The three cases he cites therefore are inapposite.

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21 meeting even took place. The delay was only for the purpose of further attempts to extort Plaintiff. In short, the "process" leading to the threat to terminate Plaintiff if he did not resolve trust and estate disputes with Ellen and Margaret Cotter and to terminate him if and when failed to acquiesce is patently unfair, not just to Plaintiff, but to RDI's minority shareholders to whom all Director Defendants owe fiduciary duties.

What followed at the two-part supposed May 29, 2015 board meeting was that Plaintiff was told that the meeting would be adjourned until 6:00 p.m. that evening and that he had until then to resolve the disputes he had with his sisters and that, if he failed to do so, the vote would proceed and he would be terminated. No honest or colorable argument can be made that what amounted to attempted extortion constitutes a process that meets the entire fairness standard.

Of course, the termination vote did not occur on May 29, 2015 because a tentative resolution had been struck by Plaintiff with his sisters. When that resolution did not come to fruition, Ellen Cotter convened another supposed special board meeting on June 12, 2015 and the threatened termination vote was held. Kane, Adams and McEachern (and Ellen and Margaret Cotter) each voted to terminate Plaintiff as President and CEO and the "process" concluded. Thus, the "process" consisted of secret machinations and agreements, attempted extortion and execution on the extortion threat. That the "process" was not close to entirely fair.

Second, the end result, whether the threatened termination of Plaintiff if he did not resolve disputes with his sisters on terms satisfactory to the two of them, the termination of him after he failed to do so, or both, is not a result the individual defendants can demonstrate was objectively fair. RDI Directors threatened Plaintiff with termination unless he acquiesced to a resolution of the California Trust Action on terms effectively dictated by his sisters, in both the discussion of the process and the result. In the process, the threat was pervasive. Indeed, not until the Directors concluded that Plaintiff would not acquiesce to the threat did the so-called process conclude, and it ended with his termination. Nor is there anything objectively fair about executing on an extortion threat when it fails to bring about the conduct sought. The individual defendants cannot satisfy their burden of showing that the end result, the termination of Plaintiff after he failed to resolve disputes with this sisters on terms satisfactory to the two of them, was objectively fair.

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Defendants' attempt to distract from the issue by pointing to performance coaching that occurred months prior to Plaintiff's removal, but what they cannot avoid is that all of that coaching and performance improvement planning fell by the wayside when Ellen and Margaret Cotter made a decision, to which Kane, Adams and McEachern agreed, to use Plaintiff's position as the bargaining chip against him. And again, while supervisory structures may have been added in as part of that so-called deal, what Defendants cannot dispute is that the material condition of Plaintiff remaining in his position was acceptance of Ellen and Margaret Cotter's terms, including most fundamentally to resolve the issues being litigated in the California Trust Action. The standard is entire fairness, and under the circumstances, Defendants cannot meet that standard. Summary judgment should be entered for Plaintiff.

3. Gould is Liable for the Breach of Fiduciary Duty.

Gould's attempt to avoid liability by relying on his vote is unveiling. First, as observed above, he too must satisfy the entire fairness standard. Second, he also issued for breach of the duty of care. The duty of care is a function of the decision-making process, not the decision. *See, e.g., Citron v. Fairchild Camera & Instrument Corp.*, 569 A. 2d 53, 66 (Del. 1989). This necessarily raises "[t]he question [of] whether the process employed [in making the challenged decision] was either rational or employed in a good faith effort to advance the corporate interests." *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 339 (Bankr D.D.C. 2006). Because equitable relief can be awarded for duty of care breaches too, the duty of cure claim against his not only is viable, it is critical.

Third, a director is liable for aiding and abetting breach of fiduciary duty if: "(1) a fiduciary relationship exists, (2) the fiduciary breached the fiduciary relationship, (3) the third party knowingly participated in the breach, and (4) the breach of the fiduciary relationship resulted in damages." *In re Amerco Derivative Litig.*, 127 Nev. 196, 225, 252 P.3d 681, 702 (2011).

The Nevada Supreme Court has held that minority shareholders may obtain equitable relief to remedy breaches of fiduciary duty by majority shareholders. *Smith v. Gray*, 57 Nev. 56, 250 P. 369 (Nev. 1926) (minority stockholders entitled to equitable relief where majority stockholders

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violated the rights of the minority). *See also, Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 12, 62 P.3d 720, 727 (Nev. 2003) (majority shareholders owe fiduciary duties to minority shareholders).

Thus, as pointed out in Plaintiff's Opposition to Gould's Motion for Summary Judgment, Gould was a knowing and active participant in that breach, even if he did not cast a vote. Gould, who had advance warning from Adams of what was afoot, indisputably failed to take action to preserve the ombudsman process, which indisputably was aborted, as part of a scheme to threaten Plaintiff with termination, and if the threats failed, to terminate him and implement a long sought after executive committee, the purpose of which Gould full well knew was to enable Ellen and Margaret Cotter to avoid reporting to the RDI Board of Directors. In addition, promptly following the termination of Plaintiff, Gould failed to take steps to correct the company's June 18th SEC filing that he at the time knew was erroneous. Indeed, by his actions and purposeful inaction, Gould has engaged in what constitutes intentional misconduct (which is discussed below).

Moreover, the various complained of acts and omissions upon which Plaintiff's claims are based must be viewed and assessed collectively, not separately and in isolation. *See, e.g., In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402 (Del. Jan. 15, 2016) (rejecting director defendants' contention that bylaw amendments should be viewed individually rather than collectively); *Carmody v. Toll Brothers., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (finding that particularized allegations that directors acted for entrenchment purposes sufficient to excuse demand); *Chrysogelos v. London*, 1992 WL 58516, at *8 (Del. Ch. 1992) ("None of these circumstances, if considered individually and in isolation from the rest, would be sufficient to create a reasonable doubt as to the propriety of the director's motives. However, when viewed as a whole, they do create such a reasonable doubt . . ."); *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at * (Del. Ch. 2002) (concluding that allegations that individually would be insufficient to show a lack of disinterestedness or independence were, taken together, sufficient to do so). As pointed out in Plaintiff's Opposition to Gould's Motion for Summary Judgment, the totality of Gould's acts and omissions in this case—including in acquiescing to inaccurate SEC filings and in aborting the CEO search—evidence, intentional dereliction of duty in derogation of the interests of RDI and its minority shareholders.

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For this reason, Gould's suggestion that Plaintiff in inadequate as a Plaintiff because he did not name himself as a defendant fails because it presumes that the vote is the *sine qua non* of his claim against Gould. Not so. Gould's acts and omissions, especially viewed in context of his overall "go along, get along" capitulation to ongoing entrenchment, also breaches of the duty of loyalty.

Summary judgment should be entered against Gould as well.

4. Section 78.138(7) Does Not Exculpate Defendants From Liability.

As pointed out in multiple briefs to this Court, Defendants' invocation of Nevada's exculpatory statute, NRS 78.138.7, misapprehends the function of the statute, which is to limit monetary liability and recovery, not to serve as a means by which the legal sufficiency of a fiduciary duty claim is assessed. *Emerald Partners v. Berlin*, 787 A.2d 85, 92 (Del. 2001) ("a Section 102(b)(7) provision does not operate to defeat the validity of a plaintiff's claim on the merits," but "it can operate to defeat the plaintiff's ability to recover monetary damages.").

Even if the exculpatory statute were properly invoked, which it is not, it has no application where, as here, duty of loyalty (and disclosure) claims also are made. *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 n. 41 (Del. Ch. 2000) (the exculpatory statute does not apply to breaches duty of loyalty because "conduct not in good faith, intentional misconduct, and knowing violations of law" are "quintessential examples of disloyal, i.e., faithless, conduct"). Here, the complained of or challenged conduct also and obviously entails breaches of the duty of loyalty (and disclosure). *Orman v. Cullman*, 794 A.2d 5, 41 (Del. Ch. 2002) (plaintiff pleaded a breach of the duty of loyalty claim where it "pled facts which made it reasonable to question the independence and disinterest of a majority of the Board that decided what information to include in the Proxy Statement"); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 914-15, 920, n.34 (Del. Ch. 2014) ("right complaint alleges or pleads facts sufficient to support the inference that the disclosure violation was made in bad faith, knowingly or intentionally, the alleged violation implicates the duty of loyalty" and is relevant to the availability of the exculpatory provisions of section 102(b)(7)); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *12 n.18 (Del. Ch. Sept. 1, 1992) (Section 102(b)(7) did not require dismissal where the plaintiffs pleaded

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that "the breach of the duty of disclosure wasn't intentional violation of the duty of loyalty"). In addition, Defendants' actions as described above were calculated and/or at minimum knowing, for the purpose of achieving ends that had nothing to do with RDI's best interests and everything to do with their own agendas, and so it is intentional misconduct.

In addition, Section 78.138(7) cannot apply in light of Defendants intentional misconduct. "Intentional misconduct" is one of three ways in which a fiduciary can fail to act in good faith. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006). The first occurs "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation." *Id.* The second occurs "where the fiduciary tax with the intent to violate applicable positive law." *Id.* The third occurs "where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *Id.* Obviously, the first two of the foregoing three ways fiduciaries can fail to act in good faith track language of 2 of 3 portions of NRS 78.138(7), namely, "intentional misconduct" and a "knowing violation of law."

Here, Plaintiff has proffered substantial evidence of an ongoing course of self-dealing and entrenchment undertaken for the purpose of protecting and furthering the personal financial and other interests of Ellen and Margaret Cotter, as well as other individual director defendants, including for example maintaining Adams' principal sources of income. These actions on their face and by their very nature were and are "intentional[] acts with a purpose other than that of advancing the best interests of [RDI]." Do the individual director defendants really expect the Court to decide that their actions to threaten Plaintiff with termination if he did not resolve trust and estate disputes with Ellen and Margaret Cotter on terms satisfactory to the two of them were not intentional acts with a purpose other than that of advancing the best interests of RDI?

Defendants may not rely on Section 78-138(7) as a means of avoiding liability. Summary judgment should be entered in Plaintiff's favor.

G. Plaintiff is Entitled to Relief.

Defendants urge that summary judgment is not warranted because Plaintiff has not proven monetary damages. As this Court has recognized on multiple occasions, however, Plaintiff's claim for breach of fiduciary duty is properly brought an equitable claim. *See Schnell v. Chris-*

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Craft Indus., Inc., 285 A.2d 437, 438-40 (Del. 1971) (the court granted equitable relief where incumbent management "attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office"). Thus, Defendants' reference to remedies at law is wholly inappropriate.

The Nevada Supreme Court has held that minority shareholders may obtain equitable relief to remedy breaches of fiduciary duty by majority shareholders. *Smith v. Gray*, 57 Nev. 56, 250 P. 369 (Nev. 1926) (minority stockholders entitled to equitable relief where majority stockholders violated the rights of the minority). *See also, Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 12, 62 P.3d 720, 727 (Nev. 2003) (majority shareholders owe fiduciary duties to minority shareholders).

As pointed out in Plaintiff's Opposition to Defendants' Motion for Summary Judgment No. 1, in a breach of fiduciary duty claim, courts may "fashion any form of equitable and monetary relief as may be appropriate." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1166 (Del. 1995). "A general common law presumption is that a director's or officer's conflict of interest can result in the voiding of a transaction." Keith Paul Bishop & Jeffrey P. Zucker, Bishop and Zucker on *Nevada Corporations and Limited Liability Companies*, § 8.16, 8-44 (2013). The Nevada Supreme Court in *Kendall v. Henry Mountain Mines, Inc.*, stated that directorial conflicts are such that the challenged action of the directors "may be avoided by the corporation or its stockholders." 78 Nev. 408, 410-11, 374 P.2d 889, 890 (1962) (quoting *Marsters v. Umpqua Valley Oil, Co.*, 90 P. 151, 153 (Or. 1907).

Remarkably, the Interested Director Defendants suggest that equitable remedies such as reinstatement could simply be reversed by Ellen and Margaret Cotter. Although instructive regarding their attitudes and the impunity with which they act, this contention is incorrect. It is well settled that majority shareholders, like directors, owe minority shareholders a duty to make independent, good faith decisions, as discussed immediately above. To suggest, then, that Ellen and Margaret Cotter could simply circumvent equitable relief due by again breaching their fiduciary duties is tantamount to an admission that they have ignored and will continue to ignore their fiduciary duties, making an award of equitable relief all the more imperative.

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Plaintiff has asserted several requests for equitable relief relative to the termination of Plaintiff. Such relief may be sought and secured by way of a breach of fiduciary duty claim. As those are proper forms of relief in connection with Defendants' wrongdoing, summary judgment in Plaintiff's favor is proper.

IV. CONCLUSION

For the foregoing reasons, and the reasons stated in the Motion, Plaintiff's Opposition to Defendants Motion for Summary Judgment No. 1, and Plaintiff's Opposition to Gould's Motion for Summary Judgment, this Court should grant the Motion and enter judgment in Plaintiff's favor on his claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty with respect to his termination as CEO and President of RDI.

DATED this 25th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2016, I caused a true and correct copy of the foregoing to be electronically served to all parties of record via this Court's electronic filing system to all parties listed on the E-Service Master List.

/s/ Judy Estrada
An employee of Lewis Roca Rothgerber Christie LLP

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APPENDIX A

- - -

R O U G H D R A F T

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CASE: Cotter, et al., vs. Reading International, et al.

DATE: October 19, 2016

WITNESS: MYRON STEELE

- - -

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ambiguous depending on what it means, asked and answered.

BY MR. SEARCY:

Q. Let me -- let me restate the question.

You're making an assumption there about what a fact-finder of facts might find; correct?

MR. KRUM: Objection; asked and answered, mischaracterizes the testimony.

BY MR. SEARCY:

Q. You may answer.

A. Yes. I'm suggesting that if the finder of fact reaches the following conclusion and there are facts to support that. But there are facts that are inconsistent with. So the finder of fact has to reach that conclusion. I cannot. No expert should resolve inconsistent facts that have a bearing on a material issue in my view and I'm not trying to do that here.

Q. And I understand. I just want to make clear that you're -- you're making hypothetical assumptions for the purposes of each of these opinions that are summarized on Page 3; correct?

MR. KRUM: Objection; mischaracterizes the testimony.

THE WITNESS: No. I wouldn't call them hypothetical. There is a factual for the fact-finder to reach that conclusion.

THE WITNESS: Sorry.

MR. KRUM: That's okay.

BY MR. SEARCY:

Q. In preparing your expert report did you look at the terms of the employment agreement between Jim Cotter, Jr., and Reading?

A. No.

Q. Were you ever aware that Mr. Cotter, Jr., had an employment agreement with Reading prior to submission of your expert report?

A. Yes. It was referred to in the depositions.

Q. Did you ever ask to see that employment agreement?

A. No.

Q. Would the employment agreement have

affected your analysis in this case?

A. My analysis of the standard of review that would apply, whether or not entire fairness would apply to the decision-making, and whether the process for his termination was arguably consistent or inconsistent with a breach of fiduciary duty? It would not.

Q. Why not?

A. Because from what I understood from the depositions, he was continuing to be employed as the CEO; and if he had a contract to terminate him as of a date certain, it was after the date he was terminated. You can infer nothing else from the --

from the depositions.

Q. Let me see if I can understand your testimony somewhat about the -- the CEO contract. When you said he was continuing to be employed as a CEO, do you know continuing to be employed under the contract?

A. No. I didn't take the contract into consideration other than the reference to it that I read in the deposition suggested it -- he had a year of benefits if he were terminated under the contract.

Q. If the contract stated that

Mr. Cotter, Jr., could be terminated without cause, would that have impacted your analysis?

A. It would not have impacted my analysis on whether the process for his termination constituted a breach of fiduciary duty. It's an issue when you initiate a process to terminate somebody, that process -- if you owe a fiduciary duty to the corporation and to the minority stock shoulders as well as the controlling stockholders, then the process should be entirely fair. Mr. Cotter himself was a stockholder.

So it wouldn't have had any impact on my analysis of independence, of disinterestedness, and of the process for termination. There was no pretension by -- on anybody's account that I could read in the depositions that he was being terminated under a terminable at will provision of the contract

A. Not the narrow scope of my analysis, which was on the process they used, no.

Q. So, in other words, your review wasn't about whether or not the board had the right and the ability to terminate Mr. Cotter, Jr., but just about the process that was used in terminating him; is that correct?

A. Yes. And let me explain that answer. Under Delaware law the fact that you have the authority to act doesn't end the inquiry, particularly in entire fairness review. Our law is

well-established that despite being authorized either by the charter or the bylaws to take certain action, when you take the action, it must be taken equitably and the considerations within the entire fairness review is whether or not that hindsight review of what took place was entirely fair, both as to the nature of the process and the result. So I would not have been impressed by the fact that there -- there was a by law authorizing them to terminate officers because it's generally understood under Delaware law you can.

Q. Is it --

A. Or the directors can. I didn't mean you. I apologize.

Q. No. I understand. Thank you.

No, just returning to your -- your process point again for a moment --

A. Sure.

Q. -- if -- is it your -- is it your testimony, is it your opinion, that under Delaware law, if no process had been undertaken, then there would be no entire fairness analysis or even business judgment analysis that would have to be undertaken at all in this case?

A. No, because even if a contract provided, hypothetically, that he could be terminated at will or terminated without cause, however you want to characterize it, if the people making that decision who ultimately selected someone from the controller to replace him who had -- who has an ongoing familial dispute, it would be analyzed to determine whether that process was entirely fair to the corporation and all of the stockholders, the minority as well as the controlling stockholders.

If the decision were made solely by, let's say, an independent disinterested chairman of the board that's authorized by the contract and the bylaws, it may be a different issue. That's why I keep repeating that it's entirely contextual. There are no bright-line rules in Delaware.

Q. In your understanding of Delaware law, are you aware of any case where a corporation has been found to have been injured or damaged by the termination of a CEO?

A. Not off the top of my head, no.

Q. I believe you've cited to a case

called Carlson in your expert report; isn't that right?

A. Uh-huh.

Q. And in the Carlson case the court there found that the termination of a CEO did not give rise to any damages; correct?

A. The case says that, yeah, in its context. And nothing in my report assessed or attempted to assess a damage remedy, except for reinstatement.

Q. Are you aware of any Delaware case where a terminated CEO has been reinstated?

A. No.

Q. And in the opinion that you provide in your report, is it your opinion that Delaware law would provide for the reinstatement of a CEO who's been terminated?

A. If the termination resulted from a breach of fiduciary duty and after, in the case of a controller context, as we have here, after entire fairness review, what Delaware law would say is that the chancellor or the vice chancellor, whoever was sitting, one of the vice chancellors, has the authority from English common law to craft a remedy and there are no limits on the remedy that can be crafted except that that court cannot award -- award punitive damages.

So the object in equity is to craft a

remedy. There is the phrase that's often repeated every wrong has a remedy. And you're supposed, when you sit on that court, to fashion the appropriate one. That is an alternative, void the act and order the reinstatement.

Q. So your opinion on reinstatement is based on general equitable principles as applied by Delaware law?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. But in terms of case precedent, you're not aware of any Delaware court ever ordering the reinstatement of a terminated CEO; correct?

A. That's correct. Sadly, there's -- despite the -- what's sometimes referred to as the rich body of Delaware law, every context doesn't have a precedent.

Q. Are you aware of cases that hold the converse, that a terminated employee should not be reinstated?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: I have no idea how to answer that because I don't know what the

context would have been. Do I know of a case under these circumstances that are in

issue? If depending on how the facts are resolved ultimately that has ever resulted under Delaware law as a reinstatement of a terminated CEO? I cannot point to a particular case. It's a -- it's an extraordinarily unusual fact situation.

BY MR. SEARCY:

Q. In terms of the process that was used to terminate Mr. Cotter, Jr., in your opinion, what are the deficiencies in the process that was used?

A. Well, the vote, as I recall it, was not a majority of independent and disinterested directors. The leadup to the event that caused the termination had been preceded by a committee that was with story acting as an ombudsman to help resolve issues within the family to improve performance. It had its suggested final review date of June 30th, as I remember.

There was an accelerated process to review the performance and to put on the agenda for a directors meeting the status, as I recall the phraseology, of the CEO, meaning Mr. Cotter.

There are ample suggestions of facts

from which the inferences can be drawn, alleged facts depending on what's ultimately concluded to be true, that there had been people already made up their mind and that the purpose of that agenda item was to terminate him. It wasn't to explore alternatives.

Tab 20

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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

APPEARANCES:

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

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

(Court was called to order)

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

THE COURT: What?

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

THE COURT: What order?

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

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

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

THE COURT: We're missing an important group.

MR. FERRARIO: That's true.

(Pause in the proceedings)

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

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

MR. WAITE: Correct.

(Pause in the proceedings)

THE COURT: What time were we going to start?

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

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

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

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

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

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

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

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

(Pause in the proceedings)

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

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

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

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

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

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

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

THE COURT: Do you have people attending by phone?

MR. FERRARIO: Excuse me?

THE COURT: Do you have people attending by phone?

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

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

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

THE COURT: Who's on the telephone?

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

THE COURT: Lovely. Thank you.

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

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

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

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

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

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

THE COURT: Maybe.

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

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

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

THE COURT: You should have lived it.

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

THE COURT: You were here, yeah.

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

THE COURT: Not a former CEO.

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

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

MR. FERRARIO: But --

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

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

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

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

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

MR. FERRARIO: I did.

THE COURT: Okay.

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

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

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

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

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

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

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

MR. FERRARIO: They could tell him.

THE COURT: Yeah.

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

THE COURT: Correct.

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

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

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

THE COURT: Well, it depends --

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

THE COURT: Depends upon what the testimony is.

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

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

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

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

MR. FERRARIO: Okay.

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

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

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

to "provided to"?

MR. FERRARIO: I think if --

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

MR. FERRARIO: Right.

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

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

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

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

them. Because it's changed over time.

MR. FERRARIO: Okay. But the briefing --

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

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

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

MR. FERRARIO: I understand.

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

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

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

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

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

THE COURT: Okay.

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

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

MR. FERRARIO: Thank you, Your Honor.

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

MR. KRUM: I do, Your Honor.

THE COURT: Okay.

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

MR. KRUM: Right. Thank you.

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

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

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

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

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

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

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

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

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

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

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

ordered.

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

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

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

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

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

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

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

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

THE COURT: But he used to be a director.

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

THE COURT: All right.

MR. KRUM: Kane objects, my client objects.

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

MR. KRUM: Right.

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

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

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

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

THE COURT: Okay.

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

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

resolved. So that issue remains outstanding.

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

THE COURT: Those were my questions for you.

MR. KRUM: Thank you.

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

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

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

MR. KRUM: They have dates.

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

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

THE COURT: What is it?

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

THE COURT: But when do they start?

MR. TAYBACK: They've started.

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

It keeps going.

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

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

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

MR. TAYBACK: Correct.

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

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

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

THE COURT: Right. No. They --

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

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

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

break for a jury.

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

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

MR. TAYBACK: That's right.

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

Mr. Ferrario.

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

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

MR. FERRARIO: Right.

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

MR. FERRARIO: Right. So --

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

MR. FERRARIO: Who, Lenhard?

THE COURT: Lenhard.

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

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

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

THE COURT: That's a problem.

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

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

MR. FERRARIO: What?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Where are you going?

THE COURT: I don't have a courtroom.

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

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

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

THE COURT: Judge Togliatti has a courtroom. She's

not the chief judge.

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

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

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

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

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

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

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

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

MR. FERRARIO: Do we still have the CLC?

THE COURT: No, we do not.

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

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

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

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

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

MR. FERRARIO: Okay. Then that moots it.

THE COURT: Okay.

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

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

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

THE COURT: Adams?

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

THE COURT: Tompkins?

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

THE COURT: 30(b)(6)?

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

UNIDENTIFIED SPEAKER: It's limited to two hours.

THE COURT: Five experts, all --

MR. FERRARIO: Oh. It's limited to two hours. Excuse me.

THE COURT: I limited it to two hours.

MR. FERRARIO: And then --

THE COURT: Five experts all over the country.

MR. FERRARIO: Five -- these expert depos have been averaging -- I think the longest was about six, seven hours, and the others have been three, four hours, they haven't been that long.

THE COURT: So let me cut to the chase. When are you going to produce the rest of the documents that we discussed this morning and resolve the issue with Mr. Krum about whether he believes your last production pursuant to the order compelling you was sufficient or not?

MR. FERRARIO: I guess what I'm troubled with, and I talked to Ms. Hendricks, who's here, and she's been handling this primarily, there was no meet and confer. We did produce the documents relating to the May 31st expression of interest letter. That's what we were ordered to do. The points he making -- he says, well, this is an ongoing saga, okay. You know, another expression comes in here. He references what's in the paper. So when does it stop? I've already had that discussion with Your Honor. His client essentially objects to

every decision that's made by the board.

THE COURT: Yes.

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

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

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

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

MS. HENDRICKS: They're not.

MR. FERRARIO: They're not all set.

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

MR. FERRARIO: We need to get those set.

THE COURT: You need to get them finished.

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

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

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

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

THE COURT: You're not done.

MR. FERRARIO: Huh?

THE COURT: You're not done.

MR. FERRARIO: Your Honor --

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

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

THE COURT: Okay.

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

THE COURT: So if you're going to produce the

documents, you'll produce them in a week or 10 days?

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

THE COURT: Great. That's easy.

MR. FERRARIO: That's it.

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

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

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

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

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

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

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

MR. FERRARIO: No, that --

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

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

THE COURT: Right.

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

THE COURT: Me, too.

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

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

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

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

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

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

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

MR. SEARCY: Your Honor, we blocked --

THE COURT: Wait. Wait, Mr. Searcy.

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

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

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

THE COURT: Sure. So you think --

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

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

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

THE COURT: Really.

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

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

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

MR. FERRARIO: Yes.

THE COURT: Best of all possible worlds.

MR. FERRARIO: Best of all worlds.

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

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

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

MR. FERRARIO: Oh.

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

MR. FERRARIO: I think we can do it.

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

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

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

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

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

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

MR. FERRARIO: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Mr. Krum --

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

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

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

What else, Mr. Searcy?

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

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

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

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

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

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

THE COURT: Wait.

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

THE COURT: I understand what you're saying.

MR. FERRARIO: Okay.

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

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

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

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

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

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

MR. FERRARIO: Yeah. Jumping around.

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

THE COURT: All the remaining experts?

MR. SEARCY: That's right.

THE COURT: Mr. Krum.

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

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

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

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

the percipient witnesses.

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

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

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

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

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

THE COURT: Okay. Anything else?

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

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

MR. KRUM: Correct.

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

THE COURT: It was.

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

THE COURT: And I granted it.

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

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

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

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

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

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

MR. KRUM: I'm sorry.

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

MR. KRUM: Correct.

THE COURT: That's a different issue.

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

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

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

was framed.

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

MR. KRUM: Okay.

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

MR. KRUM: Right.

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

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

MR. FERRARIO: We will.

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

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

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

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

MR. FERRARIO: Oh, that's all?

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

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

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

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

MR. FERRARIO: Okay. So --

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

MR. FERRARIO: Right.

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

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

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

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

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

THE COURT: We all know that.

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

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

what I'm going to be able to do for you. I'll be able to tell you on December 1st.

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

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

MR. FERRARIO: We understand that.

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

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

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

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

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

MR. FERRARIO: I think we are.

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

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

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

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

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

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

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

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

MR. TAYBACK: It's a little different --

THE COURT: I know.

MR. TAYBACK: -- but it's also not really a true M&A case.

THE COURT: I know.

MR. TAYBACK: This is a letter that was received unsolicited that is not even in and of itself an offer. And as -- that is to say, it couldn't be accepted. It was an invitation to negotiate, to do due diligence, and to meet. But it's not the valid -- it's not a valid legal basis for a claim. And you don't I think need to look any further than the argument that was just made by Mr. Krum about the other things that he wants, referring to the public article and the idea that there's an additional letter and he has not -- his client has not received it. The fact is that if there is a dialogue, even if it's a subsequent letter following on the heels of what is clearly not an offer that could have been accepted, there's no way to stake out a claim that it's a breach of fiduciary duty by any director to have done something different, to have not done something more.

We'll start with the fact that there's certainly no obligation to have purported to accept something that couldn't be legally accepted. And the letter isn't terribly long or terribly complicated, but it isn't an offer. It's an invitation to have a discussion about an offer that they hoped

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

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

So that begs the question what is it that would be the damages, what would be the component of the wrong even if it was a breach, even if you could articulate that it was a breach of some fiduciary duty to have done something more with this offer -- this alleged offer. What's the harm to the company? Well, you can't say that there's harm to the company, because there's no obligation to have done anything. So there is no harm to the company. And if you were to say,

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

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

fiduciary duties?

MR. TAYBACK: Yes.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Uh-huh.

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

THE COURT: Yes.

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

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

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

MR. TAYBACK: That's correct.

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

MR. TAYBACK: That's absolutely correct.

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

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

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

MR. TAYBACK: If I'm --

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

MR. TAYBACK: I did, too.

THE COURT: Okay.

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

THE COURT: Okay. Anything else?

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

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

them.

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

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

MR. KRUM: Yes.

THE COURT: What are you going to ask them?

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

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

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

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

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

THE COURT: I know.

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

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

Okay. What else?

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: What's that?

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

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

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

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

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

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

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

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

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

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

May I just grab my other binder?

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: Anything else? No other questions?

THE COURT: Those are all my questions for you.

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

THE COURT: You want to say something, Mark?

MR. FERRARIO: Just very briefly.

MR. KRUM: Your Honor --

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

MR. KRUM: They're a nominal defendant.

THE COURT: Mr. Krum.

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

MR. FERRARIO: I can tell you that --

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

MR. FERRARIO: I'm not.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: He's part of the family.

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

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

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

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

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

MR. FERRARIO: No.

THE COURT: It's not like that?

MR. FERRARIO: No.

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

MR. FERRARIO: Absolutely not.

THE COURT: Okay.

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

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

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

THE COURT: Never mind. Keep going.

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

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

plaintiffs that resolved most of those claims.

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

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

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

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

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

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

THE COURT: I'm aware of that.

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

THE COURT: Anything else?

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

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

THE COURT: Yes.

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

and argue other motions, as well.

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

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

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

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

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

MR. KRUM: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. KRUM: And so --

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

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

THE COURT: Anything else?

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

THE COURT: Briefly, please.

MR. TAYBACK: Briefly, yes.

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

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

repeat myself.

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

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

It is my belief that the independence issue needs to be evaluated on a transaction- or action-by-action basis, because you have to separately evaluate the independence as related to each. And while there may be facts that overlap between different actions that apply to others, I can't

evaluate it in a vacuum. So you're going to give me more information like I've asked for, Mr. Krum, okay, following the completion of that.

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

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

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

MR. TAYBACK: Yes.

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

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

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

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

THE COURT: Not the question, questions.

MR. TAYBACK: Questions.

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

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

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

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

With that I can sit down.

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

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

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

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

THE COURT: [Inaudible].

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

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

MR. FERRARIO: All right. So --

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

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

THE COURT: Now Mr. Krum.

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

THE COURT: Absolutely.

MR. KRUM: Very well.

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

MR. KRUM: Understood.

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

MR. KRUM: Understood.

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

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

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

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

THE COURT: I know.

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

or the other first?

THE COURT: I don't care.

MR. TAYBACK: I'll start.

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

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

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

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

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

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

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

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

The third point here goes to the undisputed facts.

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

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

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

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

The fact is the undisputed facts, the ones that the plaintiff cites and rely upon, support that decision. This family could not get along. There was a quote earlier about the communications between plaintiff and Mr. Kane, and there was a reference to an email with Mr. Storey, as well, where Mr. Storey says exactly as Mr. Ferrario said, look, I'm not sure we necessarily solve the problem by virtue of -- I'll say it's Exhibit 13, I'm not sure we necessarily solve the problem

by terminating the plaintiff, we could terminate all three. And in fact that was a not unreasonable thing to contemplate. But contemplating something, contemplating alternatives and then making a decision is exactly what you entrust to boards. And this is the, the prototypical decision that a board must be entrusted with, that is to say, the decision to terminate a CEO. The fact is they can do it. Their agreements and the law say they can do it. The caselaw all says it can be done. And there's no analysis, no fairness evaluation, no determination about it being a question of fact for the jury, because there is no question of fact for the jury. It's permissible. And it's permissible for very good reasons.

THE COURT: Thank you.

Mr. Ferrario.

MR. FERRARIO: Very briefly, Your Honor.

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

THE COURT: An emergency motion for a hearing on the

probate case that we never had.

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

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

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

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

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

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

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

MR. FERRARIO: Delaware law.

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

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

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

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

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

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

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

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

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

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

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

make sure when you said the --

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

MR. RHOW: Understood.

THE COURT: Is that okay?

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

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

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

THE COURT: I do have it someplace else.

MR. RHOW: Understood, Your Honor.

THE COURT: Okay.

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

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

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

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

So when the business judgment rule is rebutted, as

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

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

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

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

I'm just going to take a couple minutes and just go through the short outline of the facts. In March 2015 the five non-Cotter directors appointed Director Storey as the ombudsman. You're familiar with that. On May 19th, two days before the first board meeting, the May 21 board meeting, special board meeting, supposedly, Ellen Cotter sent out an agenda, the first item of which was, quote, "status of president and CEO." And this isn't clear from our papers, I

don't think, but you'll see when we get there, to the evidence, there were other items that talked about status of this executive and status of that executive. But as it turned out, the only one that was -- "status" meant "terminate" was the plaintiff.

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

So the meeting continues to May 29th. What happened between May 21 and May 29th? The lawyer representing the Cotter sisters in the California Trust action sends a document to the lawyer representing plaintiff in that action, here's a document your client needs to accept to avoid being terminated. So on the morning of May 29th plaintiff tries to discuss the document and negotiate terms with his sisters. They say, no, just take it or leave it. The supposed board meeting reconvenes. Lots of talk, it concludes early in the afternoon of the 29th. According to the contemporaneous handwritten notes of Tim Storey, which he confirmed in his

testimony in this case, the three of them, Adams, Kane, and McEachern, told Jim Cotter, Jr., that, you have to go settle your disputes with your sister and if you don't we're going to reconvene at 6:00 o'clock tonight, the Friday before Memorial Day, telephonically, and proceed with a vote to terminate you.

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

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

So, you know, the briefing was somewhat like ships

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

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

the manner in which they've conducted themselves throughout.

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

THE COURT: Thank you.

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

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

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

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

MR. FERRARIO: Your Honor, just very quickly.

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

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

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

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

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

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

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

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

THE COURT: Okay. Are you done?

MR. FERRARIO: Yes.

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

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

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

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

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

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

please --

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

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

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

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

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

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

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

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

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

MR. SEARCY: Okay.

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

THE COURT: Yes, we are.

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

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

THE COURT: Okay. Anything else?

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

THE COURT: Okay. Duarte-Silva.

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

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

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

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

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

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

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

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

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

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

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

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

disagrees with one of the conclusions of Mr. Osborne.

THE COURT: Anything else?

MR. KRUM: No. Thank you.

THE COURT: Okay. Anything else?

MR. SEARCY: Yes, Your Honor.

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

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

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

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

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

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

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

THE COURT: Thanks.

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

MR. FERRARIO: Did you read his report?

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

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

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

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

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

THE COURT: Okay.

MR. FERRARIO: Where are you at?

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

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

THE COURT: That is correct.

MR. FERRARIO: -- then --

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

MR. FERRARIO: That's under Delaware law, though.
THE COURT: It's under Nevada law, too.
MR. FERRARIO: No. He's only testified under Delaware law.
THE COURT: Then tell me why these conclusions are not the same as what they'd be under Nevada law. I understand your problem and your concern, but the framework is --
MR. FERRARIO: Well, I'll tell you what. There's not a case in Nevada that uses the entire fairness doctrine. Not one.
THE COURT: It doesn't use that term. It says you evaluate the entire transaction.
MR. FERRARIO: What's the transaction?
THE COURT: In this case there are multiple different activities that we may be submitting questions to the jury on.
MR. FERRARIO: What's the transaction? Just speak to terminating the CEO. Is that a transaction?
THE COURT: Yes.
MR. FERRARIO: Then who's on --
THE COURT: It's an activity.
MR. FERRARIO: Who's on what -- wow. Where does activity show in the statute or in a case? This is part of the problem, Judge.
THE COURT: So, Mr. Ferrario, I'm back to the we're

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

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

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

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

THE COURT: No, it's not different.

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

MR. TAYBACK: Right.

MR. FERRARIO: He didn't come at this from an

industry practice standpoint. He didn't say, I serve on a number of boards. He said, I am giving you --

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

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

THE COURT: Absolutely it's my job.

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

THE COURT: I understand that.

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

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

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

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

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

MR. FERRARIO: Depending on what the deal is.

THE COURT: Sometimes.

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

THE COURT: Yes, there are some --

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

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

MR. FERRARIO: 78.140 dictates exactly what --

THE COURT: Right.

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

THE COURT: Right. But --

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

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

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

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

report.

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

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

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

THE COURT: I didn't say that.

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

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

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

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

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

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

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

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

THE COURT: Absolutely.

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

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

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

THE COURT: Uh-huh. We did.

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

THE COURT: Mark, we all look at that, because that's what we look at. That's what governs our corporations. That's our corporate --

MR. FERRARIO: I agree.

THE COURT: But we have case decisions from our

Nevada Supreme Court that supplement the statutory language.

So I've made my ruling on that. If there's something else you want to talk about, I can talk about it as soon as I finish my 4:30 conference call with whichever group of folks needs to talk to me.

MR. SEARCY: Your Honor, if I may, we did have an additional point on Chief Justice Steele. However, I don't believe you rendered an opinion or gave a ruling on any of the other experts.

THE COURT: It's denied on all the other experts.

MR. SEARCY: Denied on all the others. All right.

THE COURT: So did you want to ask me another question on Justice Steele?

MR. SEARCY: No. But go ahead.

MR. RHOW: I was just going to say we -- actually, Mr. Gould, on Mr. Gould's --

THE COURT: You joined in that motion.

MR. RHOW: I know. But he also has his separate motion for summary judgment.

THE COURT: I'm not on your motion for summary judgment yet. It's still on my list.

MR. RHOW: Okay. I'm just making sure. You're asking if there's other things.

THE COURT: Well, yeah. There's a lot of other things.

MR. RHOW: Understood.

THE COURT: But I'm running out of time.

MR. KRUM: Your Honor, what's going to be next? I'm running out of gas. I need to prepare.

THE COURT: I'm going to go to the Ellen Cotter appointment as CEO and compensation motion.

MR. KRUM: Okay. Thank you.

(Court recessed at 4:27 p.m., until 4:40 p.m.)

THE COURT: So we're on the issues related to appointment of Ellen Cotter, compensation of Ellen and Margaret Cotter, and those issues. And I think there's two or three different motions that are all interrelated on these.

MR. TAYBACK: These would be Motions 5 and 6, and there is a number of issues that are all interrelated.

THE COURT: Okay.

MR. TAYBACK: So I'll --

THE COURT: I'm not big on numbers, I'm big on subjects.

MR. TAYBACK: I understand. And I'll --

THE COURT: So it's hard for me on numbers.

MR. TAYBACK: I'll address them. There's probably four or five issues.

THE COURT: Okay.

MR. TAYBACK: Our motion that we entitled Number 5 was the CEO search and appointment ultimately hiring of Ellen

Cotter. You know, I'll be relatively succinct here, which is to say it's the -- it's the tag-along to the firing of Jim Cotter, Jr. Like that, there's no case which finds a board liable for hiring a long-time executive who runs -- who has run for 16 years at the time of her hiring one of the primary two business lines of the company and had served as an interim CEO such that the board actually saw how she performed. And every director, excluding the plaintiff and Ellen Cotter herself, supported her hiring. The only attack on that decision is this kind of ongoing what I'll call amorphous and shifting claim that directors lacked independence. He hasn't articulated, other than the general claims of lack of independence, that a majority of the directors had some specific interest in the hiring of Ellen Cotter or lacked independence.

THE COURT: It's the majority of directors participating in --

MR. TAYBACK: Yes.

THE COURT: -- in a process, whether it's a decision or an action, that I have to evaluate --

MR. TAYBACK: Correct.

THE COURT: -- not the majority of all the directors.

MR. TAYBACK: Correct.

THE COURT: Okay.

MR. TAYBACK: And so you're excluding only plaintiff and Ellen Cotter. The remainder of the directors -- okay. And the question, though, is what's the allegations that say that the vote of Michael Wrotniak, to take an example, or any director on any issue -- and now I'm going to look at this particular issue -- amounted to a breach of fiduciary duty. And there just isn't -- there isn't fact -- there aren't facts that have been proffered that say, you know what, with respect to this decision this director was -- lacked independence because of this. We've heard the generalized allegations that Guy Adams supported Margaret and Ellen Cotter because he thought that he might get paid, we've heard generalized allegations about some of the others, Uncle Ed Kane; but those generalized allegations of interest don't relate to the transaction that is being looked at. And I'll call it a transaction even though it's not a transaction, it's a decision.

THE COURT: And that's why I tried to use all sorts of different words, and I don't know which word to use, but it's an activity of some sort.

MR. TAYBACK: I agree with that. I do think that there's a difference, and so I've tried to be careful to not call it a transaction, because I think the law --

THE COURT: Yeah. Because they're not really transactions.

MR. TAYBACK: Because they're not. And I think the law is different when it's a transaction, because the framework for evaluating interestedness, frankly, has more applicability when it's a transaction. That's what I say. And I see you shaking your head, but I do --

THE COURT: Yeah. I agree with you. It's a hard issue. That's why we're having this long afternoon and I didn't make you come on a motion calendar where you had 10 minutes to argue all 40 or so motions you filed.

MR. TAYBACK: The second point that I would make, and really the last point I would make, on the identification and hiring of Ellen Cotter is that the -- that the nature of the claim really only sounds, I think, in corporate waste. And the standard for determining corporate waste, that is to say, the decision I think is really I think inarguable that there's the kind of latitude one would have on these undisputed facts given who she was and her connection to the company that that's a reasonable decision.

The only question is this hiring and then termination of the external search firm, Korn Ferry. And there's an argument that's --

THE COURT: In mid search.

MR. TAYBACK: In mid search -- well, not mid search. At the point of which they made the decision.

THE COURT: Near the end of the search, yeah.

MR. TAYBACK: At the point at which they made a decision. And whether there's -- I mean, I don't -- haven't seen any case or I haven't seen any theory where a company ever has an obligation to hire a search firm or to conclude the search once they've identified a candidate that they want to hire. The fact is that happens all the time. But whether it does or doesn't doesn't matter. Because, if you look back even to the plaintiff's hiring, there was no search. There wasn't a search firm at all. He was hired because he was the son of the founder. And he doesn't seem to be complaining about that. And so I don't know that the legal term is a pot-kettle issue, but it's definitely the pot calling the kettle black. The fact is they engaged an indisputably reputable search firm, they engaged in a search, and they decided on the sitting CEO, who they always are going to know better than an external candidate. That's not something that can be second guessed. And I don't think on these facts it should be second guessed. And to the extent it's a corporate waste claim the standard, as you well know, is quite high for that.

Do you want me to address the other issues, as well, while I'm up here?

THE COURT: Yeah. Because they're all interrelated.

MR. TAYBACK: Okay. The I'll call them the other four issues which are really the subject of our Motion Number 6 is the estate's exercise of options, the appointment

of Margaret Cotter, compensation for Ellen Cotter and Margaret Cotter, and the -- there was an additional compensation voted for Margaret Cotter and Guy Adams.

Just to take them in order, with respect to the exercise of the -- the estate's exercise of options plaintiff really cites zero evidence. There's additional evidence that he's seeking regarding the advice of counsel upon which two directors sought. I don't know whether Your Honor's ruling with respect to 56(f) is going to apply here, but it would seem logically that your prior rulings probably dictate how you're going to come out on this one.

THE COURT: Maybe.

MR. TAYBACK: So I'm not going to spend much time on that -- or any more time. But I think that in fact the evidence, the undisputed evidence that's proffered supports summary adjudication of that as an issue.

With respect to the appointment of Margaret Cotter if you now say that it's the board's ultimate fiduciary duty to shareholders, including in this case this one shareholder who's been the terminated CEO, to not only evaluate the board's exercise of its fiduciary duties with respect to the hiring of the CEO or firing of a CEO, but now to subordinate executives, I think you're really entering the realm of micromanagement of a company.

The challenge here is she wasn't qualified because

she hadn't engaged in sufficient real estate-related activities. The fact is, and the undisputed facts are, she'd been affiliated with the company as a consultant through her own -- her own consulting entity that was by contract with the company had been running their live theater business for years, for 15 years, I think. Even though he just -- said in a prior motion plaintiff's lawyer said, well, the live theater business isn't even one of the two main lines, the fact is when he tried to go around or fire Margaret Cotter because he believed she mismanaged other litigation related to a show called "Stomp," the fact is he described -- plaintiff describe it as one of the most significant lines of business that the company had, which was why he was so agitated with how he perceived she handled that litigation, which ultimately came out successful and vindicated her position all along.

THE COURT: And that was the litigation over the lease of the theater; right?

MR. TAYBACK: Exactly.

THE COURT: Okay.

MR. TAYBACK: My point is with respect to the hiring of Margaret Cotter she -- the record shows and we identified in our motion three or four relevant documents and facts that show she had ample qualifications to be responsible for the real estate side of the business. It's a reasonable decision. The generalized attacks on the independence of the directors

who voted on that, who approved that don't warrant piercing into the facts to justify, you know, this decision is right or this decision is wrong at that level of decision making. It's a reasonable decision under the circumstances. It doesn't rise to the level of corporate waste, and it definitely does not satisfy -- based on the evidence that the plaintiff has proffered satisfy the high standard for director liability. And that's true for all of these.

With respect to the compensation decisions obviously the argument is the same. These are decisions made by and endorsed by a subdivision or subcomponent compensation committee, and it's done through ordinary channels. The undisputed evidence is with respect to Ellen Cotter and Margaret Cotter's compensation they hired an external firm, Towers Watson. Willis Towers Watson is actually the full name. And they came in they do a study and they say, we've looked at these companies and we think that for this purpose they are comparable and they should be -- kind of give you a guide for what range you fall within. And they fall well within that range. I think it's the 25th percentile. Just objectively looking at that determination and the process in which it made, the general allegations that a director was more or less favorable to one of them on that issue doesn't say that everything that happened then goes to a trial. I think the undisputed facts on that issue, the compensation

decisions, warrant summary judgment.

The same is true with the one-time payment of $200,000 the Margaret Cotter which was intended and identified in the minutes, undisputed and not debated -- or rather debated, but not disputed, to compensate her for work that she did outside the consulting arrangement. She did work for a period of time with respect to -- ironically, given the plaintiff's contention that she didn't have experience -- with the land entitlements to one of the historical buildings that's being redeveloped in New York under her oversight.

And the same is true with respect to the single payment to Guy Adams. Interestingly, plaintiff himself approved a single payment to all the directors based on the extraordinary work they had done up to a point in time while he was the CEO. He approved that, including $75,000 to Tim Storey and $25,000 to the other directors because the tumult within the company and the family upon the death of the father warranted the directors frankly spending a lot more time on the business of the company than they had ever had to so before, and it justified that payment. Not extraordinary, well within the board's discretion. The generalized allegations that he's put forward about people be interested don't warrant overturning that. And the fact is this payment to Mr. Adams, who undertook a lot of other activities later on, the only difference between this one the one that he

previously approved is, oh, yeah, he'd been terminated. So if there was anybody who was interested in that transaction that had an axe to grind, it was the plaintiff.

I believe that addresses all of the outstanding issues on the motions. So unless you have a specific question --

MR. FERRARIO: Your Honor, I think Mr. Tayback started off by saying --

THE COURT: Yes, I'm probably going to grant 56(f) relief if Mr. Krum asks it.

MR. FERRARIO: Okay. And that's -- because then otherwise we'll just come back and argue this, because --

THE COURT: I have that note here. I'm waiting for Mr. Krum to say it, and then I'm going to wait for him to say it and then once he says --

MR. FERRARIO: Fine. Then I'm going to be quiet. I would point out, though, that if you listen to the dialogue here -- and we'll -- I'll shut up after this.

THE COURT: No, you won't.

MR. FERRARIO: I will. It shows you why courts don't get involved. These are discretionary, because this isn't like --

THE COURT: Mr. Ferrario, I know why I don't get involved in management. I've managed them in settlement conferences as part of the resolution process of these things.

I got stuck helping manage one, so I don't ever want to do it again.

MR. FERRARIO: Because this is not --

THE COURT: But I do want parties to be accountable and perform in a manner that appears to be consistent with Nevada law. So there may be something the parties decide to do between now and when I see them next.

MR. FERRARIO: It's the Nevada law we're waiting for, though.

THE COURT: But the Nevada law is the Nevada Supreme Court. And I keep telling you what I think the Schoen case says when you have interested directors.

MR. FERRARIO: Well, we're going to go back and read that. This isn't --

THE COURT: Interested directors, lots of -- you lose a lot of protections.

MR. FERRARIO: I think we'll be back.

THE COURT: And interested directors is a very intense factual analysis.

Go.

MR. KRUM: Thank you, Your Honor.

THE COURT: Are you going to ask for 56(f) relief?

MR. KRUM: Yes, Your Honor.

THE COURT: All right. It's granted on Motions 5, 6, and there was one other one related to --

MR. TAYBACK: It's 3, Your Honor. It was related to the unsolicited offer I believe is the one you identified previously.

THE COURT: No. 5 and 6 were the only two we're talking about right now; correct?

MR. TAYBACK: Oh. Yes. Got it. Yeah. 5 and 6.

THE COURT: Okay. So 5 and 6. So there. It's 4:54.

So here's the question. What do you want to do with the rest of them? Is everybody agreeable the motions to seal that are on calendar today can be granted because they include confidential and significant financial information that needs to remain protected given the company's activities?

MR. FERRARIO: Yes, Your Honor.

MR. KRUM: Yes.

THE COURT: Okay. So all the motions to seal are granted. Or redact. Seal and/or redact.

So what do you want to do next? Because I've got through in almost four hours not much.

MR. RHOW: Everyone's looking at me. I would love to. I hope we're last and least in terms of liability.

THE COURT: Well, it's 4:55.

MR. RHOW: Yeah. So, look, I want it to be heard and I do want to argue it, but --

THE COURT: Okay. Well, but you're not the last

one.

MR. RHOW: I understand. So --

THE COURT: I mean, I've got tons of them.

MR. RHOW: -- I don't want to be squeezed in --

THE COURT: But I am breaking at 5:00 o'clock, so you've got five minutes.

MR. FERRARIO: Do you want just come back on the 1st when we're going to come back anyhow?

MR. KRUM: I can't come back on the 1st.

MR. FERRARIO: Of December?

MR. KRUM: Oh. December.

MR. FERRARIO: I think that's when she reset --

MR. KRUM: Yes. Of course.

THE COURT: 12/1. 12/1.

MR. FERRARIO: We're going to get all this done, read, supplement, and come back on the 1st.

THE COURT: That was the hope. But I wasn't sure you were physically going to be here on 12/1. And here's the reason I'm not sure you're physically going to be here on 12/1. I don't have the same hope and security that you do in believing that everyone will appear for deposition in the fashion that you guys think they will. I just as a person who practiced in complex litigation with lots of people, I could never get them all to show up when they were supposed to. So -- as a judge I can't get them to show up when they're

supposed to. I don't know if you heard the conference call I just had with my trial I finished two months ago. They still can't figure out when to come back for the post-trial motions.

MR. FERRARIO: We're going to get it done.

THE COURT: I don't believe you. So do you want to have a status conference where you guys together tell me whether you want to argue anything on 12/1, or not? Will you all get together and tell me that a couple days ahead of time so I can at least re-read what needs to be read before 12/1?

MR. FERRARIO: Yes.

MR. KRUM: Of course.

THE COURT: And if there are going to be supplemental briefs, that I can pull the supplemental briefs and read them?

MR. FERRARIO: Yes.

THE COURT: So when are you going to tell me that?

MR. FERRARIO: Three weeks out set a status conference?

THE COURT: No. I don't want you to -- I want you to do depositions. I don't want you coming back here. I don't want to see you for a long time.

MR. FERRARIO: What do you want, a week before the hearing?

THE COURT: I would like a few days, at least a few days before the hearing you to say, yes, Judge, we're coming

and we're arguing A, B, and C --

MR. FERRARIO: Okay.

THE COURT: -- or, no, Judge, we're not coming, can you give us a new date.

MR. TAYBACK: I think a week before --

THE COURT: Well, let's see what you guys negotiate. I don't really care what it is as long as you do it a couple of days before.

MR. FERRARIO: We'll know by the 23rd.

MR. KRUM: What day is --

MR. FERRARIO: That's the day before Thanksgiving.

THE COURT: And you all will send an email copied on each other to my people saying, Judge, we're either coming on December 1 and here's what we're doing, or, we're not coming on December 1 and can you give us a different date.

MR. KRUM: Yes.

THE COURT: Plan.

MR. KRUM: Thank you, Your Honor.

THE COURT: Good luck on your discovery.

MR. KRUM: Thank you.

THE PROCEEDINGS CONCLUDED AT 4:56 P.M.

* * * * *

CERTIFICATION

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

AFFIRMATION

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

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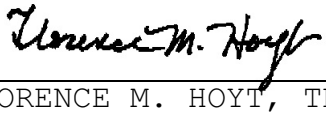
Las Vegas, Nevada 89146



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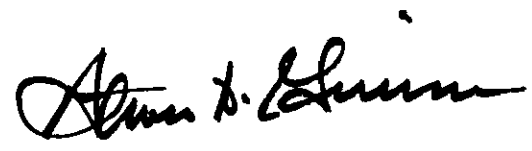

CLERK OF THE COURT

ORDR
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Attorneys for Plaintiff
James J. Cotter, Jr.

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc.,

Plaintiff,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG TOMPKINS, and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

Case No. P-14-082942-E
Dept. No. XI

Case No. A-16-735305-B
Dept. No. XI

Jointly Administered

Business Court

[PROPOSED] ORDER REGARDING DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT NOS. 1–6 AND MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY

Date of Hearing: October 27, 2016
Time of Hearing: 8:30 a.m.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

THESE MATTERS HAVING COME BEFORE the Court on October 27, 2016, Mark G. Krum appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); H. Stanley Johnson, Christopher Tayback, and Marshall M. Searcy appearing for defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding and Michael Wrotniak; Mark E. Ferrario and Kara Hendricks appearing for Reading International, Inc.; and Ekwan Rhow, Shoshana E. Bannett appearing for William Gould, on the following motions:

- Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's Termination and Reinstatement Claims;
- Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence;
- Individual Defendants' Motion for Partial Summary Judgment (No. 3) On Plaintiff's Claims Related to the Purported Unsolicited Offer;
- Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff's Claims Related to the Executive Committee;
- Individual Defendants' Motion for Partial Summary Judgment (No. 5) On Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO;
- Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re: Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams; and
- Defendants' Motion *In Limine* to Exclude Expert Testimony of Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty;

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IT IS HEREBY ORDERED THAT the Motion for Partial Summary Judgment No. 1 is DENIED. There are genuine issues of material fact as to the issues related to interested directors participating in the process.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to Motion for Partial Summary Judgment No. 2, and supplemental briefing will be discussed once the relevant discovery is complete. The independence issue needs to be evaluated on a transaction or action-by-action basis, because the independence related to each needs to be separately evaluated; even though facts overlap, the Court cannot evaluate this in a vacuum. Motion for Partial Summary Judgment No. 2 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to Motion for Partial Summary Judgment No. 3, because depositions have not been completed and the relevant documents have not been produced. Motion for Partial Summary Judgment No. 3 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Motion for Partial Summary Judgment No. 4 is GRANTED IN PART. As to the formation and revitalization (activation) of the Executive Committee, the motion is GRANTED; as to utilization of the committee, the motion is DENIED. Formation and revitalization includes a decision by the company to make use of their previously dormant Executive Committee and put people on that Executive Committee.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for Partial Summary Judgment No. 5. Motion for Partial Summary Judgment No. 5 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for Partial Summary Judgment No. 6. Motion for Partial Summary Judgment No. 6 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT the Motion *in Limine* to Exclude Expert Testimony of Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty is GRANTED IN PART. With respect to Chief Justice Steele, he may testify only for the limited purpose of

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identifying what appropriate corporate governance activities would have been, including activities where directors are interested, including how to evaluate if directors are interested. As to Dr. Finnerty, the Motion *In Limine* was WITHDRAWN. As to the other experts, the motion is DENIED.

DATED this 20 day of December, 2016.

DISTRICT COURT JUDGE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By:*/s/ Mark G. Krum*
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Tab 22

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Attorneys for Respondent and
Counter-Claimant
JAMES J. COTTER, JR.

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN

READING INTERNATIONAL, INC.,

Claimant,

v.

JAMES J. COTTER,

Respondent.

JAMES J. COTTER,

Counter-Claimant,

v.

READING INTERNATIONAL, INC., a Nevada corporation; and DOES 1 through 100, inclusive,

Counter-Respondents.

AAA Case No. 01-15-0004-2384

RESPONDENT AND COUNTER-CLAIMANT JAMES J. COTTER, JR.'S FIRST AMENDED COUNTER-COMPLAINT

Arbitration Date: None

JAMES J. COTTER, JR.'S FIRST AMENDED COUNTER-COMPLAINT

Separate from his defenses to RDI's claims against him, Respondent and Counter-Claimant, James J. Cotter, Jr. ("James Jr.") hereby asserts the following counter-claims to the July 14, 2015 Statement of Claim filed by Claimant and Counter-Respondent Reading International, Inc. ("RDI").

INTRODUCTION

1. This Arbitration involves the atypical situation where an employer has brought an action against an executive it recently purported to terminate seeking only declaratory relief that its actions were lawful – which they were not.

2. In particular and without limitation, RDI directors Edward Kane, Guy Adams, Douglas McEachern, Ellen Cotter, and Ann Margaret Cotter (sometimes collectively "the Directors"), willfully and intentionally acted with malice and oppression in orchestrating a coup of the Board of Directors to terminate James Jr. as President and CEO of RDI in conscious disregard of James Jr.'s rights after he refused to acquiesce to their unlawful demands in an unrelated family trust dispute that is currently being litigated in the Los Angeles County Superior Court.

3. On June 12, 2015, James Jr. filed a shareholder derivative complaint for breach of fiduciary duty in Nevada state court on behalf of all RDI shareholders.

4. On July 14, 2015, RDI filed a demand for arbitration with the American Arbitration Association ("AAA") seeking declaratory relief in the form of a determination that its purported termination of James Jr. was valid and that, following his termination, James Jr. somehow materially breached the June 3, 2013 employment agreement between RDI and James Jr. (the "Employment Agreement").

THE PARTIES

5. James Jr. is the son of the late James J. Cotter, Sr. ("James Sr."), the former CEO and Chairman of the Board for RDI. James Jr. is also the brother of Margaret Cotter and Ellen Cotter.

6. RDI is a Nevada corporation principally focused on the development, ownership, and operation of entertainment and real estate assets in the United States, Australia, and New Zealand.

7. Ann Margaret Cotter ("Margaret") is the daughter of James Sr. and the sister of James Jr. and Ellen. Margaret, an attorney, previously worked as an Assistant District Attorney for King's County, New York. Margaret became an outside director of RDI on or about September 27, 2002. Margaret owns a company that provides theater management services to four live theaters indirectly owned by RDI through Liberty Theatres, of which Margaret is President. After ousting James Jr. from his positions as President and CEO, she assumed the role of Executive Vice President – Real Estate Management and Development – NYC of RDI.

8. Ellen Cotter ("Ellen") is the daughter of James Sr. and the sister of James Jr. and Margaret. Ellen, an attorney, practiced corporate law at White & Case in New York before joining RDI. Ellen serves as RDI's Chairman of the Board, President and CEO. Her position as Interim President and CEO commenced after she ousted James Jr. from those positions. Ellen became permanent President and CEO on January 8, 2016. Ellen became a director of RDI on or about March 13, 2013.

9. The true names and capacities, whether individual, corporate, associate or otherwise, of Counter-Respondents named and identified herein as Does 1 through 100, inclusive, are currently unknown to James Jr. Therefore, James Jr. sues said Counter-Respondents by such fictitious names and will amend his Complaint to show their true names and capacities upon ascertaining the same. Upon information and belief, each of the Counter-Respondents sued herein as Doe has some responsibility for the damages arising as a result of the matters herein alleged.

FACTUAL ALLEGATIONS

10. Edward Kane ("Kane") is an outside director of RDI.

11. Guy Adams ("Adams") is an outside director of RDI.

12. Douglas McEachern ("McEachern") is an outside director of RDI.

13. James Jr. became a director of RDI on or about March 21, 2002, and has been actively involved in managing RDI since mid-2005.

14. In 2004, at the request of his father, James Sr., James Jr. gave up his legal career and personal life in New York City and moved to central California to take over James Sr.'s citrus farm company. When James Jr. showed great promise in that role, James Sr. brought his son into RDI.

15. After 2005, James Jr. was involved in most RDI executive management meetings and privy to most significant internal senior management memos. In 2007, James Jr. was appointed Vice Chairman of the Board.

16. In or about April 2013, James Sr. informed James Jr. that he would recommend to the Board that James Jr. become President of RDI. James Sr. had just learned he had metastatic prostate cancer and wanted to move forward with the succession plan for RDI.

17. The Board appointed James Jr. as President, effective June 1, 2013, and RDI and James Jr. entered into the Employment Agreement. A true and correct copy of the Employment Agreement is attached as Exhibit 1.

18. Pursuant to the terms of the Employment Agreement, in the event of any termination of James Jr.'s employment without cause, James Jr. is entitled to the compensation and benefits which he was receiving for a period of twelve (12) months from such notice of termination.

19. James Jr. was appointed CEO by the Board on or about August 7, 2014, immediately after James Sr. resigned from that position.

20. James Sr. died on September 13, 2014.

21. James Jr.'s work as CEO was successful, as evidenced by the stock market. RDI stock was trading at $8.17 per share when James Jr. became CEO but, by approximately the end of 2014, had traded as high as $13.26 per share and, in the Spring of 2015, traded at over $14.45 per share.

22. After the death of James Sr., Ellen and Margaret commenced a trust and estate litigation ("the Trust Litigation") against James Jr., which involves the issue of whether Margaret or James Jr., or both, should control the RDI voting stock previously controlled by James Sr.

23. To pressure James Jr. to settle the Trust Litigation, Margaret and Ellen threatened to terminate his employment with RDI.

24. On Tuesday, May 19, 2015, Ellen distributed an agenda for a Board meeting scheduled for Thursday, May 21, 2015. The first action item on the agenda was entitled "Status of President and CEO[,]" an agenda item never previously discussed, namely the termination of James Jr. as President and CEO of RDI.

25. The May 21, 2015 Board meeting was adjourned to May 29, 2015.

26. On Wednesday, May 27, 2015, Texas attorney Harry Susman ("Susman"), one of the lawyers representing Margaret and Ellen in the Trust Litigation, transmitted to Adam Streisand ("Streisand"), an attorney representing James Jr. in the Trust Litigation, a proposal to resolve all disputes, including all trust and estate matters. The proposal was communicated on a "take-it or leave-it" basis. James Jr. was given a deadline of 9:00 a.m. on Friday, May 29, 2015 to accept the proposal.

27. Directors Ellen, Margaret, Adams, Kane, and McEachern told James Jr. that he must agree to the proposal covering all trust and estate litigation and, if he did not agree, then they would vote to terminate him as President and CEO of RDI.

28. On May 28, 2015, approximately one day after Ellen's lawyer sent the "take-it or leave-it" global proposal and one day before the Board was to reconvene to determine whether to terminate James Jr. as President and CEO of RDI, Kane (outside Director to the Board) told James Jr. to accept the offer to "end all of the litigation and ill feelings." By email on May 28, 2015, Kane told James Jr.: "I have not seen the [take it or leave it] proposal. I understand that it would leave you with your title, which is very important to you and which you told me was essential ... if it is take-it or leave-it, then I STRONGLY ADVISE YOU TO TAKE IT, ... if we can end all of the litigation and ill feelings, -- and their offer to keep you as CEO as a major concession -- ..."

29. On Friday, May 29, 2015, before the Board meeting reconvened, Margaret and Ellen met with James Jr. Margaret and Ellen confirmed to James Jr. that the proposal conveyed by Susman two days earlier was, in fact, offered on a take-it or leave-it basis and that, if James Jr. did not accept it, then the Board would terminate him as President and CEO. James Jr. tried to discuss proposed changes with them, to which Ellen and Margaret responded that they would accept no changes. They repeated that if James Jr. did not accept the agreement as proposed, then he would be terminated as President and CEO of RDI.

30. At or about 2:30 p.m. on May 29, 2015, James Jr. was advised that the Board meeting would be adjourned until at or about 6:00 p.m. that evening. James Jr. had until then to strike a global settlement of the Trust Litigation with Margaret and Ellen, otherwise he would be terminated as President and CEO of RDI when the Board meeting reconvened at or about 6:00 p.m. on Friday, May 29, 2015.

31. James Jr. complained to William Gould, Lead Director of the Board, and Director Timothy Storey regarding the threats made by Ellen, Margaret, Adams, Kane, and McEachern. James Jr. complained that he believed the threats to be unlawful, and that the Board of Directors had the authority to investigate, discover, or correct the unlawful conduct of Margaret, Ellen, Adams, Kane, and McEachern.

32. The meeting reconvened at or about 6:00 p.m. on Friday, May 29, 2015, at which point Ellen reported that James Jr. had agreed in principle to substantial terms. While no definitive agreement had been reached, their lawyers would provide further documentation.

33. On Wednesday, June 3, 2015, Susman sent a global proposal to Streisand. The document contained new terms previously not discussed, much less agreed to, by the parties.

34. On June 8, 2015, James Jr. advised Margaret and Ellen that he could not accept the take-it or leave-it global settlement proposal. Margaret responded that she would advise the Board.

35. On Friday, June 12, 2015, the Board meeting of May 29, 2015 was reconvened. The sole agenda item carried over from May 21, 2015 was the termination of James Jr. as

President and CEO of RDI. On Friday, June 12, 2015, the Board (by a 3-2 vote of the purportedly independent directors) voted to terminate James Jr. as President and CEO of RDI. All other agenda items were deferred until the next regularly scheduled Board meeting on June 18, 2015.

36. James Jr. maintains that his purported termination was and is legally ineffectual.

37. James Jr. properly exhausted his administrative remedies as required by law by filing a complaint with the Department of Fair Employment and Housing and receiving an immediate "Right to Sue" Notice on June 11, 2016. A true and correct copy of James Jr.'s Complaint and the Right to Sue Notice are attached hereto as Exhibit 2.

RDI, Through Its Board, Repeatedly Failed to Comply With The Express Terms Of James Jr.'s Employment Agreement

38. On June 15, 2015, Ellen, who was appointed interim CEO following the vote to terminate James Jr. as President and CEO, purporting to act on behalf of RDI yet without informing the Board, sent James Jr. written notice confirming his termination, effective June 12, 2015. The letter demanded that James Jr. resign from the Board or RDI would cease paying compensation and providing benefits to James Jr. A true and correct copy of the June 15, 2015 letter is attached as Exhibit 3. The Employment Agreement, however, does not require James Jr. to resign from the Board of Directors.

39. Pursuant to Section 10 of the Employment Agreement, James Jr. must have been terminated for cause in order for RDI to cease severance payments (including continuation of medical benefits for one-year). However, despite acknowledging the obligation of RDI to provide severance and benefits to James Jr. based on the assumption that his purported termination without cause was legally effective, RDI unilaterally terminated those obligations in violation of Section 10 which states:

> "The Company's obligations hereunder and the Executive's right to payments shall not be subject to any right of set-off, counterclaim or other deduction by the Company not in the nature of customary withholding, other than in any judicial proceeding or arbitration." Exh. 1 at pg. 3.

40. Notwithstanding James Jr.'s contractual right to continue receiving medical benefits for him and his dependents for twelve (12) months following any termination, on or about June 30, 2015, RDI terminated those benefits. Due to a health condition of his wife and his need to care for his three young children as well as himself, James Jr. was forced to immediately obtain alternate health coverage for him and his family.

41. On or about July 31, 2015, RDI informed James Jr. that it terminated payment of his other severance benefits, effective July 31, 2015.

42. On or about August 10, 2015, James Jr. sent RDI, through its counsel, written notice of its obligation to indemnify James Jr. for all of his business expenses, including the attorneys' fees and costs associated with this Arbitration initiated by RDI pursuant to express provisions set forth in his Indemnification Agreement and his Employment Agreement.

43. Notwithstanding the express indemnification provisions in these separate documents, RDI initiated this Arbitration and is seeking fees, despite their legal, contractual, and statutory obligation to cover the costs and fees associated with any litigation arising from James Jr.'s employment at RDI.

44. As of the date of the filing of this Counter-Complaint, RDI has failed to acknowledge its contractual obligations to indemnify James Jr.

FIRST CAUSE OF ACTION
(Breach of Contract)

45. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1 to 44, inclusive, as though said paragraphs were set forth in full herein.

46. During his employment with RDI, James Jr. entered into an Employment Agreement with RDI that obligated him to provide services to RDI in exchange for certain compensation. The Employment Agreement is a valid and enforceable contract between RDI and James Jr.

47. James Jr. performed all, or substantially all, of his obligations under the contract, except those obligations that may be excused.

48. RDI breached the contract by engaging in the conduct addressed above.

49. As a direct result of RDI's conduct, James Jr. has been damaged and continues to be damaged in an amount to be determined at arbitration.

SECOND CAUSE OF ACTION
(Contractual Indemnification)

50. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1-44, 46-49, inclusive, as though said paragraphs were set forth in full herein.

51. James Jr.'s Employment Agreement provides for indemnification. Paragraph 18 of the Employment Agreement provides as follows:

> The Company shall indemnify the Executive to the fullest extent permitted by law…against all costs, expenses, liabilities and losses (including, without limitation, attorneys' fees, judgments, fines, penalties, and amounts paid in settlement) reasonably incurred by the Executive in connection with a Proceeding.

52. This provision of the Employment Agreement defines "Proceeding" to include, among other things, "any action, suit or proceeding" in which James Jr. is a "party…by reason of the fact that he is or was an officer, director or employee of the Company."

53. As a result of the conduct herein described, James Jr. has been damaged and continues to be damaged in an amount to be determined at arbitration. Per the expressed provisions in James Jr.'s Employment Agreement, RDI should be found to be wholly liable for the costs and fees associated with this litigation, as well as any damages awarded.

THIRD CAUSE OF ACTION
(Retaliation)

54. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1-44, 46-49, 51-53, inclusive, as though said paragraphs were set forth in full herein.

55. At all times relevant herein, Government Code section 12940(h) was in full force and effect, and was binding upon RDI. Said section makes it unlawful for an employer to retaliate against any person because the person has opposed any practices forbidden under the Fair Employment and Housing Act or because the person has filed a complaint.

56. As set forth above, James Jr. engaged in protected activity, including but not limited to his complaints to William Gould and Timothy Storey about the conduct of Margaret, Ellen, Adams, Kane, and McEachern that James Jr. reasonably believed to be unlawful.

57. RDI retaliated against James Jr. by terminating his employment on June 12, 2015.

58. As a proximate result of the actions alleged in this Complaint, James Jr. suffered mental anguish, emotional harm, and/or emotional distress, and has been injured in body and mind. As a result of the conduct herein described, James Jr. has been damaged and continues to be damaged in an amount to be determined at arbitration.

59. Further, RDI acted with oppression, fraud, malice, and the conscious disregard of James Jr.'s rights, thereby entitling James Jr. to punitive damages in an amount to be determined at arbitration.

60. James Jr. has also incurred and continues to incur attorneys' fees and legal expenses in an amount to be determined at arbitration according to proof.

FOURTH CAUSE OF ACTION
(Violation of California Labor Code § 1102.5)

61. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1-44, 46-49, 51-53, 55-60, inclusive, as though said paragraphs were set forth in full herein.

62. James Jr. was wrongfully discharged in violation of California Labor Code § 1102.5(c) and (d).

63. By wrongfully discharging James Jr., without cause or justification, and for the retaliatory reasons set forth in this Complaint, RDI and the Directors acted willfully and with malice towards James Jr.

64. As a proximate result of the actions alleged in this Complaint, James Jr. suffered mental anguish, emotional harm, and/or emotional distress, and has been injured in body and mind. As a result of the conduct herein described, James Jr. has been damaged and continues to be damaged in an amount to be determined at arbitration.

65. Further, RDI acted with oppression, fraud, malice, and the conscious disregard of James Jr.'s rights, thereby entitling James Jr. to punitive damages in an amount to be determined at arbitration, as well as a penalty as set forth in Labor Code section 1102.5(f).

FIFTH CAUSE OF ACTION
(Wrongful Discharge in Violation of Public Policy)

66. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1-44, 46-49, 51-53, 55-60, 62-65, inclusive, as though said paragraphs were set forth in full herein.

67. RDI discharged James Jr., effective June 12, 2015.

68. James Jr. was wrongfully discharged in violation of the California Labor Code and California Government Code.

69. RDI, through Margaret and Ellen specifically, and the Directors generally, engaged in conduct that violated California statutes and public policy.

70. As a proximate result of the actions alleged in this Complaint, James Jr. has suffered, and continues to suffer, mental anguish, emotional harm, and/or emotional distress, and has been injured in body and mind. As a result of the conduct herein described, James Jr. has been damaged and continues to be damaged in an amount to be determined at arbitration.

71. Further, RDI and the Directors acted with oppression, fraud, malice, and the conscious disregard of James Jr.'s rights, thereby entitling James Jr. to punitive damages in an amount to be determined at arbitration.

SIXTH CAUSE OF ACTION
(California Code of Civil Procedure §1060 – Declaratory Relief)

72. James Jr. repeats, re-alleges, and incorporates by reference paragraphs 1-44, 46-49, 51-53, 55-60, 62-65, 67-71, inclusive, as though said paragraphs were set forth in full herein.

73. California Code of Procedure §1060 provides that any person who desires a declaration of his rights or duties with respect to another, in cases of actual controversy relating to the legal rights and duties of the respective parties, may ask the court for a declaration of rights or duties, and the Court may make a binding declaration of these rights or duties, whether or not

further relief is or could be claimed at the time. Any such declaration by the Court shall have the force of a final judgment.

74. RDI continues to engage in some or all of the unlawful and unfair conduct, as described herein.

75. An actual controversy exists in that RDI asserts that it has the legal right to perform the acts, as described herein.

76. James Jr. desires a declaration as to his rights with respect to the unlawful and unfair conduct, as described herein. Specifically, James Jr. desires a declaration stating that RDI's breach of the Employment Agreement was unlawful.

77. It is therefore necessary for the Arbitrator to declare the rights and duties of the parties hereto.

PRAYER FOR RELIEF ON COUNTERCLAIMS

WHEREFORE, James Jr. prays for judgment as follows:

1. For declaratory relief including, without limitation, restitution and a declaration that RDI breached the Employment Agreement;

2. For all compensatory damages resulting and/or flowing from RDI's breach of the Employment Agreement;

3. For all past and future lost earnings, benefits, and compensatory damages in an amount to be proven at the time of arbitration;

4. For special damages;

5. For punitive damages in an amount to be determined at arbitration;

6. For penalties under Labor Code section 1102.5(f);

7. For prejudgment interest on all compensatory damages according to the legal rate;

8. For reasonable attorney's fees and costs pursuant to the Employment Agreement;

9. For an award of reasonable attorney's fees pursuant to the FEHA, and any other applicable provisions of California statutory or common law; and

10. For any other and further relief as the Arbitrator may deem proper.

Dated: January 20, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

TRACEY A. KENNEDY
NORA K. STILES
Attorneys for Respondent and Counter-Claimant
JAMES J. COTTER, JR.

EXHIBIT 1

EX-10.2 3 rdi-20130630ex1025b25a7.htm EX-10.2

EMPLOYMENT AGREEMENT

EMPLOYMENT AGREEMENT, dated as of June 3, 2013 by and between Reading International, Inc., a Nevada corporation, (the "Company"), and James J. Cotter, Jr. (the "Executive").

1. Term of Employment

Subject to the provisions of Section 10 below, the Company shall employ the Executive, and the Executive shall serve the Company in the capacity of President for a term commencing as of June 3, 2013 and ending that date which is twelve (12) months after either party provides the other party with written notice of termination (the "Term of Employment").

2. Duties

During the Term of Employment, the Executive will serve as the Company's President and will report directly to the Chief Executive Officer. The Executive shall devote substantially all of his business time to the Company and shall perform such duties, consistent with his status as President of the Company, as he may be assigned from time to time by the Chief Executive Officer.

3. Compensation

During the Term of Employment, the Company shall pay to the Executive as compensation for the performance of his duties and obligations hereunder a salary at the rate of $335,000 per annum during each year of the term of this Agreement. Such salary shall be paid in accordance with the Company's standard payment practices.

4. Expenses and Other Benefits

All travel, entertainment and other reasonable business expenses incident to the rendering of services by the Executive hereunder will be promptly paid or reimbursed by the Company subject to submission by the Executive in accordance with the Company's policies in effect from time to time. The Executive shall be entitled to a vehicle allowance of $15,000, per annum.

The Executive shall be entitled during the Term of Employment to participate in employee benefit and welfare plans and programs of the Company including, without any limitation, any key man or executive long term disability insurance and employee stock option plans to the extent that any other senior executives or officers of the Company or its subsidiaries are eligible to participate and subject to the provisions, rules, regulations, and laws applicable thereto. The Executive shall immediately be granted 100,000 employee stock options, which options shall vest annually over a five (5) year period.

5. Death or Disability

This Agreement shall be terminated by the death of the Executive and also may be terminated by the Board of Directors of the Company if the Executive shall be rendered incapable by illness or any physical or mental disability (individually, a "disability") from substantially complying with the terms, conditions and provisions to be observed and performed on his part for a continuous period in excess of three (3) months or ninety (90) days in the aggregate during any twelve (12) months during the Term of Employment.

6. Disclosure of Information; Inventions and Discoveries

The Executive shall promptly disclose to the Company all processes, trademarks, inventions, improvements, discoveries and other information (collectively, "developments") directly related to the business of the Company conceived, developed or acquired by him alone or with others during the Term

of Employment by the Company, whether or not during regular working hours or through the use of material or facilities of the Company. All such developments shall be the sole and exclusive property of the Company, and upon request the Executive shall deliver to the Company all drawings, sketches, models and other data and records relating to such development. In the event any such development shall be deemed by the Company to be patentable, the Executive shall, at the expense of the Company, assist the Company in obtaining a patent or patents thereon and execute all documents and do all other things necessary or proper to obtain letters patent and invest the Company with full title thereto.

7. Non-Competition

The Company and the Executive agree that the services rendered by the Executive hereunder are unique and irreplaceable. During his employment by the Company, the Executive shall not provide any type of services to any business that in the reasonable judgment of the Company is, or as a result of the Executive's engagement or participation would become, directly competitive with any aspect of the business of the Company.

8. Non-Disclosure

The Executive will not at any time after the date of this Employment Agreement divulge, furnish or make accessible to anyone (otherwise than in the regular course of business of the Company) any knowledge or information with respect to confidential matters of the Company, except to the extent such disclosure is (a) in the performance of his duties under this Agreement, (b) required by applicable law, (c) authorized in writing by the Company, or (d) when required to do so by legal process, that requires him to divulge, disclose or make accessible such information.

9. Remedies

The Company may pursue any appropriate legal, equitable or other remedy, including injunctive relief, in respect of any failure by the Executive to comply with the provisions of Sections 6, 7 or 8 hereof, it being acknowledged by the Executive that the remedy at law for any such failure would be inadequate.

10. Termination

This Agreement and the Executive's employment with the Company may be terminated by the Board of Directors of the Company (i) in the event of the Executive's fraud, embezzlement or any other illegal act committed intentionally by Executive in connection with Executive's duties as an executive of the Company which causes or may reasonably be expected to cause substantial economic injury to the Company or (ii) upon thirty (30) days' notice to the Executive if the Executive shall be in material breach of any material provision of this Employment Agreement other than as provided in clause (i) above and shall have failed to cure such breach during such thirty (30) day period (the events in (i) and (ii) shall constitute "Cause"). Any such notice to the Executive shall specify with particularity the reason for termination or proposed termination. In the event of termination under this Section 10 or under Section 5 (except as provided therein), the Company's unaccrued obligations under this Agreement shall cease and the Executive shall forfeit all right to receive any unaccrued compensation or benefits hereunder but shall have the right to reimbursement of expenses already incurred. If the Company terminates Executive without Cause, the Executive shall be entitled to compensation and benefits which he was receiving for a period of twelve months from such notice of termination. Notwithstanding any termination of the Agreement pursuant to this Section 10 or by reason of disability under Section 5, the Executive, in consideration of his employment

hereunder to the date of such termination, shall remain bound by the provisions of Sections 6, 7 and 8 (unless this Agreement is terminated on account of the breach hereof by the Company) of this Agreement.

In the event of any termination, the Executive shall not be required to seek other employment to mitigate damages, and any income earned by the

Executive from other employment or self-employment shall not be offset against any obligations of the Company to the Executive under this Agreement. The Company's obligations hereunder and the Executive's rights to payment shall not be subject to any right of set-off, counterclaim or other deduction by the Company not in the nature of customary withholding, other than in any judicial proceeding or arbitration.

11. Resignation

In the event that the Executive's services hereunder are terminated under Section 5 or 10 of this Agreement (except by death), the Executive agrees that he will deliver his written resignation to the Board of Directors, such resignation to become effective immediately.

12. Data

Upon expiration of the Term of Employment or termination pursuant to Section 5 or 10 hereof, the Executive or his personal representative shall promptly deliver to the Company all books, memoranda, plans, records and written data of every kind relating to the business and affairs of the Company which are then in his possession on account of his employment hereunder, but excluding all such materials in the Executive's possession which are personal and not property of the Company or which he holds on account of his past or current status as a director or shareholder of the Company.

13. Arbitration

Any dispute or controversy arising under this Agreement or relating to its interpretation or the breach hereof, including the arbitrability of any such dispute or controversy, shall be determined and settled by arbitration in Los Angeles, California pursuant to the Rules then obtaining of the American Arbitration Association. Any award rendered herein shall be final and binding on each and all of the parties, and judgment may be entered thereon in any court of competent jurisdiction.

14. Waiver of Breach

Any waiver of any breach of this Employment Agreement shall not be construed to be a continuing waiver or consent to any subsequent breach on the part either of the Executive or of the Company.

15. Assignment

Neither party hereto may assign his or its rights or delegate his or its duties under this Employment Agreement without the prior written consent of the other party; provided, however, that this Agreement shall inure to the benefit of and be binding upon the successors and assignees of the Company, upon (a) a sale of all or substantially all of the Company's assets, or upon merger or consolidation of the Company with or into any other corporation, and (b) upon delivery on the effective day of such sale, merger or consolidation to the Executive of a binding instrument of assumption by such successors and assigns of the rights and liabilities of the Company under this Agreement, provided, however, that no such assignment or transfer will relieve the Company from its payment obligations hereunder in the event the transferee or assignee fails to timely discharge them. No rights or obligations of the Executive under this Agreement may be assigned or transferred other than his rights to compensation and benefits, which may be transferred by will

or operation of law or as otherwise specifically provided or permitted hereunder or under the terms of any applicable employee benefit plan.

16. Notices

Any notice required or desired to be given hereunder shall be in writing and shall be deemed sufficiently given when delivered or 3 days after mailing in United States certified or registered mail, postage prepaid, to the party for whom intended at the following address:

The Company:

Reading International, Inc.
6100 Center Drive, Suite 900
Los Angeles, CA 90045
The Executive:

James J. Cotter, Jr.
Reading International, Inc.
6100 Center Drive, Suite 900
Los Angeles, CA 90045

or to such other address as either party may from time to time designate by like notice to the other.

17. General

The terms and provisions of this Agreement shall constitute the entire agreement by the Company and the Executive with respect to the subject matter hereof, and shall supersede any and all prior agreements or understandings between the Executive and the Company, whether written or oral. This Agreement may be amended or modified only by a written instrument executed by the Executive and the Company, and any such amendment or modification or any termination of this Agreement shall become effective only after written approval thereof has been received by the Executive. This Agreement shall be governed by and construed in accordance with California law. In the event that any terms or provisions of this Agreement shall be held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms and provisions hereof. In the event of any judicial, arbitral or other proceeding between the parties hereto with respect to the subject matter hereof, the prevailing party shall be entitled, in addition to all other relief, to reasonable attorneys' fees and expenses and court costs.

18. Indemnification

The Company shall indemnify the Executive to the fullest extent permitted by law in effect as of the date hereof, or as hereafter amended, against all costs, expenses, liabilities and losses (including, without limitation, attorneys' fees, judgments, fines, penalties, and amounts paid in settlement) reasonably incurred by the Executive in connection with a Proceeding. For the purposes of this section, a "Proceeding" shall mean any action, suit or proceeding, whether civil, criminal, administrative or investigative, in which the Executive is made, or is threatened to be made, a party to, or a witness in, such action, suit or proceeding by reason of the fact that he is or was an officer, director or employee of the Company or is or was serving as an officer, director, member, employee, trustee or agent of any other entity at the request of the Company.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

READING INTERNATIONAL, INC.

By: /s/ James J. Cotter, Sr.

James J. Cotter, Sr.

AGREED TO AND ACCEPTED:

By: /s/ James J. Cotter, Jr.

James J. Cotter, Jr.

EXHIBIT 2

STATE OF CALIFORNIA | Business, Consumer Services and Housing Agency GOVERNOR EDMUND G. BROWN JR.

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING DIRECTOR KEVIN KISH

2218 Kausen Drive, Suite 100 I Elk Grove I CA I 95758
800-884-1684 I TDD 800-700-2320
www.dfeh.ca.gov I email: contact.center@dfeh.ca.gov

June 11, 2016

Nora Stiles
333 South Hope Street, 43rd Floor
Los Angeles California 90071

RE: **Notice to Complainant or Complainant's Attorney**
DFEH Matter Number: 777593-232581
Right to Sue: Cotter / Reading International, Inc.

Dear Complainant or Complainant's Attorney:

Attached is a copy of your complaint of discrimination filed with the Department of Fair Employment and Housing (DFEH) pursuant to the California Fair Employment and Housing Act, Government Code section 12900 et seq. Also attached is a copy of your Notice of Case Closure and Right to Sue. Pursuant to Government Code section 12962, DFEH will not serve these documents on the employer. You or your attorney must serve the complaint. If you do not have an attorney, you must serve the complaint yourself. Please refer to the attached Notice of Case Closure and Right to Sue for information regarding filing a private lawsuit in the State of California.

Be advised that the DFEH does not review or edit the complaint form to ensure that it meets procedural or statutory requirements.

Sincerely,

Department of Fair Employment and Housing

STATE OF CALIFORNIA | Business, Consumer Services and Housing Agency GOVERNOR EDMUND G. BROWN JR.

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING DIRECTOR KEVIN KISH

2218 Kausen Drive, Suite 100 I Elk Grove I CA I 95758
800-884-1684 I TDD 800-700-2320
www.dfeh.ca.gov I email: contact.center@dfeh.ca.gov

June 11, 2016

RE: **Notice of Filing of Discrimination Complaint**
DFEH Matter Number: 777593-232581
Right to Sue: Cotter / Reading International, Inc.

To All Respondent(s):

Enclosed is a copy of a complaint of discrimination that has been filed with the Department of Fair Employment and Housing (DFEH) in accordance with Government Code section 12960. This constitutes service of the complaint pursuant to Government Code section 12962. The complainant has requested an authorization to file a lawsuit. This case is not being investigated by DFEH and is being closed immediately. A copy of the Notice of Case Closure and Right to Sue is enclosed for your records.

Please refer to the attached complaint for a list of all respondent(s) and their contact information.

No response to DFEH is requested or required.

Sincerely,

Department of Fair Employment and Housing

STATE OF CALIFORNIA | Business, Consumer Services and Housing Agency GOVERNOR EDMUND G. BROWN JR.

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING DIRECTOR KEVIN KISH

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
800-884-1684 | TDD 800-700-2320
www.dfeh.ca.gov | email: contact.center@dfeh.ca.gov

June 11, 2016

James Cotter
333 South Hope Street, 43rd Floor
Los Angeles, California 90071

RE: **Notice of Case Closure and Right to Sue**
DFEH Matter Number: 777593-232581
Right to Sue: Cotter / Reading International, Inc.

Dear James Cotter,

This letter informs you that the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective June 11, 2016 because an immediate Right to Sue notice was requested. DFEH will take no further action on the complaint.

This letter is also your Right to Sue notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

To obtain a federal Right to Sue notice, you must visit the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier.

Sincerely,

Department of Fair Employment and Housing

STATE OF CALIFORNIA | Business, Consumer Services and Housing Agency GOVERNOR EDMUND G. BROWN JR.

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

DIRECTOR KEVIN KISH

2218 Kausen Drive, Suite 100 I Elk Grove I CA I 95758
800-884-1684 I TDD 800-700-2320
www.dfeh.ca.gov I email: contact.center@dfeh.ca.gov

Enclosures

cc:

COMPLAINT OF EMPLOYMENT DISCRIMINATION

BEFORE THE STATE OF CALIFORNIA

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
Under the California Fair Employment and Housing Act
(Gov. Code, § 12900 et seq.)

In the Matter of the Complaint of
James Cotter, Complainant.
333 South Hope Street, 43rd Floor
Los Angeles, California 90071

DFEH No. 777593-232581

vs.

Reading International, Inc., Respondent.
6100 Center Drive, Suite 900
Los Angeles, California 90045

Complainant alleges:

1. Respondent **Reading International, Inc.** is a subject to suit under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Complainant believes respondent is subject to the FEHA.

2. On or around **June 12, 2015**, complainant alleges that respondent took the following adverse actions against complainant: **Discrimination, Harassment, Retaliation Terminated,** . Complainant believes respondent committed these actions because of their: **Age - 40 and over, Engagement in Protected Activity, Sex - Gender, Other Familial status.**

3. Complainant **James Cotter** resides in the City of **Los Angeles**, State of **California**. If complaint includes co-respondents please see below.

Additional Complaint Details:

I believe that Reading International terminated my employment to retaliate against me for my complaints about the conduct of directors and officers at the company and my refusal to settle certain personal litigation. I further believe that Reading International terminated me because of my age, sex, and/or familial status. During my employment, I experienced a hostile work environment.

VERIFICATION

I, **Nora Stiles**, am the Attorney for Complainant in the above-entitled complaint. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

On June 11, 2016, I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Los Angeles, California
Nora Stiles

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-1422.

On June 14, 2016, I served true copies of the following document(s) described as **1) NOTICE TO COMPLAINANT OR COMPLAINANT'S ATTORNEY; 2) NOTICE OF FILING OF DISCRIMINATION COMPLAINT; 3) NOTICE OF CASE CLOSURE AND RIGHT TO SUE; 4) COMPLAINT** on the interested parties in this action as follows:

Reading International, Inc.
c/o William D. Ellis
Agent for Service of Process
6100 Center Dr., Ste. 900
Los Angeles, CA 90045

☒ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 14, 2016, at Los Angeles, California.

Maria Bautista

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 333 South Hope Street, 43rd Floor, Los Angeles, CA 90071-1422.

On June 14, 2016, I served true copies of the following document(s) described as **1) NOTICE TO COMPLAINANT OR COMPLAINANT'S ATTORNEY; 2) NOTICE OF FILING OF DISCRIMINATION COMPLAINT; 3) NOTICE OF CASE CLOSURE AND RIGHT TO SUE; 4) COMPLAINT** on the interested parties in this action as follows:

Reading International, Inc.
William D. Ellis
Agent for Service of Process
6100 Center Dr., Ste. 900
Los Angeles, CA 90045

☒ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 14, 2016, at Los Angeles, California.

Maria Bautista

EXHIBIT 3

READING
INTERNATIONAL

June 15, 2015

James J. Cotter, Jr.
311 Homewood Rd
Los Angeles, CA 90049

Dear Jim:

As you are aware, your Employment Agreement (the "Agreement") with Reading International, Inc. (the "Company"), and your employment with and position as President and Chief Executive Officer of the Company, has been terminated effective Friday, June 12, 2015. Pursuant to Section 11 of your Agreement, this termination obligates you to resign immediately from the Board of Directors of the Company. This letter shall serve as notice that your failure to resign from the Board of Directors places you in material breach of your Agreement. You have 30 days from today to cure this breach by submitting your written resignation from the Board of Directors. Failure to do so within 30 days will result in you forfeiting any compensation or benefits you might otherwise have been entitled to under your Agreement.

You must also immediately return any Company property, documents, or data that you may have in your possession. You may arrange for the return of these items, as well as for your personal belongings at the office to be collected, by having your attorney contact the Company's attorney, Gary McLaughlin at Akin Gump Strauss Hauer & Feld (310-728-3358).

This letter is without prejudice to any of the Company's rights or remedies, all of which are expressly reserved.

Very Truly Yours,

Ellen M. Cotter

Reading International, Inc.
6100 Center Drive, Suite 900
Los Angeles, California 90045

t: 213.235.2240 f: 213.235.2229

www.readingrdi.com