IN THE SUPREME COURT OF THE STATE OF NEVADA

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE; DOUGLAS MCEACHERN, JUDY, CODDING, AND MICHAEL WROTNIAK,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

JAMES J. COTTER, JR. INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF, READING INTERNATIONAL, INC.,

Real Parties in Interest,

Supreme Court Case No.: 72261

Dist. Ct. Case No.: A-15-719860-B
jointly administered with
Case No. P 14-082942-E and
Case No. A-16-735305-B

RDI'S JOINDER TO THE PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Real Party in Interest, Reading International, Inc., through its undersigned counsel, states that:

Reading International, Inc. is a publicly traded Nevada corporation. No publicly held corporation owns 10% or more of the aggregate outstanding common stock of Reading International, Inc.

Reading International, Inc. has been represented by the following law firm in the proceedings below:

GREENBERG TRAURIG, LLP

DATED this 7th day of February 2017.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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ROUTING STATEMENT

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

VERIFICATION

STATE OF NEVADA)
: SS
COUNTY OF CLARK)

The undersigned declares under the penalty of perjury that she is counsel for Real Party in Interest Reading International, Inc., and has read the attached Joinder to the Petition for Writ for Prohibition, or in the Alternative, for Mandamus, and, and that the factual assertions therein are true of her own knowledge, except as to those matters stated on information and belief, and that as to such matters she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 7th day of February 2017.

TAMI D. COWDEN

Subscribed and sworn to before me this

7th day of February, 2017.

NOTARY PUBLIC, STATE OF NEVADA

JOYCE HEILICH
NOTARY PUBLIC
STATE OF NEVADA
Appt No. 15-2880-1
Exp. August 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Real Party in Interest, Reading International, Inc. ("RDI" or the "Company") joins in the Petition for Writ of Prohibition, or in the Alternative, Mandamus filed by Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy, Codding, and Michael Wrotniak.

STATEMENT OF RELIEF SOUGHT

The writ petition filed by Petitioners seeks Supreme Court intervention due to a significant issue of first impression involving this state's corporate law. Specifically, the writ addresses who may properly serve as a representative of the shareholders of a corporation in a derivative. Through rulings in the case below, Respondent Honorable Elizabeth Gonzales has allowed Real Party in Interest, James J. Cotter, Jr. ("Cotter, Jr."), to serve as the representative plaintiff on behalf of RDI in a purportedly derivative action that challenges *his own termination* as CEO and seeks the purely personal remedy of reinstatement. To further compound the inherent conflict of interest evident in such representation, Cotter, Jr. is currently engaged in an arbitration with RDI, in which he has alleged his employment contract was breached and his termination by RDI was unlawful. He seeks more than $1.2 million in purported compensatory damages, plus punitive damages. Additionally, Cotter, Jr. is currently engaged in litigation with two board members who are named as defendants in this litigation, Ellen Cotter and Margaret Cotter, his sisters, wherein the issue is the control of a trust that, along with the

Estate of James J. Cotter, Sr. (father of the Cotter siblings), possesses a majority of the voting shares of RDI.

These obvious disqualifying circumstances, and others as set forth below, all dictate that this derivative action should not be permitted to proceed with Cotter, Jr. as the representative plaintiff.

RDI joins in this Petition because ultimately, it is RDI—and of course, its shareholders—that suffer as a result of Cotter, Jr.'s vindictive litigation. RDI's insurance has been exhausted, but it must continue to fund the defense of its directors—*from whom no monetary relief is even arguably available under Nevada law, because Cotter, Jr.'s claims do not assert any claim of fraud or unlawful conduct.*[1]

Moreover, there is no denying that Cotter, Jr. does not have shareholder support for his litigation. Significantly, independent shareholders – ***i.e., those with no ties to any of the three Cotter siblings***– who had *initially* given credence to the allegations raised by Cotter, Jr. in his Complaint, but, obviously mindful of his own inherent conflicts, had not trusted him as representative plaintiff, and intervened in this matter. *See* **I SUPP APP 1**, Motion to Intervene on Order

[1] Moreover, two of the Individual Defendants, Judy Codding and Michael Wrotniak***, were not even members of the board at the time Cotter, Jr. was terminated,*** **yet**, as the Petition notes, continue to be included as defendants to the claims regarding such termination.

Shortening Time, filed August 6, 2015; **I APP 134**.[2] But following the expedited discovery that occurred in this matter, wherein hundreds of thousands of pages of documents were produced, and numerous hours of depositions of the Individual Defendants occurred; the T2 Plaintiffs *dismissed their Complaint*. [3]

Both the Individual Defendants and RDI filed motions to dismiss his Complaint. However, those motions were denied before the T2 Plaintiffs had dismissed their complaint. The Individual Defendants again challenged Cotter, Jr.'s standing as one of several bases for summary judgment on the termination-related claims, in its Motion for Partial Summary Judgment No. 2, to which RDI Joined. However, the District Court denied that motion, without even addressing the issue of standing.

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[2] The Intervenor Plaintiffs consisted of T2 Partners Management, LP; T2 Accredited Funds, LP; T2 Qualified Funds, LP; Tilson Offshore Fund, LP; T2 Partners Management I, LLC; T2 Partners Management Group, LLC; JMG Capital Management Group, LLC; and Pacific Capital Management, LLC., which collectively owns more than 1.5 million shares of RDI Class A nonvoting stock more than twice as much as that claimed by Cotter, Jr. **I APP 134**. These intervening Plaintiffs have been referred in the litigation as "the T2 Plaintiffs."

[3] Such dismissal was the result of a settlement; however, the terms of the settlement provided *only* for mutual releases of claims by the parties, and a press release. **II APP 327**. There was *no* payment of any damages by any defendant, including RDI, *no* agreement as to future practices or conduct with respect to RDI's governance, and not even any payment of the plaintiffs' attorneys fees by RDI or any defendant. Moreover, the T2 Plaintiffs acknowledged in the Motion for Approval that, based on the information received in discovery, they were satisfied with RDI's corporate practices. **II SUPP APP 176, Joint Motion to Approve Settlement.** This Settlement was noticed to all RDI shareholders, none of whom stepped forward to join in Cotter, Jr.'s litigation.

Cotter, Jr. has done his best to present this litigation as a case in which a coalition of sitting directors engaged in a coup and usurped from him his rightful leadership of the Company. Cotter Jr. sites no authority for his view that he is somehow entitled to the position of CEO, other than to say that this was allegedly his father's wish. Perhaps needless to say, Nevada corporations do not recognize any notion of fee tail male when it comes to the management of its public corporations. If the issues presented by this writ actually warranted comparisons between the ability and experience of Cotter, Jr, and his sisters, then the Individual Defendants and RDI could present to this court overwhelming evidence that rebuts Cotter, Jr.'s claims as to his superiority as a CEO.

For example, RDI could show that the directors who voted to terminate Cotter Jr., included had each initially elected him CEO: it is uncontested that there was no change in the composition of the Board of directors between the date of his father's resignation as CEO and the date that the Board terminated Cotter. Jr. as CEO. Furthermore, the voting control of RDI continues, as it did at the time that Cotter, Jr. was elected CEO, to rest with the Cotter family which has, at the both annual meetings of stockholders since Cotter Jr's termination, voted in favor of all but one of the directors incumbent at the time of Cotter Jr's termination. Additionally, RDI could provide ample evidence that Cotter, Jr., who was elected CEO out of deference to what they were advised were the wishes of Mr. Cotter,

Sr., (at a time when Mr.Cotter Sr. continued to vote more than 66% of the voting power of RDI) was wholly incapable of performing his duties as CEO. He was unable to work well with others, and displayed anger management issues. Several female employees filed complaints. He had no hands on experience in any of the Company's business segments. This lack of experience showed as he struggled with the position of President and CEO. Indeed, Cotter, Jr. himself recognized his own shortcomings to such an extent thathe engaged a coach at Company expense (some $20,000 per month) to assist him in analyzing Company information and developing Company strategy. The Board of Directors were aware that Cotter, Jr. was failing, and even appointed one of its own to mentor him – a fact that Cotter, Jr. acknowledged in his pleadings. But Cotter, Jr.'s progress proved unsatisfying. Even despite these glaring shortcomings, considerable efforts were made to find a workable solution that would allow Cotter, Jr. to maintain the position of CEO, while having his authority severely curtailed to prevent harm to RDI. Indeed, in a case of "allowing no good deed to go unpunished," it was these endeavors by the Defendant Directors to work with all of the Cotter siblings to find an overall resolution of RDI's management crisis , that Cotter, Jr. now contends constituted an extortionate attempt to force him to settle other litigation.

If this were a valid derivative action, with an objective plaintiff acting on behalf of the Company, then RDI might well be resigned to allowing the litigation

to proceed, and the evidence relating to Cotter, Jr.'s poor performance, and his jealous contempt for his elder sisters' successes paraded across a courtroom to rebut his claims of a power grab. But the reins of this purportedly derivative action are not held by a shareholder who has nothing to gain but benefit to the Company, and by extension, to the shareholders as a whole. Instead, this litigation is being driven by a brother consumed with resentment against his sisters and believing that the management of a public company can be handed down from father to son like a medieval fiefdom. Notwithstanding Cotter Jr's attempts to paint the defendant directors as dishonorable parliamentarians participating in a palace coup, the only issues relevant to this writ petition are those that pertain to the qualifications of Cotter, Jr. to represent Company shareholders in litigation where the requested relief is his own reinstatement to the position of. As shown below, he simply does not have the necessary qualifications.

Despite these shortcomings, Cotter, Jr. continues to wage war on RDI to the detriment of the Company. This Court should put an end to his vendetta by granting the writ relief.

STATEMENT OF ISSUE PRESENTED

> Whether an officer who was terminated by a vote of the majority of the board of directors is qualified to serve as the representative plaintiff in a derivative action that seeks his own reinstatement as the remedy.

STATEMENT OF RELEVANT FACTS

The litigation below was commenced by Cotter, Jr. on the very day of his termination as CEO of the Company, and seeks, as relief, his reinstatement to that position. **II APP 381, Second Amended Verified Complaint, Prayer for Relief, ¶ 3.a.** In furtherance of that goal, Cotter, Jr., wearing the cloak of derivative class representative, has formulated a fantasy plot in which every action taken by the current defendant board members since his termination (including even those who did had not voted in favor of his termination, as well as persons who were not even on the board at the time of his termination) was purportedly undertaken for the sole purpose of "entrenching" his their own positions of RDI. **II APP 329-385**.[4] Thus, Cotter, Jr.'s entire case is based upon the ***motivations he imputes*** to his sisters, whom he deems unqualified for their positions, despite the fact that each had considerably more operations experience in the Company's concerns than did he. Additionally, Cotter, Jr.'s claims of damage to the Company are based entirely on theories of how the Company *ought* to have performed since his termination.

[4] RDI's citations to allegations contained in complaints filed by Cotter, Jr. or the T2 Plaintiffs are not intended to constitute admissions of all allegations contained in the cited paragraphs, but instead, are offered merely to substantiate the undisputed background information necessary to permit this court to understand the issue raised herein.

Background Information

Reading International, Inc. is a publicly traded company, whose operations involve development, ownership, and operation of entertainment and real estate assets in Australia, New Zealand, and the United States. **II APP 340, ¶ 26**. Its voting shares have long been owned primarily by members of the Cotter family, including, until his death in 2014, James J. Cotter, Sr. ***Id.* at ¶¶ 26 and 28.** The shares controlled by Cotter, Sr., which consisted of more than 66 percent of the voting shares, are now owned by either his estate (the "Estate") or by the James J. Cotter, Sr. Family Trust (the "Trust").[5] ***Id.*** The executors of the Estate are Cotter, Sr.'s daughters, Ellen Cotter and Margaret Cotter **I APP 250-251, ¶ 43.** Ellen Cotter and Margaret Cotter are also, indisputably, trustees of the Trust, and Margaret Cotter is a trustee of a Voting Trust created within that Trust. **I APP 239-240, ¶ 19-21.** However, Cotter, Jr. claims also to be a trustee of the Voting Trust, based on an amendment to the trust signed while Cotter, Sr. was hospitalized prior to his death. **I APP 239, ¶ 20.** That purported amendment also granted, under certain circumstances, alternative yearly control over the trust to Margaret Cotter and Cotter, Jr. ***Id.***

[5] With these shares, and other voting shares owned by Cotter family members, approximately 70 percent of the voting shares are in the control of the Cotter family.

Cotter, Jr. is presently involved in two lawsuits, other than this one, with Ellen and Margaret Cotter, involving the Trust and the Estate. These lawsuits are entitled, *In Re James J. Cotter, Living Trust, dated August 1, 2000,* Los Angeles Superior Court Case No. BP159755, and *In the Matter of the Estate of James J. Cotter*, *Sr.*, Clark County District Court Case No. P-14-082942-E. **I APP 238, ¶ 11.** The latter suit is being jointly administered with this matter.

In August of 2014, shortly before his death, Cotter, Sr., who had long served as RDI's CEO, and Chairman of the Board of Directors, suddenly resigned for health reasons. **II APP ¶ 236, ¶ 17.** Each of Cotter, Sr.'s children, Ellen, Margaret and Cotter, Jr. (collectively, the "Cotter Siblings") were members of RDI's Board of Directors at that time. The other members of the Board of Directors were Edward Kane, Douglas McEachern, Guy Adams. William Gould, and Timothy Story. **II APP ¶¶ 3, 17-23.** In accordance with what the independent directors believed to be Cotter, Sr.'s wishes as the Company's controlling stockholder, the RDI's Board of Directors appointed Cotter, Jr. as CEO. *Id*.

Of the Cotter Siblings, Cotter, Jr. had been the one least involved in the day to day operations of the Company. **Ex, 7 to MSJ No. 1 – McEachern's Depo, 49:25-50:7.** Ellen Cotter had been working at RDI since 1997. She had been in charge of the Company's domestic cinema operations since 2002. **II APP 336-**

337, ¶ 19; II SUPP APP 303:24; 304:2-20. She had also served as Chairman of the Board since Cotter, Sr.'s resignation. Similarly, Margaret Cotter had worked with RDI since 1998, and had significant experience in the Company's live theater endeavors. **II APP 336, ¶ 18; II SUPP APP 309:18- 310:8.** Working through an entity owned by RDI, she oversaw RDI's live-theater operations for 13 years; including management of four properties, management of the staff, booking of shows, overseeing regulatory licensing, and engaging and redevelopment efforts while facing the prospect of historical designation. ***Id.*** **at 15:9-13; 39: 20-25.**

In contrast, while Cotter, Jr. had served on RDI's Board for a number of years, he became an employee of RDI only in 2013, when he was appointed to a position that had been vacant for many years, and reactivated solely for his benefit. **Ex. C, to RDI's Opposition to Cotter, Jr.'s MSJ – Deposition of J.J. Cotter, Jr. 133:21-25; 151:20-22; 162:7- 9.**

Cotter, Jr.'s tenure as CEO was fraught with conflict, including disputes among the Cotter Siblings, and claims of hostile work environment brought against Cotter, Jr. and the Company by an employee. III APP 503:17-509:4. Unbeknownst to RDI's Board, Cotter, Jr. contracted on behalf of RDI with an outside consultant to coach him, to the tune of $20,000 a month. **III SUPP APP 450-453 (filed under seal)**. Yet even despite such expensive outside assistance, Cotter, Jr.'s performance earned the criticism of several non-Cotter board

members. In February, one board member was assigned to act as a mentor to Cotter, Jr. and to mediate his disputes with his sisters; requiring said board member to receive payment of $75,000 for such efforts. **I APP 250, ¶ 26 (b); II APP 345-346, ¶ 50, 55.** After several months in which a majority of the Board saw no improvement, a series of board meetings were held, which meetings culminated in the termination of Cotter, Jr. as CEO. Cotter, Jr. remained as a Director of the Company. **I APP 233-234, ¶¶ 29, 34**, III APP 509:15-512:11.

On the same day as his termination, Cotter, Jr. filed suit against the Company and the Individual Defendants (including both of the directors who voted against his termination), with the original complaint asserting both individual claims for wrongful termination, and purported derivative claims for breaches of fiduciary duty related to the termination and other decisions of the Board of Directors, and, seeking his own reinstatement. **I APP 1-32**. Subsequently, the T2 Plaintiffs intervened, copying many of Cotter, Jr.'s allegations. **I APP 134-151**.

Following the initial filing of Cotter, Jr.'s complaint, the Individual Defendants had moved to dismiss that complaint on multiple grounds, including Cotter, Jr.'s lack of qualification to serve as a representative plaintiff in a purported derivative action seeking his own re-instatement. The District Court did not address the adequacy of Plaintiff to represent RDI and its shareholders, but instead,

merely required Plaintiff to amend his claims regarding derivative damages. **I APP 177: 2-178:3, I SUPP APP. 174.**

Discovery then commenced, involving the production by the Company of hundreds of thousands of pages of documents, and depositions of the Individual Defendants, many of which depositions proceeded over several days. In July 2016, the T2 Plaintiffs and the Defendants brought a joint motion for voluntary dismissal and approval of settlement, which dismissal, after notice to the shareholders and a hearing, was ultimately approved.[6] **II SUPP APP. 176; II SUPP APP 374.** Meanwhile, even though discovery had been closed, Cotter, Jr. was permitted to amend his Complaint a second time, in which he added as defendants two board members who had joined the Board subsequent to the original filing, Judy Codding and Michael Wrotniak, and to add allegations relating to corporate decisions made since the original filing. **I APP. 329-385.** Despite the fact that neither Codding nor Wrotniak were on RDI's Board of Directors at the time of his termination, Cotter, Jr. included them in claims related

[6] No payments or concessions were made by the Company or any Individual Defendants. The plaintiffs of the other derivative action essentially acknowledged that discovery had not yielded evidence of wrongdoing. See II SUPP APP 176, Joint Motion, p 7:26-8:2 ("The T2 Plaintiffs have reviewed a number of transactions and engaged in discussions with management in addition to participating in the litigation and have determined that Defendants have acted, and will continue to act in good faith to use best practices with regard to board governance, protection of stockholder rights, and maximizing value for all its stockholders.").

to that action. ***Id.*** Essentially, Cotter, Jr. has challenged every significant decision, and many routine decisions, made by the Board of Directors, claiming the actions were the product of a board unduly influenced by Ellen Cotter and Margaret Cotter. ***Id.***

Dispositive and evidentiary motions were filed, and such motions were heard on October 6, 2016, including a motion for partial summary judgment on the claims arising from Cotter, Jr.'s termination, joined by RDI . **I APP 386; II SUPP APP 269.** Included in that Motion, was a renewed challenge to Cotter, Jr.'s qualification to serve as a representative plaintiff, given that his own personal interests overshadowed the interests of other shareholders. **II APP 409-413.** In opposing the Motion, Cotter, Jr. did not point to any evidence that he had been a competent CEO, that his reinstatement was supported by any other stockholder of RDI, or that his reinstatement would benefit any stockholder other than himself. **VII APP 1604-1636.** Nor did he offer any rebuttal to the assertion that his reinstatement would not in any way advantage the Company. Cotter, Jr. did not even dispute that he is in a different and conflicted position from other stockholders. **VII App. 1634-1645.** Instead, he claimed that his termination claim should be treated as a derivative claim because of his claims that RDI Board of Directors did not act in a disinterested fashion when it terminated him. *Id.*

The District Court denied the Motion, saying only that

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

IX APP 9-11. The District Court did not address the issue of Mr. Cotter's adequacy as a representative. However, as a result of this ruling, the District Court has implicitly determined that a terminated officer had standing to derivatively sue a Nevada board of directors for a breach of fiduciary duty arising from his or her own termination.

STANDARD OF REVIEW

Standing is a question of law reviewed *de novo*. *Argüelles v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011); *see also*, *Kona Enterprises, Inc. v. Estate of Bishop*, 179 F.3d 767, 769 (9th Cir. 1999) (reviewing standing to assert derivative claims *de novo).* A district court's interpretation of a rule or statute is reviewed *de novo*, without deference to the conclusions of the lower court. *State v. Lucero*, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011). This Court also reviews a decision on a motion for summary judgment *de novo*. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

REASONS THE WRIT SHOULD ISSUE

This Court should entertain this writ petition, and resolve the issues herein, as each issues relates to the appropriate interpretation of Nevada's corporate law.

I. THIS COURT SHOULD ISSUE A WRIT DIRECTING THE DISTRICT COURT TO DISMISS THIS SUIT AS IT HAS BEEN MAINTAINED BY A PLAINTIFF WHO DOES NOT ADEQUATELY AND FAIRLY REPRESENT THE INTERESTS OF THE SHAREHOLDERS SIMILARLY SITUATED IN ENFORCING THE RIGHTS OF THE CORPORATION.

This Court should issue a writ of mandamus directing the District Court to dismiss the complaint, in light of the obvious inability of Cotter, Jr. to fairly and adequately represent the shareholders as a whole. The District Court has *twice* failed to apply the appropriate analysis to the issue of standing.

The District Court's stance on this issue is particularly ironic, given the nature of Cotter, Jr.'s claims against Ellen Cotter and Margaret Cotter. Those claims are that his sisters, and those supposedly influenced by his sisters, made decisions contrary to the best interests of the Company, for the purpose of benefiting Ellen Margaret Cotter to the supposed detriment of the Company. In order to prove such claims, Cotter, Jr. is going to have to prove to that the Defendant Directors did not believe their decisions were in the bests interests of RDI. In other words, Cotter, Jr.'s claims essentially boil down to the accusation that the Defendant Directors did not honestly believe that Cotter, Jr. was not performing adequately as CEO, and did not honestly believe Ellen Cotter and Margaret Cotter capable of performing well in their respective positions at RDI.

What is apparent from this rather extraordinary basis for claims is that Cotter, Jr. is so thoroughly convinced of his own abilities, despite the total absence of any support for such a belief, that he simply cannot conceive of anyone not honestly believing that he was and remains the best person to be CEO. But it is precisely this inflated view of his self-worth, and his willingness to destroy the Company in hopes of vindicating his position, that renders him an inadequate representative. He simply cannot view this litigation with the objectivity required to determine the best interests of the shareholder, as is necessary for a derivative plaintiff. Accordingly, this Court should grant the Petition.

A. Writ Relief is Appropriate to Prevent Continuation of a Case Wherein the Plaintiff Lacks Standing.

This Court has previously recognized that writ relief to address the standing of plaintiff in an action is appropriate. *D. R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 125 Nev. 449, 453, 215 P.3d 697, 700 (2009). Here, RDI raises an important issue of law and policy relating to representative capacity in derivative shareholder suits. Additionally, writ petition is appropriate where there is no plain, speedy remedy at law. *Id.* Here, as in *D. R. Horton*, RDI lacks a plain, speedy remedy as there is no appeal from a denial of a motion for summary judgment

Furthermore, intervention by way of extraordinary writ is appropriate where "the issue is one of first impression and of fundamental public importance," or it "will mitigate or resolve related or future litigation." *Williams v. Eighth Jud. Dist.*

Ct. of State, ex rel. Cnty. of Clark, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011) (internal quotations and citation marks omitted). Standing to serve as a representative plaintiff in a derivative action is a topic that this Court has seldom addressed. Certainly there is no precedent in this state, or indeed, in any state, that would allow a terminated corporate officer to serve as the representative named plaintiff in a derivative suit challenging that termination. Accordingly, this Court should entertain, and grant, the Petition.

B. Cotter, Jr. Cannot Fairly Represent RDI Shareholders

Cotter, Jr. cannot adequately represent the interests of other shareholders in this litigation, as his personal stake in the outcome of this and other litigation in which he is engaged with RDI outweighs his shareholder interests in a derivative action. Pursuant to NRCP 23.1:

> The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

NRCP 23.1. ("An adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class.") *Larson v. Dumke*, 88-15440, 1990 WL 38754 (9th Cir. 1990). The true measure of adequacy of representation is how well the plaintiff advances the interests of the other similarly situated shareholders. *Emerald Partners v. Berlin*, 564 Ad 670, 674 (Del. Ch. 1989). A

derivative plaintiff may not use the derivative suit to his own personal advantage. Shareholder Deriv. Actions L. & Pac. § 4:4 (2016-2017).

In determining whether a plaintiff will fairly and adequately represent the interests of other shareholders, a court *must* consider any extrinsic factors which might indicate that a representative might disregard the interests of the other members of the class. *See e.g*., *Emerald Partners, supra,* Among the factors that courts have deemed relevant include:

> economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; . . . other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc., 619 F.2d 588, 593–94 (6th Cir. 1980); *see also Energetic, Inc. v. Proctor*, CIV3:06CV0933-, 2008 WL 4131257, at *6 (N.D. Tex. Aug. 29, 2008) (applying these factors to a derivative action governed by Nevada law). A combination of these factors can obviously justify dismissal of a derivative suit, but a strong showing on even one is sufficient to show sufficient conflict to require dismissal. *Emerald Partners,* 564 A.2d at 673. Application of these factors demonstrates that Cotter, Jr. is woefully inadequate as a representative.

1. There are Economic Antagonisms Between Cotter, Jr. and Other Shareholders.

In *Energytec*, where, as here, a former officer sought to regain his position by claiming his termination was the product of a breach of fiduciary duty, the court found that the former officer's personal economic interest in reinstatement was antagonistic to that of other shareholders, because such other shareholders "do not stand to regain past employment or company influence." *Energytec,* at *7.

Additionally, antagonistic economic interests are found when the plaintiff is involved in separate litigation with the defendant corporation or its directors and when the plaintiff has a personal dispute with the defendant directors. *DeLeo v. Swirsky*, 00 C 6917, 2002 WL 989526, at *3 (N.D. Ill. May 14, 2002), *report and recommendation approved,* 00 C 6917, 2002 WL 1447855 (N.D. Ill. July 2, 2002). As one court explained, involvement in other litigation with the defendants creates an "economic conflict with the class, since [the plaintiff] might 'throw' the class action to recover more in the antitrust action." *Schnorbach v. Fuqua*, 70 F.R.D. 424, 434 (S.D. Ga. 1975).

2. The Remedy Sought would Provide Cotter, Jr. a Benefit that other Shareholders would not Receive.

Closely related to the economic antagonism factor is the remedy sought, particularly when, as here, the putative plaintiff seeks to unravel a corporate action. Cotter, Jr. seeks to invalidate his termination and be reinstated to a position that

carries with it a generous compensation package, and personal prestige. No other shareholder would receive such a benefit, and accordingly, there is no basis to assume that such an outcome would be satisfactory to other shareholders. In *Maynard, Merle & Co., Inc. v. Carcioppolo*, 51 F.R.D. 273 (S.D.N.Y.1970), the District Court rejected a derivative plaintiff who would uniquely benefit from the relief sought, stating

> '[I]t does not appear that plaintiffs would fairly and adequately protect the interests of the class which they seek to represent, i.e., the other Carci shareholders at the time of the merger. Their interests are potentially adverse to those of the other class members in that the harm which they have suffered from the merger is unlike that of any Carci shareholder and consequently the relief they most desire (rescission) might not be satisfactory to the others.

51 F.R.D. at 277–78.

In *Davis v. Comed*, the Court noted that by seeking rescission of the challenged transaction, the plaintiff virtually confessed to ulterior motives, because he failed to consider the consequences of such rescission, which might have led to bankruptcy, or foreclosure on outstanding company loans. *Davis v. Comed, Inc.*, 619 F.2d 588, 597 (6th Cir. 1980). The same is true here, where Cotter, Jr.'s insistence on his own reinstatement ignores the potential consequences should RDI be compelled to reinstate him, contrary to the the wishes of its Board and stockholders.

Courts have long recognized the impracticality of reinstatement as a remedy where there is hostility between the parties. *Teutscher v. Woodson*, 835 F.3d 936, 951 (9th Cir. 2016) ("The factors that determine whether a reinstatement award is appropriate include whether "excessive hostility or antagonism between the parties" renders reinstatement practically infeasible..."); *Chollett v. Patterson-UTI Drilling Services, LP, LLLP*, CIV.A. V-08-27, 2010 WL 3700833, at *7 (S.D. Tex. Sept. 14, 2010) (reinstatement not appropriate when "a hostile relationship exists between the employer and the plaintiff."). Indeed, forcing persons who share animosity for each other to work together is "a harbinger of disaster and a catalyst to more litigation." *Hoffman v. Nissan Motor Corp. in U.S. A.*, 511 F. Supp. 352, 355 (D.N.H. 1981). This is particularly true where, as here, the position is one that can be terminated for any cause, or no cause. *See Blair v. Young Phillips Corp.*, 235 F. Supp. 2d 465, 472 (M.D.N.C. 2002).

Furthermore, RDI's Bylaws provide that the Board of Directors has the authority to terminate officers without cause. Given the lack of faith in Cotter, Jr., termination would be inevitable. Accordingly, reinstatement would be nothing more than incitement to further disruption, and likely litigation Significantly, Cotter, Jr.'s own experience in RDI's operations pales in comparison to that of his sister, Ellen Cotter, who was appointed interim CEO following his termination. While Cotter, Jr.'s employment with RDI had begun just a scant year prior to his

appointment as CEO, and had then consisted of a position that had been previously vacant for years–indicating its lack of substance--Ellen Cotter has been employed by RDI for more than fifteen years, and had run its day to day operations of the Company's domestic cinema operations for more than a decade. **II SUP APP 280.** Moreover, she served as Chairman of the Board of Directors during Cotter, Jr.'s term as CEO. And while Cotter, Jr. boasted in his Second Amended Complaint that RDI's shares rose to a high of $14.45 during his term as CEO, **II APP 345, ¶ 44**, in just the first six months when Ellen Cotter acted as interim CEO, RDI shares rose even higher, to over $16.00 per share. **I SUPP APP 140-146**.

In light of all of the above, granting Cotter, Jr.'s requested relief of reinstatement obviously would only wreak havoc on RDI. The Company would be required to dismiss a successful CEO, who has worked and developed relationships with management and customers for the past eighteen months. Moreover, given that every other member of RDI's Board of Directors has been the target of Cotter, Jr.'s vindictiveness, reinstatement would result in forcing the Company to accept a CEO where there is considerable hostility and animosity between him and the Board of Directors. The disruption of such a change would cause immeasurable harm to the Company.

Given these practical impediments to reinstatement, and the likely harm to the Company—and thus, the shareholders-- resulting in such an event, Cotter, Jr.'s

insistence on that remedy demonstrates his inability to serve as an objective representative plaintiff.

3. There is other Litigation Pending Between RDI and Cotter, Jr.

In addition to the present litigation, Cotter, Jr. is involved in an arbitration in which he alleges RDI breached his employment agreement, violated California statutes, and terminated him in violation of California Public Policy, for which he seeks compensatory and punitive damages. **IX APP 218102215.** He is also involved in litigation with his sisters regarding a trust and their father's estate, in which he makes the same allegations regarding his termination. **I APP 238, ¶ 11.**

The existence of other litigation between a putative derivative plaintiff and the corporation is generally considered an inherent conflict of interest that disqualifies the plaintiff, particularly when the two suits arise out of the same facts. *Barrett v. S. Connecticut Gas Co.*, 172 Conn. 362, 375 (1977) ("The conflict between Barrett's simultaneous maintenance of the individual and derivative actions is made even clearer by the undisputed fact that both suits arise out of the same dispute."); see also, *Priestly v. Comrie*, No. 07 CV 1361 (HB), 2007 WL 4208592, at *6 (S.D.N.Y. Nov. 27, 2007) (plaintiff "unfit" to serve as deriviative plaintiff where direct claims are also advanced), citing *St. Clair Shores Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688(SWK), 2006 WL 2849783, at *7 (S.D.N.Y.

Oct. 4, 2006) (noting that plaintiffs who advance both derivative and direct claims "face an impermissible conflict of interest.").

Accordingly, this factor indicates that Cotter, Jr. is not qualified to serve as a representative plaintiff.

4. Relative Magnitude of Personal and Derivative Interests.

This factor addresses whether the plaintiff has potential financial interests relevant to the litigation beyond his interest as a shareholder, and a comparison of the value of such interests. Here, Cotter, Jr. indicated that he holds 770,186 shares of Class A non-voting stock, which constitutes less than 3.5% of RDI's outstanding shares. **1 APP 236, ¶ 17.** Since his Second Amended Complaint was filed, he has apparently reduced his holdings of such stock to 418,583 shares, thereby reducing his personal stake to less than 2% of such outstanding shares. **1 APP 54.** Additionally, Cotter, Jr. has freely acknowledged that the primary relief sought in the litigation is equitable (i.e., his own reinstatement to the position of CEO), and therefore, the neither the Company or the shareholders are unlikely to receive *any* monetary benefit from the litigation. However, if the equitable relief is granted, Cotter, Jr. will personally receive an immediate, significant financial benefit, as he will receive the compensation granted by RDI to its CEO. Accordingly, this factor indicates that Cotter, Jr. is not qualified to serve as a representative plaintiff.

5. Plaintiff's Vindictiveness Toward the Defendants.

Courts consider vindictiveness as a factor in order to "to render ineligible individuals who possess animus that would preclude the possibility of a suitable settlement." *Love v. Wilson*, CV 06-06148ABCPJWX, 2007 WL 4928035, at *7 (C.D. Cal. Nov. 15, 2007), *aff'd sub nom. Love v. Sanctuary Records Group, Ltd.*, 386 Fed. Appx. 686 (9th Cir. 2010) (internal quotation and citation omitted). In *Love*, the court noted that personal language in the complaint, such as asserting that a defendant "pursued a path to promote himself, injure *The Beach Boys* trademark, and breach his fiduciary duties to BRI" indicated vindictiveness, animosity and resentment. *Love v. Wilson*, at *7. Cotter, Jr.'s Second Amended Complaint is replete with similar disparagement of the Defendants here, especially his sisters. **See II APP 337, 341-42 (¶ 15 (referring to Margaret as "demonstrably unqualified" to hold a VP position; ¶ 35 (asserting that Ellen and Margaretwere "frustrated by [his] refusal . . . to accede to their demands for titles, positions, promotions, employment contracts, and money from RDI," and labeling Director Margaret Cotter's handling of the STOMP matter, which resulted in a highly-favorable $2.2 million judgment for the Company, a "debacle"); ¶ 37 (asserting that Ellen Cotter was fearful that Cotter, Jr. would fire her"), ¶ 58 (asserting that MC's "diligence or candor, or lack of**

one or both" was called into question;[7] ¶ 63 (referring to Defendant Kane's support of Ellen and Margaret Cotter as "visceral").

In light of the above invective, there can be no reasonable dispute that Cotter, Jr. has displayed considerable vindictiveness towards the Defendants. "The plaintiff must not have ulterior motives and must not be pursuing an external personal agenda." *Smith v. Ayres*, 91-1734, 1992 WL 319148 (5th Cir. 1992). In *Smith*, the court determined that the plaintiff could not adequately represent other shareholders because of his personal motivation in pursuing the litigation, which, as here, involved allegations of the defendants taking sides in a family dispute. In *Smith*, the plaintiff had threatened to ruin the defendant. Cotter, Jr. has made similar threats against the Individual Defendants here. *See* Vol. 2 App. 478-79 (4/29/16 Adams Dep. at 426:19-427:9); Vol. 3 App. 524-25 (5/6/16 McEachern Dep. at 78:14-79:2). Just as in *Smith*, where the litigation was fueled by personal dislike, the litigation here is fueled by Cotter, Jr.'s personal dislike for his sisters, and desire to vindicate his own sense of personal grievance.

Additionally, engaging in multiple lawsuits against the defendants indicates vindictiveness. *Puri v. Khalsa; Peraim Kaur,* 13-36024, 2017 WL 66621, at *1 (9th Cir. Jan. 6, 2017); *Larson v. Dumke*, 88-15440, 1990 WL 38754 (9th Cir.

[7] At the time the SAC was filed, Cotter, Jr. was aware that the arbitration of the dispute with a third party about which he complains in ¶¶ 58-61 had resulted in a judgment in favor of RDI in excess of $2 million.

1990). As noted above, in addition to this litigation, Cotter, Jr. is engaged in a lawsuit against his sisters and an arbitration against RDI. In each of these proceedings, Cotter, Jr. has asserted that his termination was wrongful. A plaintiff who feels *personally* wronged by corporate actions cannot represent the interests of shareholders who did not suffer any personal affront. In *Roberts v. Alabama Power Co.*, 404 So. 2d 629, 636 (Ala. 1981), the court determined that a plaintiff who brought an action for age discrimination, and filed a derivative suit wherein he claimed corporate misconduct, including discriminatory employment practices, could not fairly represent shareholders, even though he had already lost his personal suit, and thereafter no longer had an ongoing direct claim against the corporation. The Court noted that " [i]t seems unlikely . . . that Plaintiff's loss in his personal lawsuit will give him the requisite detachment, required under Rule 23.1, to stand in the shoes of and make decisions for the stockholders whom he has just unsuccessfully sued." *Roberts v. Alabama Power Co.*, 404 So. 2d at 637.

This factor dictates that Cotter, Jr. is not qualified to serve as a representative plaintiff.

6. Other Shareholders Do Not Support Cotter, Jr.

Cotter, Jr.'s filing of this suit led independent shareholders to intervene – an action that is itself indicative of a lack of faith in Cotter, Jr.'s ability to represent

shareholder interests.[8] Indeed, instead of seeking the same relief Cotter, Jr. seeks, those plaintiffs sought an entirely different remedy, *i.e.,* transforming *all* stock into voting stock. Moreover, after extensive discovery, those intervening plaintiffs realized the lack of substance to the claims they raised. As a result, their claims were voluntarily dismissed. In short, Cotter, Jr. has failed to show that other shareholders support his efforts to regain the CEO position.

Given the presence of each of these factors, it is clear that Cotter, Jr. cannot fairly represent the shareholders in a derivative action. However, the District Court summarily denied this standing argument, failing even to explain any reasoning for the denial. Accordingly, this Court should grant writ relief.

[8] Indeed, in granting that Motion to Intervene, which relied on NRCP 24(a)(2) – *i.e.,* intervention as a matter of right, the District Court *necessarily* found that the Intervening Plaintiffs had shown that their interests were not properly represented.

CONCLUSION

Review of the relevant factors demonstrates that Cotter, Jr. is not a suitable representative plaintiff for a derivative lawsuit. Accordingly, this Court should grant the Writ of Prohibition, or in the Alternative, Mandamus.

Respectfully submitted this 7th day of February 2017.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14. The brief contains approximately 6665 words.

Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21(a)(3). I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of February 2017

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, I caused a copy of ***RDI'S Joinder to Petition for Writ of Prohibition or, in the Alternative, Mandamus; Appendix Volumes I, II, and III and Pages Filed Under Seal*** to be served to Petitioner and Real Parties in Interest via electronic mean through the District Court's Wiznet E-Mail filing system on February 7, 2017, and upon

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