# IN THE SUPREME COURT OF NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc.,

Petitioner,

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,

and

DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, AND MICHAEL WROTNIAK,

Real Parties in Interest.



CASE NO.:

District Court Case No. A-15-719860-B

## PETITION FOR WRIT OF MANDAMUS

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## RULE 26.1 DISCLOSURE

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

Petitioner James J. Cotter, Jr. is an individual.

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## ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding under NRAP 17(11), because this writ raises an issue of statewide importance to resolve whether the only means by which the presumptions of NRS 78.138(3) can be rebutted is to show that the directors in question lacked independence or disinterestedness, such that the statutory presumptions did not apply in the first instance. The Court in *Wynn Resorts, Ltd v. Eighth Judicial Dist. Ct.*, 133 Nev. __, 399 P.3d 334 (2017) did not address or resolve this issue. The issue is of statewide importance because the Legislature recently amended NRS 78.138(7) to include, among other changes, a new subsection (a) that says a director or officer cannot be liable to the corporation "unless. . . [t]he trier of fact determines that the presumption [that the director or officer acted in good faith, on an informed basis and with a view to the interests of the corporation] established by subsection 3 has been rebutted." S.B. 203, 2017 Leg., 79th Sess. § 4 (2017). If, as the District Court found, independence and disinterestedness are the only criteria—not only to assess whether the business judgment rule applies in the first place but also to assess whether the plaintiff provided evidence to rebut the rule's presumptions—a

plaintiff would never be able to show that disinterested and independent directors' acts or omissions were a breach of their fiduciary duties and involved intentional misconduct, fraud, or a knowing violation of the law.

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## I. THE RELIEF SOUGHT

Petitioner James J. Cotter, Jr. ("Plaintiff") seeks a writ of mandamus compelling the District Court to vacate its December 28, 2017 Order granting certain director defendants' motions for partial summary judgment Nos. 1 and 2 (of 6), granting defendant William Gould's motion for summary judgment and dismissing the action *completely* as against five director defendants based solely on the District Court's determination that there were no disputed issues of material fact regarding their disinterestedness (and presumably independence). The defendants, except Gould, moved for partial summary judgment with respect to only specific matters. Gould's motion for summary judgment was not fully briefed and scheduled for hearing on January 8, 2018, almost one month after the December 11, 2017 hearing and ruling that gives rise to and is the subject of this writ.

The District Court, however, without giving Plaintiff proper notice and adequate time to respond, elected to treat the motions as directed to the three breach of fiduciary duty *claims* made against the defendants and granted summary judgment as to defendants Kane, McEachern, Codding, Wrotniak, and Gould on all claims and dismissed

them from the case. Granting summary judgment on all claims against these defendants under these circumstances was error, as this Court held in *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. ___, ___, 335 P.3d 199, 202 (2014) ("*Renown*").

The District Court also erred in granting summary judgment for these defendants under the business judgment rule because (1) it did not consider that evidence of breaches of fiduciary duty, including in particular the duty of loyalty, rebuts the business judgment rule presumptions, and (2) because it apparently failed to recognize that acts and omissions of individual directors must be viewed collectively, not in isolation, to fairly assess whether their actions and omissions breached their fiduciary duties. Instead, the District Court assessed only whether individual director defendants were interested and/or lacked independence and, based upon its conclusions regarding those matters alone, granted summary judgment as to all breach of fiduciary duty claims and dismissed the action in its entirety as to the five director defendants it determined to be disinterested and (presumably) independent—without making further inquiry as to whether there was a triable issue of fact with

respect to whether the presumptions of the business judgment rule had been rebutted.

## II. ISSUES PRESENTED

1. Did the District Court err in granting summary judgment in favor of four defendants on all Plaintiff's claims when the full merits of these claims were not challenged in the partial motions for summary judgment?
2. Did the District Court err in *sua sponte* granting summary judgment as to five defendants on all claims without giving Plaintiff ten days notice and an opportunity to be heard?
3. May a derivative plaintiff rebut the presumptions of NRS 78.138(3) only by showing that the directors in question lacked disinterestedness and/or independence, such that the statutory presumptions did not apply in the first instance?
4. In assessing director disinterestedness and independence, as well as claimed breaches of fiduciary duty, is the court

to consider all of the evidence, or only evidence relating to a particular matter?

## III. MATERIAL FACTS

### A. Case Background.

This is a shareholder derivative action for breaches of fiduciary duty owed to Reading International, Inc. PA119–174.[1] Reading International (RDI) is a publicly traded Nevada corporation engaged in the development, ownership, and operation of multiplex cinemas and retail and commercial real estate in United States, Australia, and New Zealand. PA129 (¶ 26). Plaintiff was and is a substantial shareholder and director and former President and CEO of RDI. PA126 (¶ 17). His sisters, defendants Ellen Cotter ("EC") and Margaret Cotter ("MC"), were and are members of the RDI board of directors (the "Board") and at all times relevant hereto have purported to be and/or have been the controlling shareholder(s) of RDI. PA126–27 (¶¶ 18–19). The remaining individual defendants each were at relevant times and are members of the RDI Board of Directors (the "Board"), as well as members of certain Board committees. PA127–129 (¶¶ 20–25).

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[1] Citations to "PA__" refer to Petitioner's Appendix.

## B. Procedural History of the Four Claims Alleged by Plaintiff.

Plaintiff's Verified Second Amended Complaint ("SAC") states four claims, for breach of the fiduciary duty of care (first cause of action), breach of the fiduciary duty of loyalty (second cause of action), breach of the fiduciary duty of candor and disclosure (third cause of action), and for aiding and abetting breach of fiduciary duty (fourth cause of action). PA165–172.

The SAC alleges a wrongful course of conduct by the director defendants to seize and perpetuate control of RDI to protect and further their personal financial and other interests, in derogation of their fiduciary duties owed to the corporation. The particular matters include the following:

1. The threat by defendants Adams, Kane and McEachern to terminate Plaintiff as President and CEO of RDI if he did not resolve disputes with his sisters in separate trust litigation on terms acceptable to them (which included giving them control of RDI);
2. The vote by Adams, Kane and McEachern to terminate Plaintiff because he failed to acquiesce to the threat;

3. EC's threat to terminate health insurance for Plaintiff and his family if he did not resign as a director of RDI, which defendant Gould acknowledged was an erroneous position, but to which he nevertheless acquiesced, resulting in erroneous SEC filings by RDI, among other things;
4. Use of the executive committee of Kane, Adams, EC and MC to limit the participation of Plaintiff and Timothy Storey as directors, to which Gould acquiesced;
5. Creating misleading board materials, such as inaccurate minutes, to which Gould acquiesced;
6. Kane and Adams, as compensation committee members, authorizing exercise of the 100,000 share option to assist EC and MC in their efforts to retain control of RDI, over the stated reservations of committee member-director Storey;
7. The involuntary "retirement" of director Storey by the one-time "special nominating committee" comprised of McEachern, Adams and Kane, at the direction of EC and MC, because Storey failed to exhibit the required subservience to EC and MC as controlling shareholders;
8. Board stacking/adding Codding and Wrotniak by the one-time "special nominating committee" of McEachern,

Adams and Kane, to which Gould acquiesced while acknowledging that he had insufficient time to fulfill his fiduciary responsibilities;

9. The CEO search committee of MC, McEachern and Gould aborting a formal CEO search and selecting EC even though she did not possess the experience they required for the position, which the full Board nevertheless approved;

10. Hiring MC as a senior executive responsible for the Company's valuable New York real estate and paying her a substantial six-figure salary and a $200,000 pre-employment bonus "recommended" by EC, even though directors had acknowledged that MC had no prior real estate development experience;

11. Gratuitously paying $50,000 to Adams, a loyal director who was retired and received no income except from companies controlled by EC and MC, because EC "recommended" it;

12. Preparing erroneous and/or materially misleading statements in board materials, such as agendas and minutes; and

13. Preparing materially misleading and inaccurate statements in public disclosures, including disclosures

filed with the SEC filings and statements made in press releases.

PA 120–125 (¶¶ 2–4, 8–16); PA139–144 (¶¶ 72–94); PA145–162 (¶¶ 99, 101(a)–(i)–162); PA3240–3244 (Joint Pretrial Memo; list of claims at II.B.).

Plaintiff's duty of care and loyalty claim(s) are primarily based on these thirteen matters. Many of those matters—including 1, 3, 5, 7, 8, 12, and 13 —were *not* the subject of a motion for partial summary judgment. (Item 13, erroneous and materially misleading public statements, also serves as a basis for Plaintiff's breach of the duty of candor claim, which was *not* the subject of any of the six motions for partial summary judgment discussed in this petition).

The acts and omissions on which the duty of care and duty of loyalty claims are based also include several as to which motions for partial summary judgment were *denied* (as to director defendants EC, MC, and Adams). Those matters include items 1, 4, 6, 9, 10 and 11, above. PA3074 (Dec. 21, 2016 Order at 3:15–19) (granting MSJ No. 4 "[a]s to formation and revitalization (activation) of the Executive Committee," but denying it "as to utilization of the committee"); PA3618–3619 (December 28, 2017 Order).

More generally, plaintiff's duty of loyalty claims are based on the misuse by EC and MC of their position as controlling shareholders and the acts and omissions of the other director defendants in acquiescing to their self-serving and actively assisting them in protecting and pursuing their personal interests rather than acting solely in the interest of the Company. Taken together, these acts and omissions confirm an ongoing course of entrenchment and self-dealing, not a series of unrelated, one-off, coincidental actions as they were misleadingly framed in the director defendants' Partial MSJs. The District Court at the October 27, 2016 hearing acknowledged that Plaintiff's SAC includes allegations about a series of acts and omissions that collectively show breaches of one or more of the fiduciary duties of care, loyalty and candor.[2] PA2945–2946 (Oct. 27, 2016 Hearing Tr. at 55:23–58:25).

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[2] Plaintiff also maintains that certain of the Individual Director Defendants' complained of conduct in and of itself gives rise to or constitutes breaches of fiduciary duty. PA3240–3242 (paragraphs in bold typeface). These matters include: the conduct to threaten Plaintiff with termination; (ii) the termination of him; and (iii) the manner in which the formal CEO search was aborted and EC made CEO. PA3241.

### C. Relevant Procedural History.

#### 1. The Partial Summary Judgment Motions.

On September 23, 2016, the individual director defendants other than Gould (hereinafter, the "individual defendants") filed six separate motions for partial summary judgment, numbered 1 through 6 ("Partial MSJ Nos. 1–6"), each of which was directed only at specific matters raised in the respective motions. PA1001–PA2793. None of the motions sought summary judgment across the board on any of the four claims pleaded in the SAC.

#### 2. The October 27, 2016 Hearing.

At the initial summary judgment hearing on October 27, 2016, the District Court acknowledged that the Partial MSJ Nos. 1–6 did not challenge Plaintiff's breach of fiduciary duty claims as pleaded in plaintiff's SAC, but rather that they amounted to motions asking the Court not to instruct the jury by way of special interrogatory that those particular matters could be found to be independent breaches of fiduciary duty. PA2945–2946 (Tr. at 55:23–58:25).

The District Court denied Partial MSJ No. 1 regarding the termination of Plaintiff as a CEO, finding that "there are genuine issues of

material fact and issues related to interested directors participating in the process." PA3008 (*id.* at 117:9–12). The District Court granted in part and denied in part Partial MSJ No. 4 regarding the executive committee of the RDI Board, ruling:

> 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.*

PA2983 (*Id.* at 93:10–13) (emphasis added).

Other Partial MSJs regarding particular matters—director independence (No. 2); the Offer (No. 3); the aborted CEO search (No. 5); and other matters including the Exercise and the employment and compensation of MC as a senior executive at RDI (No. 6)—were denied on Rule 56(f) grounds. *See* PA3074 (Dec. 21, 2016 Order).

**3. Defendants' Writ Petitions.**

Unhappy with the District Court's rulings, the individual defendants and RDI filed petitions for writs of mandamus on February 1 and 14, 2017, respectively. *See* Case Nos. 72261 & 72356. These petitions effectively stayed the case for the better part of 2017. On September 28, 2017, when the District Court first set trial for January 2, 2018, PA3083, fact discovery was not yet complete. PA3207.

### 4. The December 11, 2017 Hearing.

All the individual defendants' motions for partial summary judgment were reset for hearing and heard on December 11, 2017. PA3205. The District Court granted Partial MSJ No. 1 regarding termination as to defendants Kane, McEachern and Gould on the grounds that Plaintiff had failed to raise a disputed issue of material fact regarding their disinterestedness or independence. PA3308 (Dec. 11, 2017 Hearing Tr. at 41:4–20).[3] The District Court granted Partial MSJ No. 2, which generally addressed the subject of director independence. This motion, however, did not address either a claim or an element of a claim as to all director defendants other than EC, MC, and Adams on the same grounds. PA3311 (*Id.* at 44:20–45:4). The District Court granted Partial MSJ No. 3 regarding an offer to purchase RDI on separate grounds. PA3315 (*Id.* at 48:17–22).

The District Court denied Partial MSJ No. 5 regarding the aborted CEO search and denied Partial MSJ No. 6 regarding the Option, the hiring of MC as a senior RDI executive and her compensation, and certain other conduct. PA3316 (*Id.* at 49:11–52:15).

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[3] Codding and Wrotniak were not directors at the time of Plaintiff's termination.

Although the director defendants who filed Partial MSJ Nos. 1–6 did not seek dismissal of any of the claims for breach of fiduciary duty made against them in the SAC, the District Court nevertheless dismissed the entire case against four of them—Kane, McEachern, Codding and Wrotniak. PA3340 (*Id.* at 73:9–14).

**5. Gould's Summary Judgment Motion.**

Director defendant Gould, who had filed a separate motion for summary judgment ("MSJ") in 2016, on December 1, 2017 requested a hearing on his previously-filed motion and included supplemental briefing. PA176–1000 (MSJ); PA3189–3204 (Request for Hearing on Gould MSJ). On December 4, 2017, Gould also filed a "Supplemental Reply In Support of Motion for Summary Judgment" containing further arguments. PA3219–3235. Although the hearing on his MSJ was noticed for January 8, 2018, *see* PA3191, and Plaintiff's Opposition to Gould's additional argument was not due until December 18, 2017, the District Court at the December 11 hearing ruled that Gould was entitled to summary judgment on the same grounds as the individual defendants other than EC, MC and Adams, namely, that there were no disputed issues of material fact regarding

Gould's disinterestedness and independence. PA3308, PA3311–12, PA3340 (Dec. 11, 2017 Hearing Tr. at 41:4–20; 44:20–45:4; 73:9–14).

**6. The December 28, 2017 Hearing and Order.**

Plaintiff moved to reconsider the District Court's rulings on December 11, and on December 28, 2017, the District Court heard and denied that motion. That denial is the subject of this writ petition. PA3648 The Court also denied plaintiff's separate motion to stay, PA3650, and later that day, entered an order on the individual defendants' Partial MSJs, Gould's MSJ, and several motions *in limine* ("the Order") which, among other things, dismissed this action entirely as against the five director defendants. PA3615–3621. Trial of this action to a jury is scheduled for three to four weeks, commencing on January 8, 2018. PA3283.[4]

The oppositions to Plaintiff's motion to reconsider filed by the remaining defendants, and the arguments they proffered at the December 28, 2017 hearing, show that they intend to use the District Court's December 28, 2017 order to narrow the scope of the case against the remaining defendants. Together with actions the five dismissed director

[4] The District Court rescheduled the original January 2, 2018 trial date by one week to accommodate an argument on another writ petition before this Court on January 3.

defendants have taken since being dismissed, they and the remaining director defendants also will use that order to seek to prevent Plaintiff from showing breaches of fiduciary duties that would rebut application of the business judgment rule, in accordance with NRS 78.138(7), because of the District Court's dismissal of the five directors.

First, the remaining defendants have made clear that they will take the position that dismissal of this case as against the five individual director defendants severely limits the matters on which plaintiff can base breach of fiduciary duty claims against the remaining defendants. PA3465 (at 19–22 ("the Court's decision . . . leaves only one challenged action – the RDI Board's June 12, 2015 termination of Plaintiff as CEO and President – without a majority of disinterested, independent directors voting in its favor."). Thus, according to the remaining defendants, the Court's ruling dismissing the five director defendants virtually guts Plaintiff's case.

Second, as the remaining director defendants have previewed, they will take the position that dismissal of the case as against the five dismissed director defendants affects which party bears the burden of proof. With respect to matters on which the District Court has determined the remaining defendants were not disinterested, independent, or both and

therefore cannot invoke the statutory presumptions typically referred to as the business judgment rule, the remaining defendants argue that the business judgment rule nevertheless immunizes them because a majority of the directors who made or approved the challenged decision were found by the Court to be disinterested or independent and were dismissed. *Id.* As to matters with respect to which they cannot show that a majority of the directors who approved the challenged decision were dismissed by the Court, Court Exhibit number 1 to the December 28, 2018 hearing shows that the dismissed five director defendants are taking action to formally ratify such decisions to enable the remaining defendants to argue that a majority of the directors who made or approved the decision were disinterested and independent. PA3656 (Court's Exhibit 1). For example, with respect to the 3-to-2 vote to terminate Plaintiff, the five dismissed director defendants intend to ratify that vote, thereby enabling the remaining defendants to argue that director Adams' lack of independence does not matter and that the termination vote cannot serve as a basis for liability on his part. *Id.* PA3635 (ll. 19-24); PA3645 (ll. 5-8); PA3646 (ll. 5-9).

## IV. REASONS WHY THE WRIT SHOULD ISSUE

Writ relief is appropriate to assess whether "the District Court acted appropriately in granting summary judgment on [all] claims" where, as here, "the full merits of these claims were not specifically [noticed and] argued in the [partial] motions for summary judgment or at the hearing." *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. ___, ___, 335 P.3d 199, 202 (2014) ("*Renown*") (granting writ petition). The District Court granted summary judgment as to five of the eight director defendants on *all* of Plaintiff's *claims*, even though the individual defendants (other than Gould) had filed only partial summary judgment motions as to specific matters. Here, as in *Renown*, the District Court's grant of summary judgment raises "an important issue of law needing clarification and judicial economy is served by [the Court's] consideration of this petition," *id.*, because trial is set to begin on January 8, 2018 and proceed before a jury for several weeks against the three remaining defendants on the very same claims. If writ relief is not granted, a successful appeal of the Order would require the parties to "do over" a costly and time-consuming jury trial.

Writ relief is also appropriate to clarify an important issue of corporate law, especially when the issue involves the interpretation of a

recent statutory amendment. *See Sandpointe Apartments, LLC v. Dist. Ct.*, 129 Nev. __, ___, 313 P.3d 849, 852 (2013). Petitioner seeks clarification of the means by which he and other similarly situated plaintiffs may rebut the presumptions under NRS 78.138(3) that directors of a corporation "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." The Nevada Legislature recently added a new subsection (a) to NRS 78.138(7), confirming that directors and officers cannot be liable to their corporation "unless. . . [t]he trier of fact determines that the presumption established by subsection 3 has been rebutted." S.B. 203, 2017 Leg., 79th Sess. § 4 (2017). The District Court dismissed the five directors based solely on its determination of their disinterestedness and (apparently) independence, without allowing petitioner the opportunity to rebut the rebuttable presumptions under NRS 78.138(3) by showing that these director defendants had breached their fiduciary duties by, among other things, not acting in good faith, on an informed basis, and with a view to the interests of the Company.

## V. ARGUMENT

### A. The District Court erred in granting summary judgment as to five defendants on all claims when their motions for partial summary judgment addressed only specific matters.

When reviewing a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). The Court reviews an order granting summary judgment *de novo*. *Id.*; *Renown* 335 P.3d at 202.

Although a District Court has the inherent power under Nev. R. Civ. P. 56 to *sua sponte* grant summary judgment on claims that are not a part of a motion for summary judgment, before doing so the Court must give the non-moving party 10 days notice and the opportunity to defend himself. *Renown*, 335 P.3d at 202; *Soebbing v. Carpet Barn*, 109 Nev. 78, 83–84, 847 P.2d 731, 735 (1993) (holding same). In *Renown*, the defendant hospital moved for summary judgment on three specific issues: policy coverage, third-party beneficiary status of the plaintiff, and Renown's compliance with certain statutes. *Renown*, 335 P.2d at 201. The District Court denied the motion, holding there were issues of fact. *Id.* Thereafter, Renown renewed its motion and the plaintiff filed a partial summary judgment motion on the statutory violation issue only. *Id.* After a hearing,

the district court granted the plaintiff's motion, deciding not only the three issues raised by Renown but finding "in favor of Wiley on his breach of contract and intentional interference with contract claims, *even though the full merits of these claims were not specifically argued in the cross-motions for summary judgment or at the hearing*." *Id.* (emphasis added). This Court granted the writ petition with respect to that portion of the order because the "claims for breach of contract and intentional interference with contract . . . were nowhere mentioned in the six summary judgment briefs." *Id.* at 202.

**1. Partial MSJ Nos. 1, 2, and 3 did not argue the full merits of Plaintiff's fiduciary duty claims.**

Similarly here, the individual defendants moved for partial summary judgment on specific matters only—*i.e.*, Plaintiff's termination (Partial MSJ No. 1); director independence (No. 2); the Offer (No. 3); the executive committee (No. 4); the aborted CEO search (No.5); an option exercise and other issues, including the employment of MC by RDI (No. 6). *See, e.g.*, PA1002 ("this Motion for Summary Judgment (No.1) as to the First, Second, Third, and Fourth Causes of Action in Plaintiffs Second Amended Complaint, *to the extent that they assert claims based on Plaintiffs [sic] June 12, 2015 termination* . . . .") (emphasis added).

Unlike defendant Gould, the individual defendants did not move for summary judgment on any, much less all, of the claims against them for breach of fiduciary duty. These claims are based on matters not addressed in the MSJs—*e.g.*, the attempt to extort plaintiff and the materially misleading and erroneous public disclosures and board process failures. PA3240–3244 (Pretrial Memo); Section III.B, *supra*, at 12–13 (Nos. 5, 12, and 13). Moreover, those claims also are based on matters as to which the District Court *denied* partial summary judgment, including Partial MSJ Nos. 1, 4, 5 and 6, each of which involves conduct by dismissed defendants. For example, Partial MSJ No. 5 relates to the aborted CEO search and the appointment of Ellen Cotter as CEO, which is conduct MC, Gould and McEachern choreographed. Section III. B, *supra*, at 13 (No. 9).

**2. The District Court's ruling on the Partial MSJs deprived Plaintiff of Notice and an Opportunity to be heard.**

A party's right to notice and an opportunity to be heard on matters not addressed in a motion for summary judgment "has nothing to do with the merits of the case." *Soebbing*, 109 Nev. at 83, 847 P.2d at 735 (citing *U.S. Dev't Corp. v. Peoples Fed. Savings and Loan Ass'n*, 873 F.2d 731, 734 (4th Cir.1989)). " '[R]egardless of a claim's merit, a District Court may not *sua sponte* enter summary judgment against it until the claim's

proponent has been given notice and a reasonable opportunity to be heard.' " *Soebbing*, 109 Nev. at 83, 847 P.2d at 735 (quoting *U.S. Dev't Corp.*, 873 F.2d at 734).

Here, because the individual defendants did not seek summary judgment on any, much less all, of the claims against them, the District Court's ruling went beyond the issues raised in Partial MSJ Nos. 1, 2, and 3 in dismissing all claims against five defendants. Plaintiff should have received not less than ten days' notice and been given an opportunity to be heard. Nev. R. Civ. P. 56(c); *Renown*, 335 P.3d at 202. For this reason alone, the Order granting the partial summary judgment motions and dismissing the entire case against Kane, McEachern, Codding and Wrotniak must be vacated. *See Renown*, 335 P.3d at 202 (directing clerk to order a writ of mandamus vacating portion of District Court order granting summary judgment on two of the plaintiff's claims).

### 3. The District Court decided Gould's Motion for Summary Judgment before briefing was complete.

Plaintiff was entitled to the same notice on Gould's MSJ, because briefing was still open on that motion on December 11. Gould's December 1, 2017 Request for Hearing on [His] Previously Filed Motion for Summary Judgment ("Request") included ten pages of supplemental

arguments. PA3193–3204. Although argument on Gould's MSJ was set for January 8, 2018, PA3191, and Plaintiff's Opposition to Gould's Request was not due until December 18, 2017, the Court on December 11 dismissed Gould from the case for the same reasons it dismissed the four other individual defendants. PA3308, PA3311–12, PA3340; PA3618–19. This deprived Plaintiff of due process and warrants vacating the Order. *Cf. Renown*, 335 P.3d at 202 (holding defendant was entitled to notice and an opportunity to be heard on matter not addressed in a motion for summary judgment).

### B. The District Court Erred in its Application of the Business Judgment Rule, Which Is a Rebuttable Presumption.

#### 1. The business judgment rule can be invoked only by disinterested and independent directors.

"The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the Company." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, __, 399 P.3d 334, 341 (2017) (quoting *Shoen v. the SAC holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006)).

As a threshold matter, only disinterested and independent directors may avail themselves of the business judgment rule's presumptions and protections. *Shoen*, 122 Nev. at 635–636, 137 P.3d at 1181 ("The business judgment rule... applies only in the context of valid interested director action [citation omitted] or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties" [citation omitted] (emphasis supplied); *id.* at 636, 137 P.3d at 1181 ("disinterested directors may invoke the business judgment rule's protections"); *id.* ("In explaining how the business judgment rule presumption operates, the *Aronson* court first noted that only disinterested directors can claim its protections." (Citation omitted).

The business judgment rule does not apply where "directors have an interest other than as directors of the corporation." *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 769 (2d Cir. 1980). This is because "[d]irectorial interest exists whenever divided loyalties are present." *Rales v. Blasband*, 634 A. 2d 927, 933 (Del. 1993) (citations and quotations omitted). A director's disinterestedness is a question of fact. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) ("Whether a director is 'interested' is a question of fact").

Independence requires that a director be able to engage, and in fact engages, in decision-making "based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Gilbert v. El Paso, Co.*, 575 A.2d 1131, 1147 (Del. 1990); *Rales*, 634 A. 2d at 936. "Directors must not only be independent, [they also] must act independently." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2003); *see also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("We have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations"), *modified in part on other grounds*, 636 A.2d 956 (Del. 1994). "Independence is a fact-specific determination made in the context of a particular case." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004). "The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Id.* at 1049–50.

As the foregoing reflects, if a plaintiff shows that a director lacked disinterestedness, independence or both, the business judgment rule cannot be invoked by the director. The rule is not rebutted; rather, it

simply does not apply because the director has not met the threshold requirement to invoke it: disinterestedness and independence. *Shoen*, 122 Nev. at 637, 137 P.3d at 1181 (In such instances, the directors are "incapable of invoking the business judgment rule's protections...".)

### 2. The Business Judgment Rule Can be Rebutted by Showing Breaches of Fiduciary Duty.

Where the business judgment rule is properly invoked by directors who are disinterested and independent, the plaintiff bears the burden of rebutting it. *Wynn Resorts, Ltd*, 133 Nev. at __, 399 P.3d at 341 ("a director will not be liable for damages based on a business decision unless it can be shown that the director breached his fiduciary duties...") (citing NRS 78.138(7)); *Cinerama v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (The business judgment rule presumption "is a rule of evidence that places the initial burden of proof on the plaintiff challenging the board's decision").

In *Shoen*, this Court adopted the two-prong analysis employed by the Delaware Supreme Court in *Aronson v. Lewis*. *Shoen*, 122 Nev. at 635, 137 P.3d at 1180. In *Aronson v. Lewis*, the court held that the business judgment rule only applies when a director is disinterested and independent and that in such circumstances their conduct still could fail to

"meet[] the tests of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) (emphasis supplied) ("*Aronson*").

In *Shoen*, in the context of demand futility, this Court held that a plaintiff can rebut the presumptions of the business judgment rule by showing that rule "is not likely in fact to protect the decision" or by raising a " 'reasonable doubt...[that] the challenged transaction was otherwise the product of a valid exercise of business judgment.' " 122 Nev. at 637, 137 P.3d at 1181–82 (quoting *Aronson*, 473 A.2d at 814–15).[5] Particularly relevant in this case—which arises from an ongoing course of entrenchment and self-dealing precipitated by Ellen and Margaret Cotter as controlling shareholders and acquiesced to and assisted by the other individual director defendants anxious to please them, as distinguished from serving RDI's best interests—is this Court's conclusion in *Shoen* that:

> [D]irectors' independence can be implicated by particularly alleging that the director's execution of their duties is unduly influenced [citation omitted], manifesting 'a direction of

[5] For example, a decision by directors approving actions that are violations of law (e.g., the Foreign Corrupt Practices Act) that subject a corporation to legal recourse, monetary liability and the like "is not likely in fact to [be] protected" by the business judgment rule. But by the District Court's analysis in this case, the business judgment rule absolutely protects such fiduciary breaches if the directors are disinterested and independent. That cannot be the law in Nevada, nor should it be.

> corporate conduct in such a way as to comport with the wishes or interests of the [person] doing the controlling' [citation omitted]."

*Shoen*, 122 Nev. at 639, 137 P.3d at 1183.[6]

Thus, as a matter of law (and logic), if a plaintiff can show that the director or directors: (i) failed to act on an informed basis; (ii) failed to act in good faith; and/or (iii) failed to act in the honest belief that the action was taken in the best interests of the company, the plaintiff will have rebutted the presumptions of the business judgment rule. *See also Cinerama*, 663 A.2d at 1164 (to rebut this presumption, the plaintiff bears "the burden of providing evidence that the board of directors, in reaching its challenged decision, breached any one of its... fiduciary duties [of] good faith, loyalty or due care").[7]

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[6] The concept of good faith is particularly relevant in cases in which there is a "controlling shareholder with a supine or passive board." *In Re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 761 n. 487 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). In such cases, "[g]ood faith may serve to fill [the] gap [between a fiduciary duties of care and loyalty] and insure that the persons entrusted by shareholders to govern [the] corporation do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *Id.*

[7] Under NRS 78.138 (7), in addition to rebutting the presumptions of the business judgment rule, the plaintiff also must show breach(es) of fiduciary duty by the individual director defendants and that the fiduciary breaches entailed intentional misconduct, a knowing violation of law and/or fraud. NRS 78.138(7). "Intentional misconduct" is one of three ways in which a fiduciary can fail to act in good faith. *In re Walt Disney Co.*, 906 A.2d at 67. The first occurs "where the fiduciary intentionally acts with a purpose

S.B. 203 recently amended NRS 78.138(7) to include the requirement that the business judgment rule be rebutted. NRS 78.138(7) therefore now requires the plaintiff to: (a) rebut the presumption under NRS 78.138(3) that directors are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation; (b) show that the director's act or failure to act constituted a breach of fiduciary duty; and (c) show that such breach involved intentional misconduct, fraud or a knowing violation of law.

The recent amendment raises the same question as is raised by the rulings of the District Court here, which is whether a plaintiff can rebut the presumptions of the business judgment rule by showing breach(es) of fiduciary duties by the individual director defendants. The question also could be stated as follows: Are directors of Nevada corporations who are entitled to invoke the business judgment rule because they are

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other than that of advancing the best interests of the corporation." *Id.* The second occurs "where the fiduciary acts 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.* Although Plaintiff below contended that he had demonstrated the breaches of fiduciary duty that entailed the first and third kinds of intentional misconduct, the analysis performed by the District Court began and ended with an analysis of disinterestedness and independence. PA3618.

disinterested and independent absolutely immune from personal liability if they breach their duty of loyalty?

### 3. The District Court Concluded That the Business Judgment Rule Can Be Rebutted Only by Showing Director Interest (or a lack of Independence), which is Clearly Erroneous.

As described above, in granting summary judgment in favor of five individual director defendants with respect to claims for breach(es) of the duty of care (first claim), breach(es) of the duty of loyalty (second claim) and breach(es) of the duty of candor (third claim), the District Court did so based on its determination that there were no disputed issues of material fact regarding the disinterestedness or independence of those director defendants. PA3618; PA3327 (Dec. 11, 2017 Hearing Tr. at 60:6–8) ("the directors that I found there was not evidence of a lack of disinterestedness have the protection the statute provides to them").

But the District Court treated evidence of breaches of fiduciary duty as legally irrelevant to rebutting the business judgment rule presumptions. For example, the District Court stated as follows:

> THE COURT: Let's skip ahead, then. Mr. McEachern. What evidence of disinterestedness do you have for Mr. McEachern? And if you could tell me where in the briefing it is, I will look at it again. But, as I've said, other than

> Mr. Adams I did not see evidence of disinterestedness as opposed to allegations of breach of fiduciary duty.
>
> [Counsel]: Mr. McEachern attempted to extort Mr. Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter, you need to go resolve your disputes with your sisters and were going to reconvene at 6 o'clock and if you don't[,] you'll be terminated. Now, there is no dispute about that. We have in evidence the testimony—
>
> THE COURT: I understand that that's one of your claims of breach of fiduciary duty...

PA3303 (Dec. 11, 2017 Hearing Tr. at 36:10–23).

In explaining why partial summary judgment motions were granted as to some directors but denied as to others as to the same matters (which was MSJ Nos. 1, 5 and 6), the District Court explained "[s]ome directors I found to be disinterested" and "they're protected." PA3319 (*id.* at 52:4–10). Likewise, after listening to counsel for plaintiff recite evidence of a series of breaches of fiduciary duty by director defendant Gould, PA3324–26 (*id.* at 57:22–58:14 and 59:2–25), the District Court stated as follows:

> The fact that I am denying certain issues related to the other summary judgments [meaning denying several of the motions for partial summary judgment] does not diminish the fact that the directors that I found there was not evidence of a lack of disinterestedness have the protection the statute provides to them."

PA3327 (*id.* at 60:1–8).

Defendants agree that the District Court determined that certain directors were not interested and/or did not lack independence, and on that basis concluded that they could not have personal liability for breaches of fiduciary duty. In their opposition to plaintiff's motion for reconsideration, the individual defendants asserted a position that effectively summarized how the District Court ruled, as follows:

> "Before Plaintiff can question the substantive merits of these thirteen RDI board decisions [which is the same list set out at pages 5-6, *supra*] derived from the SAC and the joint pretrial memorandum] and proceed to trial on some kind of generalized usurpation and entrenchment theory against the various Individual Defendants, he must first show that a majority of the directors involved in these decisions were either interested or not independent... ."

PA3472 (at 8:19–22).

The basis upon which the District Court ruled was so clear that the individual defendants effectively made the same observation twice, stating as follows:

> "To proceed to trial on fiduciary duty claims... Plaintiff must, at a minimum, first show that these directors were either interested in, or not independent with respect to, each transaction alleged to be a breach of fiduciary duty."

PA3473 (id. at 9:14–17.)

In so ruling, the District Court granted summary judgment and dismissed the action in its entirety against the five individual director

defendants because it determined there were no genuine issues of material fact regarding their disinterestedness. The District Court denied summary judgment to the three individual defendants because there "are genuine issues of material fact related to the disinterestedness of each of those individuals[,]" concluding that "they cannot at this point rely upon the business judgment rule." PA3308 (Dec. 11 Hearing Tr. at 41:4–12); PA3074 (Order).

Respectfully, the analysis employed by the District Court is inconsistent with the plain terms of NRS 78.138, directly contrary to the holding and rationale of *Shoen*, and amounts to nothing less than a determination that the business judgment rule, if invoked by director defendants that are disinterested and independent, is irrebuttable, thus effectively immunizing such directors from liability for breach of their fiduciary duties.

#### 4. The District Court Erred in Not Collectively Considering the Acts and Omissions of the Dismissed Directors to Determine Whether There Are Material Questions of Fact Regarding Breach of Fiduciary Duties.

As we point out earlier in this petition, the District Court acknowledged that there are claims of breach of fiduciary duty arising from: (i) matters that had not been the subject of Partial MSJ Nos. 1–6 (*e.g.*,

the breach of duty of loyalty arising from the efforts of director defendants Kane, McEachern and Adams to extort plaintiff into resolving certain personal trust and estate disputes he had with his sisters); and (ii) matters that had been the subject of Partial MSJ Nos. 1–6 which were denied in whole or part (MSJ Nos. 1, 4, 5 and 6). These matters, together with other matters alleged in the SAC, collectively give rise to breaches of the duties of care, loyalty, and candor in furtherance of an ongoing scheme of entrenchment and self-dealing.[8]

As a matter of law and, in cases such as this logic as well, the acts and omissions of the individual director defendants must be viewed collectively, not in isolation. *See, e.g., In re Ebix, Inc. Stockholder Litig.*, 2016 Del. Ch. LEXIS 5 at *66–67 n.137, 2016 WL 208402 (Del. Ch. Jan. 15, 2016) (rejecting director defendants' contention that bylaw amendments should be viewed individually rather than collectively); *Carmody v. Toll Brothers,*

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[8] Directors owe all stockholders, not just the stockholders who appointed them, "an uncompromising duty of loyalty." *In re Trados Inc. S'Holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013). Under some circumstances, it is a breach of loyalty for directors not to act to protect the minority stockholders from a controlling stockholder. *Louisiana Mun. Police Emp. Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009) (finding that the failure to act in the face of a controlling stockholder's threat to the corporation and its minority stockholders supported a reasonable inference that the board of directors breached its duty of loyalty by deciding not to cross the controlling stockholder).

*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 Del. Ch. LEXIS 144 at *29–30, 2002 WL 31888343 (Del. Ch. Dec. 18, 2002) (concluding that allegations which individually would be insufficient to show a lack of disinterestedness or independence when taken together, were sufficient to do so).

But the District Court apparently misapprehended case law which stands for the proposition that, except in circumstances where there is a general lack of independence, such as financial dependence on a controlling party (such as Adams here on EC and MC) or interest arising from a close, debilitating familial or quasi-familial relationship (such as director Kane has with MC and EC), interest and independence also must be assessed on a transaction by transaction basis. PA2974–75 (Oct. 27, 2016 Hearing Tr. at 84:4–6, 21– 85:3). The District Court failed to allow for the

possibility that directors who lacked traditional indicia of interest in the context of a particular transaction may have failed to act independently. The District Court ignored that "[d]irectorial interest exists whenever divided loyalties are present." *Rales*, 634 A. 2d at 933 (citations and quotations omitted). "Directors must not only be independent, [they also] must act independently." *Telxon Corp.*, 802 A.2d at 264.

Based on the District Court's ruling and statements made at the October 27, 2016 hearing quoted and cited above, it appears that the District Court assessed whether individual director defendants were disinterested with respect to particular matters, but did not view the evidence collectively to assess whether directors suffered from divided loyalties and/or failed to act independently. The failure to do so constitutes clear error because it ignores and goes against the teaching of *Shoen:*

> [D]irectors' independence can be implicated by particularly alleging that the director's execution of their duties is unduly influenced [citation omitted], manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the [person] doing the controlling' [citation omitted]."

*Shoen*, 122 Nev. at 639, 137 P.3d at 1183.

## VI. CONCLUSION

Petitioner James J. Cotter, Jr. respectfully requests that a writ of mandamus issue compelling the District Court to vacate its December 28, 2017 Order granting certain director defendants' motions for partial summary judgment Nos. 1 and 2 (of 6), granting defendant William Gould's motion for summary judgment and dismissing the action *completely* as against five director defendants based solely on the District Court's determination that there were no disputed issues of material fact regarding the disinterestedness of these directors when they acted to please the Cotter sisters and failed to act in the best interests of the corporation they were duty-bound to serve, Reading International, Inc.

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **PETITION FOR WRIT OF MANDAMUS**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 7,619 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to

be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

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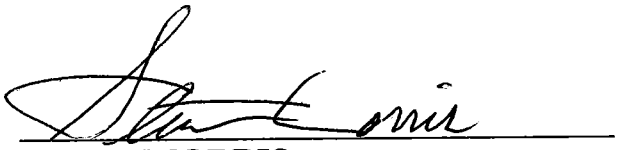
## VERIFICATION

I, Steve Morris, declare:

1. I am one of the attorneys for the Petitioner herein;
2. I verify that I have read the foregoing **PETITION FOR WRIT OF MANDAMUS** that the same is true to the best of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true.
3. I declare under penalty of perjury of the laws of Nevada that the foregoing is true and correct.



STEVE MORRIS

## CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below. I hereby certify that on the 2nd day of January, 2018, a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** was served by the following method(s):

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