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

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

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

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

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

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

So, you know, the briefing was somewhat like ships

ordered.

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

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

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

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

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

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

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

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

THE COURT: But he used to be a director.

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

THE COURT: All right.

MR. KRUM: Kane objects, my client objects.

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

MR. KRUM: Right.

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

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

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

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

THE COURT: Okay.

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

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

resolved. So that issue remains outstanding.

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

THE COURT: Those were my questions for you.

MR. KRUM: Thank you.

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

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

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

MR. KRUM: They have dates.

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

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

THE COURT: What is it?

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

THE COURT: But when do they start?

MR. TAYBACK: They've started.

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

It keeps going.

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

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

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

MR. TAYBACK: Correct.

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

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

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

THE COURT: Right. No. They --

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

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

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

break for a jury.

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

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

MR. TAYBACK: That's right.

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

Mr. Ferrario.

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

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

MR. FERRARIO: Right.

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

MR. FERRARIO: Right. So --

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

MR. FERRARIO: Who, Lenhard?

THE COURT: Lenhard.

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

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

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

THE COURT: That's a problem.

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

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

MR. FERRARIO: What?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Where are you going?

THE COURT: I don't have a courtroom.

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

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

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

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

not the chief judge.

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

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

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

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

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

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

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

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

MR. FERRARIO: Do we still have the CLC?

THE COURT: No, we do not.

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

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

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

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

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

MR. FERRARIO: Okay. Then that moots it.

THE COURT: Okay.

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

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

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

THE COURT: Adams?

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

THE COURT: Tompkins?

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

THE COURT: 30(b)(6)?

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

UNIDENTIFIED SPEAKER: It's limited to two hours.

THE COURT: Five experts, all --

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

THE COURT: I limited it to two hours.

MR. FERRARIO: And then --

THE COURT: Five experts all over the country.

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

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

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

every decision that's made by the board.

THE COURT: Yes.

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

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

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

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

MS. HENDRICKS: They're not.

MR. FERRARIO: They're not all set.

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

MR. FERRARIO: We need to get those set.

THE COURT: You need to get them finished.

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

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

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

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

THE COURT: You're not done.

MR. FERRARIO: Huh?

THE COURT: You're not done.

MR. FERRARIO: Your Honor --

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

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

THE COURT: Okay.

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

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

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

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

THE COURT: Great. That's easy.

MR. FERRARIO: That's it.

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

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

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

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

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

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

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

MR. FERRARIO: No, that --

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

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

THE COURT: Right.

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

THE COURT: Me, too.

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

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

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

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

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

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

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

MR. SEARCY: Your Honor, we blocked --

THE COURT: Wait. Wait, Mr. Searcy.

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

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

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

THE COURT: Sure. So you think --

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

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

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

THE COURT: Really.

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

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

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

MR. FERRARIO: Yes.

THE COURT: Best of all possible worlds.

MR. FERRARIO: Best of all worlds.

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

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

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

MR. FERRARIO: Oh.

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

MR. FERRARIO: I think we can do it.

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

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

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

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

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

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

MR. FERRARIO: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Mr. Krum --

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

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

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

What else, Mr. Searcy?

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

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

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

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

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

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

THE COURT: Wait.

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

THE COURT: I understand what you're saying.

MR. FERRARIO: Okay.

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

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

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

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

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

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

MR. FERRARIO: Yeah. Jumping around.

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

THE COURT: All the remaining experts?

MR. SEARCY: That's right.

THE COURT: Mr. Krum.

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

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

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

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

the percipient witnesses.

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

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

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

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

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

THE COURT: Okay. Anything else?

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

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

MR. KRUM: Correct.

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

THE COURT: It was.

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

THE COURT: And I granted it.

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

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

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

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

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

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

MR. KRUM: I'm sorry.

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

MR. KRUM: Correct.

THE COURT: That's a different issue.

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

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

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

was framed.

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

MR. KRUM: Okay.

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

MR. KRUM: Right.

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

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

MR. FERRARIO: We will.

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

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

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

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

MR. FERRARIO: Oh, that's all?

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

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

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

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

MR. FERRARIO: Okay. So --

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

MR. FERRARIO: Right.

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

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

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

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

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

THE COURT: We all know that.

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

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

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

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

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

MR. FERRARIO: We understand that.

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

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

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

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

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

MR. FERRARIO: I think we are.

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

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

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

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

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

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

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

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

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

THE COURT: I know.

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

THE COURT: I know.

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

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

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

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

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

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

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

fiduciary duties?

MR. TAYBACK: Yes.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Uh-huh.

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

THE COURT: Yes.

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

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

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

MR. TAYBACK: That's correct.

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

MR. TAYBACK: That's absolutely correct.

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

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

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

MR. TAYBACK: If I'm --

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

MR. TAYBACK: I did, too.

THE COURT: Okay.

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

THE COURT: Okay. Anything else?

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

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

them.

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

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

MR. KRUM: Yes.

THE COURT: What are you going to ask them?

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

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

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

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

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

THE COURT: I know.

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

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

Okay. What else?

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: What's that?

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

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

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

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

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

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

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

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

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

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

May I just grab my other binder?

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: Anything else? No other questions?

THE COURT: Those are all my questions for you.

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

THE COURT: You want to say something, Mark?

MR. FERRARIO: Just very briefly.

MR. KRUM: Your Honor --

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

MR. KRUM: They're a nominal defendant.

THE COURT: Mr. Krum.

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

MR. FERRARIO: I can tell you that --

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

MR. FERRARIO: I'm not.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: He's part of the family.

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

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

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

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

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

MR. FERRARIO: No.

THE COURT: It's not like that?

MR. FERRARIO: No.

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

MR. FERRARIO: Absolutely not.

THE COURT: Okay.

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

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

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

THE COURT: Never mind. Keep going.

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

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

plaintiffs that resolved most of those claims.

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

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

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

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

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

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

THE COURT: I'm aware of that.

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

THE COURT: Anything else?

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

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

THE COURT: Yes.

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

and argue other motions, as well.

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

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

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

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

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

MR. KRUM: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. KRUM: And so --

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

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

THE COURT: Anything else?

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

THE COURT: Briefly, please.

MR. TAYBACK: Briefly, yes.

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

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

repeat myself.

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

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

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

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

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

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

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

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

THE COURT: All right. Thank you.

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

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

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

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

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

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

MR. TAYBACK: Yes.

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

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

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

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

THE COURT: Not the question, questions.

MR. TAYBACK: Questions.

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

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

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

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

With that I can sit down.

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

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

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

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

THE COURT: [Inaudible].

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

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

MR. FERRARIO: All right. So --

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

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

THE COURT: Now Mr. Krum.

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

THE COURT: Absolutely.

MR. KRUM: Very well.

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

MR. KRUM: Understood.

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

MR. KRUM: Understood.

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

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

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

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

THE COURT: I know.

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

or the other first?

THE COURT: I don't care.

MR. TAYBACK: I'll start.

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

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

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

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

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

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

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

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

The third point here goes to the undisputed facts.

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

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

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

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

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

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

THE COURT: Thank you.

Mr. Ferrario.

MR. FERRARIO: Very briefly, Your Honor.

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

THE COURT: An emergency motion for a hearing on the

probate case that we never had.

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

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

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

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

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

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

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

MR. FERRARIO: Delaware law.

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

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

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

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

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

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

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

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

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

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

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

make sure when you said the --

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

MR. RHOW: Understood.

THE COURT: Is that okay?

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

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

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

THE COURT: I do have it someplace else.

MR. RHOW: Understood, Your Honor.

THE COURT: Okay.

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

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

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

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

So when the business judgment rule is rebutted, as

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

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

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

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

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

ignored to select EC. The Company's disclosures before and after the search, that it employed an outside search firm, which was Korn Ferry, likewise were materially misleading because they create the misimpression that the search firm participated in the selection of the EC when, in fact, the search firm was terminated so EC could be selected without interference from it.

Simply put, the individual director defendants themselves made a thorough record of what they should have done and what they did, which did not approximate what they themselves agreed they should have done, but which, consistent with their prior and subsequent conduct, amounted to acceding to the wishes of EC and MC.

Likewise, as to the end result, the individual defendants cannot satisfy their burden of showing that the selection of EC, who woefully failed to even approximate satisfying the criteria the CEO search committee set, is entirely fair to RDI and its shareholders, particularly after she made MC the head of real estate development for New York.

f. Gould Knowingly Allowed RDI to Issue Inaccurate and Materially Misleading SEC Filings and Press Releases, and Knowingly Failed to Act to Correct Them, Thereby Breaching His the Duties of Disclosure and Loyalty

As described above, Gould repeatedly allowed RDI to make inaccurate and materially misleading SEC filings and public disclosures. For example, he did that on or about June 18, 2015 when he took no action whatsoever to stop or correct the Form 8-K and the June 15, 2015 press release issued by the Company, which announced the termination of Plaintiff and which erroneously (according to Gould himself at the time) asserted that Plaintiff was required to resign from the RDI Board of Directors due to his termination. Gould did so previously when he took no action whatsoever with respect to the Company's inaccurate and materially misleading SEC filings stating that the director Storey had "retired." Cotter siblings were working together cooperatively. He did so repeatedly when he failed to take any action whatsoever to have the Company correct its recurring inaccurate disclosures that omitted to disclose that Adams was financially dependent on and beholden to the Cotter sisters. He did so doubly when he allowed the Company to disclose that EC had been selected as the new CEO following hanging "thorough search." This is an ongoing course of conduct that Gould's Motion seeks to excuse by inviting reliance on Company counsel -- without producing the advice on which Gould claims to have

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relied. Plaintiff either is entitled to Rule 56(f) discovery or Gould cannot invoke reliance on the advice of counsel.

g. Gould Breached His Fiduciary Duties in Failing to Take Any Action to Make a Good Faith, Informed Decision Regarding the Offer

As summarized in the accompanying declarations of Plaintiff, Gould and the other director defendants failed to take any actions whatsoever to place themselves in position to make an informed, good faith decision regarding how to respond to the Offer. Instead, they asked what the controlling shareholders wanted to do and agreed to do what the controlling shareholders wanted to do. Gould, as a lawyer supposedly well-versed in matters of corporate governance, full well knew that nothing, or next to nothing, did not satisfy his duty of care. He also full well knew that he owes fiduciary duties to all shareholders, not just a controlling shareholders. He nevertheless failed act in a manner that reflected that knowledge.

4. Use of an Executive Committee Here Is Additional Evidence of the Alleged Entrenchment Scheme, to Which Gould Acquiesced

The fact that delegation to an executive committee is not a violation of the Company's by-laws or Nevada law does not mean that, as it was done here, it does not constitute a breach of fiduciary duty with respect to which equitable relief is appropriately awarded. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) ("inequitable action does not become permissible simply because it is legally possible").

Moreover, and contrary to what the Motion assumes, the right of a board of directors to delegate is not unlimited, and delegation by a board of directors may give rise to a claim for breach of fiduciary duty. *Grimes v. Donald*, 1995 WL 54441, at *9 (Del. Ch. Jan. 11,1995), quoted in *Quickturn Design Sys., Inc., v. Shapiro*, 721 A.2d 1281, 1292 n.43 (Del. 1998) (a board "may not either formally or effectively abdicate its statutory power and its fiduciary duty to manage or direct management of the business and affairs of th[e] corporation.") *CA, Inc., v. AFCSME Emps. Pension Plan*, 953 A.2d 227, 239 (Del. 2008) ("internal governance contracts" such as bylaws are invalid if they "prevent the directors from exercising their full managerial

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power in circumstances where their fiduciary duties would otherwise require them" to act in a manner contrary to the contract or bylaw.)

In view of such law, it is no surprise that respected commentators have suggested that "to the extent a board may exclude a director through the use of a board committee, it could only do so if the director faces a specific and direct conflict of interest with respect to the matter under discussion." J. Travis Laster and John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, THE BUS. LAWYER, Winter 2014-2015, at 59. Furthermore, if a "director has been excluded for an extended period of time, and if the committee has been tasked with the full power of the board and is effectively carrying out the board's role, then the excluded director may have powerful equitable arguments in his favor" in light of the fact that "the ability of a board majority to exclude minority directors stands in tension with the concepts of director involvement and collective deliberation . . ." (*Id.* at 60.)

5. N.R.S. 78.138(7) Does Not Preclude Liability in This Case

The individual director defendants in most if not all of their MSJs cite to NRS 78.138(7) and, in particular, to the portion that requires that fiduciary breaches "involve[] intentional misconduct, fraud, or a knowing violation of law" and, based on that language, and cases that quote that language, conclude that they are "protected" or "immune" from liability. (*See e.g.*, MSJ No. 4 at 8:3-8.) In doing so, they invariably provide no substantive discussion of the notion of "intentional misconduct." Indeed, they cite only one case, a Federal District Court case from the 10th Circuit, for the proposition that intentional misconduct and a knowing violation of law "both require knowledge that the conduct was wrongful." In other words, the complained of conduct needs to be something beyond and unintentional breach of the duty of care.

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

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

"Intentional misconduct" is one of three ways in which a fiduciary can fail to act in good faith. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006). The first occurs "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation." *Id.* The second occurs "where the fiduciary 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.*

Gould is guilt of both the first and third type of intentional conduct. Plaintiff has proffered substantial evidence of an ongoing course of self-dealing and entrenchment undertaken for the purpose of protecting and furthering the personal financial and other interests of EC and MC, as well as other individual director defendants, including for example maintaining Adams' principal sources of income. These actions on their face and by their very nature were and are "intentional[]

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acts with a purpose other than that of advancing the best interests of [RDI]." Does Gould really expect the Court to determine on summary judgment that the activation and repopulation of an executive committee, which Gould full well knew was intended to and had the effect of limiting the function of RDI's board, was not an intentional act with a purpose other than advancing the best interests of RDI? Does he really expect the Court to determine on summary judgment that, in effectively firing Korn Ferry and in completely ignoring the criteria set by the CEO search committee for identifying candidates and hiring a new CEO, was not an intentional act with a purpose other than advancing the best interests of RDI? Does he really expect the Court to decide on summary judgment that hiring and paying MC as if she had decades of experience in real estate development when, in fact, she had no prior experience, was not an intentional act with a purpose other than advancing the best interests of RDI?

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that MSJ No. 5 should be denied.

DATED this 13th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2016, I caused a true and correct copy of the foregoing to be electronically served to all parties of record via this Court's electronic filing system to all parties listed on the E-Service Master List.

/s/ Luz Horvath
An employee of Lewis Roca Rothgerber Christie LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation;

Nominal Defendant.

AND ALL RELATED CLAIMS.

CASE NO. A-15-719860-B
DEPT. NO. XI
Coordinated with:
CASE NO. P-14-082942-E
DEPT. NO. XI
CASE NO. A-16-735305-B
DEPT. NO. XI
Jointly administered

PLAINTIFF JAMES J. COTTER, JR.'S OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 1) RE PLAINTIFF'S TERMINATION AND REINSTATEMENT CLAIMS

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Plaintiff James J. Cotter, Jr., ("JJC" or "Plaintiff"), by and through his attorney Mark G. Krum of Lewis Roca Rothgerber Christie LLP, files this Opposition to **INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 1) RE: PLAINTIFF'S TERMINATION AND REINSTATEMENT CLAIMS** filed by Reading International, Inc. (the "Motion"), as follows.

I. INTRODUCTION[1]

This matter concerns breaches of fiduciary duty by individual defendants as directors of Reading International, Inc. ("RDI" or the "Company"), a public company, in threatening to terminate plaintiff James J. Cotter, Jr. ("Plaintiff" or "JJC") as President and Chief Executive Officer ("CEO") of RDI, if he did not resolve disputes between him and his sisters, EC and MC, on their terms and, when Plaintiff did not acquiesce to the threat, voting to terminate him.

The first (breach of the duty of care), second (breach of the duty of loyalty) and fourth (aiding and abetting breach of the duty of loyalty) claims made in Plaintiff's Second Amended Complaint ("SAC") are based in part on the conduct of certain director defendants in threatening to terminate Plaintiff as President and CEO of RDI, if he did not resolve disputes he had with EC and MC on terms satisfactory to them and, after he failed to do so, terminating him as President and CEO. The undisputed material facts are the following:

- Plaintiff was President and CEO of RDI until he purportedly was terminated by the RDI board of directors on June 12, 2015.
- On January 15, 2015, all five of the non-Cotter members of the RDI board of Directors unanimously agreed and resolved that, for the RDI board of directors to terminate Plaintiff, a majority of the outside directors would be required to vote in favor of doing so.
- In May 2015, Plaintiff was told that three of five outside directors of RDI, namely, Adams, Kane and McEachern, were prepared to vote to terminate him as President and CEO if he failed to resolve certain disputes he had with EC and MC.

[1] Defendants' Summary Judgment Motion No. 1 is in some respects the counterpart to Plaintiff's motion for summary judgment, and Plaintiff therefore incorporates the evidence and arguments from his motion by way of reference.

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- At a reconvened supposed special meeting of the RDI Board of Directors May 29, 2015, EC told the RDI board that she and MC had reached a resolution of their disputes with Plaintiff. No vote regarding termination of Plaintiff was then had.
- Plaintiff, EC and MC thereafter failed to resolve their disputes.
- EC called another supposed special board meeting for June 12, 2015. At the meeting, three of five outside directors, namely, Adams, Kane and McEachern, voted to terminate Plaintiff as President and CEO. Storey and Gould voted against termination.
- Defendant Adams in May and June 2015 (and for some time previously, as well as since then) relied on companies controlled by EC and MC for a majority of his recurring income.
- Defendant Kane had a five-decade, close personal and *quasi-familial* relationship with James J. Cotter, Sr. ("JJC, Sr."); Kane believed he knew what JJC, Sr.'s wishes were regarding a fundamental dispute between Plaintiff, on one hand, and EC and MC on the other hand, regarding whether MC alone or MC together with Plaintiff was to be trustee(s) of a voting trust which would hold approximately seventy percent of the voting stock of RDI; Kane's view was that JJC, Sr.'s wishes were that MC alone be the trustee.

Thus, defendants lacked disinterestedness and independence, either generally or with respect to the particular challenged actions (here, the decisions to threaten Plaintiff with termination and to terminate him). Plaintiff has rebutted the presumption that the business judgment rule applies, and the burden shifts to the individual director defendants to demonstrate the entire fairness of both their process and the result (measured objectively) reached.

Here, defendant Adams lacked independence because he was dependent on EC and MC for a majority of his income, including at the time he took the challenged actions. Additionally, he lacked disinterestedness with respect to the challenged action(s) because, he and his financial benefactors, EC and MC, personally stood to gain while other RDI shareholders would not.

Defendant Kane generally lacked independence because of (1) his five-decade relationship with JJC, Sr.; (2) his view that he knew what Sr.'s wishes were regarding a critical item in dispute between Plaintiff and EC and MC, who would be the trustee(s) of the voting trust; (3) his view that it was the wishes of JJC, Sr. that MC alone be the trustee of that voting trust; and (4) his

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insistence that Plaintiff accede the demands of EC and MC or be terminated. Likewise, Kane lacked disinterestedness with respect to the subject decisions, including for the same reasons.

The individual defendants cannot satisfy the entire fairness test with respect to the "process" by which they threatened and effected Plaintiff's termination. Nor can they demonstrate the objective fairness of threatening him with termination unless he resolved disputes with MC and EC on terms satisfactory to the two of them and terminating him when he failed to do so.

Where, as here, director defendants cannot satisfy their burden of demonstrating the entire fairness of the challenged conduct, the challenged conduct may be avoided by the corporation or by its shareholders. That is exactly the relief Plaintiff seeks hereby, which RDI and he are entitled to receive, namely, an order that declares the decision to terminate Plaintiff as President and CEO of RDI as void or voidable and, to the point, of no force or effect.

II. PROCEDURAL HISTORY OF AND THE CLAIMS MADE IN THIS CASE

Plaintiff's SAC states four claims, for breach of the fiduciary duty of care, breach of the fiduciary duty of loyalty, breach of the fiduciary duty of candor and disclosure, and aiding and abetting breach of fiduciary duty.

The SAC alleges a wrongful course of conduct by the director defendants to seize control of RDI in order to further their personal financial and other interests, in derogation of their fiduciary duties. (SAC, ¶ 1.) The SAC alleges an ongoing course of conduct, including (1) threatening Plaintiff with termination if he did not settle trust and estate disputes on terms satisfactory to EC and MC and terminating him when he failed to do so (SAC, ¶¶ 4, 72-94); (2) activating and repopulating an executive committee and forcibly "retiring" Tim Storey, to secure their control of RDI and eliminate the participation of Plaintiff and Storey as directors (SAC, ¶¶ 8, 99,127-134); (3) misusing RDI's corporate machinery, including through Kane and Adams as members of the RDI Board of Directors Compensation Committee authorizing the exercise of a supposed option to acquire 100,000 shares of RDI Class B voting stock (SAC, ¶¶ 10, 102-108); (4) stacking the RDI Board of Directors with persons whose sole "qualification" to be an RDI director was personal friendship with a Cotter family member (SAC, ¶¶ 11, 121-134); (5) manipulating RDI's SEC disclosures and annual shareholders meetings to disguise and effectuate their

entrenchment scheme (SAC, ¶¶ 12, 13, 101-135 and 136); (6) manipulating and aborting a CEO search process to ensure that EC was selected (SAC, ¶¶ 14, 13-147); (7) looting the Company, including by employing MC in a highly compensated senior executive position for which she had no prior experience or professional qualifications (SAC, ¶¶ 15, 148-153) and, most recently, by rejecting third-parties' Offer to purchase all the outstanding stock of RDI at a price well in excess of the price at which it traded in the market, without taking any action to determine what was in the best interests of RDI and its shareholders other than EC and MC (SAC, ¶¶ 16, 154-162).

Plaintiff's claims all arise from an ongoing course of conduct, aptly described as entrenchment, not from a series of unrelated, one-off, coincidental actions as they are framed in the Interested Director Defendants' MSJs.

III. RESPONSE TO FACTUAL ASSERTIONS

The Director Defendants portray Plaintiff's appointment as CEO as some accident occasioned by JJC, Sr.'s death. In reality, JJC, Sr. intended Plaintiff to succeed him. In a memo to the compensation committee dated January 16, 2009, JJC, Sr. expressly suggested JJC succeed him. (Appendix Ex. [1] (JCOTTER0145336).)

The Director Defendants devote a section of their brief to discussing an invented argument they call "Significant Problems with Plaintiff's Managerial Skills Become Obvious." (Defs.' Mot. for Summ. J. No. 1 at p. 5:17.) This theme, and the flimsy evidence taken out of context to support it, contradicts what at least some directors actually felt at the time, that is, before they had a motive to retroactively color their statements and give testimony that serve their present litigation goals. For example, Director Kane proclaimed in a June 8, 2015 email to JJC that "there is no one more qualified to be the CEO of this company than you." (Appendix Ex. [2] (JCOTTER009286).) A day earlier, Kane said "I want you to be CEO and run the company for the next 30 years or more." (*Id.*) And, these statements came in the midst of the meetings that led to Plaintiff's ouster. So, contrary to the spin Defendants give the evidence, no uniform body of evidence shows that Plaintiff's managerial style caused concern for the directors. This remains a sharply disputed point incapable of resolution through a summary process.

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Director Defendants mischaracterize Director Storey's feeling regarding Plaintiff's work as CEO. They claim "Storey concluded that Plaintiff 'needs to make progress in the business and with Ellen and Margaret [Cotter] quickly, or the board will need to look to alternatives to protect the interests of the company." (Defs.' Mot. Summ. J. at p. 8:27–9:1.)

First, this ambiguous statement does not explicitly reflect any desire by Director Storey to terminate Plaintiff. Director Storey subsequently expressed his approval of Plaintiff's work. Specifically, Storey's notes from May 21, 2015, say that "none of the steps [Plaintiff] proposes to take or has in fact taken are unusual or untoward." (Appendix Ex. [5] (TS0000061).) Storey then added "[o]ther than from Margaret or Ellen, . . . I haven't heard of any material negativity from any other executive as to the CEOs requirements." (*Id.*) Storey recognized the particular governance challenges Plaintiff faced in his sisters. (*Id.*) Despite all this, Storey concluded that "progress has been made in a number of respects," and cautioned that "the resolution need not necessarily be removal of the CEO . . . it could be the removal of the other executives—or all of them." (*Id.* at -62–63; *see also* Appendix Ex. [3] (WG Dep. Ex. 61) (discussing progress).)

Once again, the evidence shows a factual dispute concerning the mindset of RDI directors as to Plaintiff's termination.

The Defendants portray the May 21, 2015 meeting as a natural progression of events—"a months-long effort to address and alleviate ongoing conflicts." (Defs' Mot. Summ. J. No. 1 at 6–8.) In reality, on Tuesday May 19, 2015, EC distributed an agenda for a RDI board of directors meeting on Thursday, May 21, 2015. (Appendix Ex. [6] (EC Dep. Ex. 339).) The first agenda item was "Status of President and CEO." (*Id.*) This subject had not been previously addressed at an RDI Board of Directors meeting. Indeed, a draft agenda a few days earlier made no mention of the subject. (Appendix Ex. [7] (EC Dep. Ex. 338.) Storey wrote in a May 20, 2015 email to Director Gould that "I am only assuming the matter before us is a resolution to immediately remove the CEO—that isn't clear from the agenda, or any direct comment made to me by any party." (Appendix Ex. [8] (TS0000073).) The Defendants have attempted to obscure the official record of the May 21, 2015 board meeting, producing the fictional minutes in redacted form, which excise the advice of counsel. (Appendix Ex. [9] (GA000003864).)

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The evidence does not support Defendants' argument that JJC was fired after a deliberate, regular, and lawful process. (*See* Defs.' Mot. Summ. J. 9:27-10:2.) Rather, Plaintiff was threatened with termination if he failed to resolve disputes with his sisters on their terms, and then terminated when Kane, Adams, and McEachern voted to terminate him.

On June 8, 2015, JJC advised EC and MC that he could not accept their lawyers' settlement document. MC responded that she "would notify the board that you are unwilling to take our offer despite your acceptance to most of it last week." (JJC Dec. at ¶ 18; Appendix Ex. [12] (MC Dep. Ex. 327); Appendix Ex. [13] (MC 5/13/16 Dep. Tr. at 368:13-369:22); *see also* Appendix Ex. [13] (MC 5/12/16 Dep. Tr. 271:22-279:7); Appendix Ex. [14] (Dep. Ex. 156);.)

On June 10, 2015, EC transmitted an email to all RDI board members stating, among other things, that "we would like to reconvene the Meeting that was adjourned on Friday, May 29th, at approximately 6:15 p.m. (Los Angeles time.)" (JJC Dec. at ¶ 19).

When the tentative agreement did not come to fruition, Kane resumed his advocacy toward Plaintiff, including on June 11, 2015, stating: "I do believe that if you give up what you consider 'control' for now to work cooperatively with your sisters," Kane admonished, "you will find that you will have a lot more commonality than you think." (Appendix Ex. [15] (Kane Dep. Ex. 306 at p. EK 00001613).) "Otherwise," Kane threatened, "you will be sorry for the rest of your life, they and your mother will be hurt and your children will lose a golden opportunity." (*Id.*) Tellingly, Kane also wrote that JJC, Sr. gave MC the right to vote the B stock to force them to work together, and that trying to change that would be a "nonstarter." (Appendix Ex. 15 Kane Dep. Ex. 306).) Kane testified repeatedly that Plaintiff's failure to accede to his sisters' settlement demands cost him his job. (Appendix Ex. [16] (Kane 5/2/16 Dep. Tr.194–195 (testifying that he told JJC to "take [the settlement offer]. . . . You're going to get terminated if you don't.").

On Friday, June 12, 2015, a supposed RDI board of directors special meeting was convened. Adams and Kane (and McEachern) voted to terminate JJC (as did MC and EC). Storey and Gould voted against terminating JJC as President and CEO. (JJC Dec. at ¶ 20; Appendix Ex. [16] (Kane 5/2/16 Dep. Tr. 191:25-192:12, 193:3-194-10); Appendix Ex. [4] (Storey 2/12/16 Dep. Tr. 139:22-140-11); *see also* Appendix Ex. [17] (TS 8/3/16 Dep. Tr. 75:4-76:16 and 81:22-

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82:6).) In January 2016, EC was made permanent President and CEO of RDI. (JJC Dec. at ¶ 21).

Adams, MacEachern, and Kane predetermined their vote before any actual deliberations—and they did so over the protests of other directors, who felt railroaded into a foregone outcome. Prior to May 19, 2015, each of Adams and Kane (and McEachern) communicated to EC and/or among themselves their respective agreement to vote as RDI directors to terminate JJC as President and CEO of RDI. (Appendix Ex. [30] (EC 6/16/16 Dep. Tr. 175:17-176:8); Appendix Ex. [4] (Storey 2/12/16 Dep. Tr. at 96:5-91:4, 98:21-100:8, 100:14-101:11); Appendix Ex. 9 (Adams 4/28/16 Dep. Tr. at 98:7-17; 98:18-99:22); Appendix Ex. [21] (Adams 4/29/16 Dep. Tr. 378:15-370:5); *see also* Appendix Ex. [18] (TS 8/31/16 Dep. Tr. 66:22-67:20) and Appendix Ex. [19] (Dep. Ex 131).) During their planning prior to the May 21 meeting, Kane on May 18, 2016 sent an email to Adams in which Kane agreed to second the motion for JCJ's termination, if necessary:

> See if you can get someone else to second the motion [to terminate Plaintiff]. If the vote is 5-3 I might want to abstain and make it 4-3. If it's needed I will vote. It's personal and goes back 51 years. If no one else will second it I will.

(Appendix Ex. [28] (Dep. Ex. 81 at GA00005500).)

Gould and Storey objected that the non-Cotter directors had not employed a proper process regarding terminating JJC and requested that the non-Cotter directors meet before the May 21 meeting. Gould warned they could "face possible claims for breach of fiduciary duty if the Board takes action without following a process." (Appendix Ex. [23] (Gould Dep. Ex. 318).) Storey used the term "kangaroo court," and noted, "[A]s directors we can't just do what a shareholder [, meaning EC and MC,] asks." [2] (Appendix Ex. [24] (Kane Dep. Ex. 116).) Kane responded they did not need to meet, stating "the die is cast." (Appendix Ex. [25] (EK Dep. Ex. 117 at TS000069).)

The supposed special board meeting on May 29 commenced, and Adams made a motion to terminate Plaintiff as President and CEO. In response, Plaintiff questioned Adams' independence and/or disinterestedness. (JJC Dec. at ¶ 15). The meeting eventually was adjourned until 6:00 PM.

[2] Gould and Storey also were of the view that the ombudsman process was to continue into June 2016, at which time Storey would report further and the five would determine next steps. (Appendix Ex. [17] (TS 8/3/16 Dep. Tr. 33:12-36:16 and 37:15-38:20).)

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Plaintiff was told that he needed to resolve his disputes with his sisters or suffer termination. (*Id.*)

Defendants have wrongfully insisted that Plaintiff resign as Company director. For example, on June 15, 2016 EC declared that Plaintiff's unlawful termination "obligates you to resign immediately from the board of Directors," which requirement, EC argued, was an obligation of Plaintiff's employment contract. (Appendix Ex. [26] (Jun 15, 2016 Letter).) RDI's SEC Form 8-K dated June 12, 2015 repeated this false claim. (Appendix Ex. [27] (Ellis Dep. Ex. 347).) Gould, who drafted Plaintiff's employment contract, testified that this was not required: "I drafted the contract . . . . And it did say in there he would resign. But what we intended that to mean was his position as president." (Appendix Ex. [20] (Gould 6/8/16 Dep. Tr. 244:16–246:6.) Gould communicated the wrongfulness of EC's position to the Board, to RDI's in-house attorney, and to EC—but EC sent the letter in question and caused the erroneous SEC filing. (*Id.*)

IV. ARGUMENT

A. Director Defendants' Fiduciary Duties.

The power of directors to act on behalf of a corporation is governed by their fiduciary relationship to the corporation and to its shareholders. *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006) (citations omitted). Generally, those duties are described as the duty of care and the duty of loyalty. (*Id.*) The duty of good faith may be viewed as implicit in the duties of care and loyalty, or as part of a "triumvirate" of fiduciary duties. *See In re BioClinica, Inc. Shareholder Litig.*, No. CV 8272-VCG, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013); *Brookstone Partners Acquisition XVI, LLC v. Tanus*, No. CIV.A. 7533-VCN, 2012 WL 5868902, at *2 (Del. Ch. Nov. 20, 2012).

1. The Duty of Care

The duty of care typically is described as requiring directors to act on an informed basis. *Schoen*, 137 P.3d at 1178. Whether directors acted on an informed basis "turns on whether the directors have informed themselves "prior to making a business decision, of all material information reasonably available to them." *Smith v. Van Gorkom*, 488 A. 2d 858, 872 (Del. 1985) (*quoting Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984). Due care thus is a function of the decision-making process, not the decision. *See, e.g., Citron v. Fairchild Camera & Instrument*

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Corp., 569 A. 2d 53, 66 (Del. 1989). This necessarily raises "[t]he question [of] whether the process employed [in making the challenged decision] was either rational or employed in a good faith effort to advance the corporate interests." *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 339 (Bankr. D.D.C. 2006).

2. The Duty of Loyalty

The director's duty of loyalty requires that directors "maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Schoen*, 137 P.3d at 1178 (citations omitted). The duty of loyalty was described in *Guth v. Loft* as follows:

> "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and [to] its shareholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate . . . director, peremptorily and inexorably, the most scrupulous observance of his duty [of loyalty], not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation [or its shareholders] . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interests."

Guth v. Loft, 5 A.2d 503, 510 (Del. 1939).

The terms "loyalty" and "good faith," are "words pregnant with obligation" and "[d]irectors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor." *In re Tyson Foods, Inc., Consol. Shareholder Litig.*, 2007 WL 2351071, at *4 (Del. Ch. Aug. 15, 2007).

3. The Duty of Disclosure

"Whenever directors communicate publicly or directly with shareholders about the corporation's affairs . . . directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty." *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). "Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors [of the corporation]." *Id.* at 10-11. When directors communicate with stockholders, they must do so with "complete candor." *In re Tyson Foods, Inc.*, No. CIV.A. 1106-CC, 2007 WL 2351071, at *3 (Del. Ch. Aug. 15, 2007).

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4. Directors' Fiduciary Duties Are Owed to All Shareholders, Not Just the Controlling Shareholder(s)

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).

B. The Business Judgment Rule Is a Rebuttable Presumption, Rebutted Here

The business judgment rule is a rebuttable 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 was taken in the best interests of the company." *See, e.g., In Re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (*quoting Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). In Nevada, the business judgment rule is codified in NRS § 78.138.3, which provides that "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation."

The business judgment rule typically is articulated as consisting of four elements: (i) a business decision, (ii) disinterestedness and independence, (iii) due care, and (iv) good faith. *Roselink Investors, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 2016 (S.D.N.Y. 2004) (citations omitted). The presumptions of the business judgment rule are rebutted where any of the four elements is absent. *Id.* at 216-17. Here, at least each of the last three elements is absent.

With respect to disinterestedness and independence, because two (Gould and Storey) of the five non-Cotter directors voted against termination, Plaintiff need only show that one of the three directors who voted to terminate Plaintiff had an interest in the challenged conduct or lacked independence from others (here EC and MC) who had an interest in the challenged conduct.

There is no dispute that, as to at least any matters of disagreement between EC and MC and JJC, MC and EC lack disinterestedness and lack independence. The Interested Director Defendants admit that in their summary judgment motions, including as follows:

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> The Individual Defendants, for the purposes of this motion [regarding "director independence"], do not contest the independence of Ellen and Margaret Cotter as RDI directors with respect to the transactions and, or corporate conduct at issue---which are addressed in the Individual Defendants' other, contemporaneously-filed summary judgment motions.

("Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence" at p. 14, fn. 2.)

1. Individual Defendants' Lack of Disinterestedness

With respect to disinterestedness, because the business judgment rule presumes that directors have no conflict of interest, 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) (internal citations and quotations omitted). Thus, a director must be disinterested in the challenged conduct in particular and, as a general matter, otherwise independent. *Beam*, 845 A.2d at 1049.

As the Interested Director Defendants acknowledge, EC and MC lack disinterestedness with respect to the challenged actions, starting with the threat to terminate Plaintiff unless he resolved the California Trust Action and other matters on terms satisfactory to EC and MC, and continuing thereafter with the termination of him on account of his failure to do so.

The same is true, for largely the same reasons, for defendant Kane, who is called "Uncle Ed" by EC and MC and who, by his contemporaneous conduct demonstrated that he acted as "Uncle Ed" throughout to effectuate what he thought were JJC, Sr.'s wishes, and not as a disinterested RDI director exercising disinterested business judgment.

Likewise, Adams admittedly picked sides in a family dispute. He also demonstrated his lack of disinterestedness by, among other things, vigorously pursuing the EC and MC agenda, starting with the termination of Plaintiff, to further his own interest (including to be interim CEO) and to protect the interests of EC and MC, on whom he is financially dependent.[3]

For such reasons, among others, EC, MC, Kane, and Adams each lack disinterestedness

[3] Plaintiff does not concede that McEachern was disinterested and/or independent. Because Plaintiff can prevail on this Motion without showing McEachern to have lacked disinterestedness or independence, he chooses not to address McEachern.

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with respect to the challenged action of threatening Plaintiff and terminating Plaintiff. For that reason alone, each is not entitled to the presumptions of the business judgment rule in connection with their actions to threaten Plaintiff and to terminate him as President and CEO of RDI.

2. Individual Defendants' Lack of Independence

Independence, as used in the context of an element of the business judgment rule, requires a director to engage 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). Assessing directorial independence "focus[es] on impartiality and objectiveness." *In Re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920, 938 (Del. Ch. 2003) (*quoting Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001), *rev'd in part on other grounds,* 817 A.2d 149 (Del. 2002); s*ee 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. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam*, 845 A.2d at 1049-50.

> Independence is lacking in situations in which a corporate fiduciary derives a benefit *from the transaction* that is not generally shared with the other shareholders. In situations in which the benefit is derived by another, the issue is whether the [corporate fiduciary]'s decision resulted from that director being *controlled* by another." *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) (explaining the distinction between interest and independence). Control may exist where a corporate fiduciary has close personal or financial ties to or is beholden to another.

Id. A close personal friendship in which the director and the person with whom he or she has the questioned relationship are "as thick as blood relations" would likely be sufficient to demonstrate that a director is not independent. *In re MFW S'Holders Litig.*, 67 A.3d 496, 509 n.37 (Del. Ch. 2013).

Similarly, a director who is financially beholden to another person, such as a controlling

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stockholder, is not independent of that person. *In re Emerging Commc'n, Inc. S'Holders Litig.*, 2004 WL 1305745, at *33 (Del. Ch. May 3, 2004). The Court of Chancery has found that directors who derive a substantial portion of their income from a controlling stockholder are not independent of that stockholder. *Id.* at *34. "In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the . . . personal consequences resulting from the decision." *Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (*quoting Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

Here, the conduct of EC, MC, Kane, and Adams to extort Plaintiff into resolving trust and estate disputes on terms dictated by EC and MC are squarely and unequivocally efforts to obtain personal benefits for EC and MC not shared with other RDI shareholders. Kane's personal relationship with JJC, Sr., Kane's view that JJC, Sr. intended MC control the Voting Trust, and Kane's actions to make that happen, among other things, demonstrate his lack of independence. As shown by his own sworn testimony in his Los Angeles Superior Court divorce proceeding and in this case, Adams as a general matter is not independent of EC and MC, because he is financially dependent upon income he receives from companies that EC and MC control. For such reasons, among others, each of Kane and Adams (and MC and EC) lacked independence and therefore are not entitled to the presumptions of the business judgment rule.

3. Individual Defendants' Lack of Good Faith

The element of good faith requires the director to act with a "loyal state of mind." *Hampshire Group, Ltd., v. Kuttner*, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). 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] corporations do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *Id.*

Here, in threatening plaintiff with termination and terminating him when he failed to succumb to the threats, Adams and Kane demonstrated unwavering loyalty—to MC and EC—not

to RDI by its other shareholders. Adams and Kane contemporaneously evidenced this, including by their own emails to one another and, as to Kane, to Plaintiff. (Appendix Ex. [28] (Dep. Ex. 81 at GA00005500); Appendix Ex. [29] (Adams Dep. Ex. 85 at GA00005544–45; *see also* Appendix Ex. [17] (TS 8/3/16 Dep. Tr. 65:12-66:20).) They diligently pursued and protected the interests of EC and MC, not the interests of RDI and its other shareholders.

4. Individual Defendants Failed To Exercise Due Care

Even had EC, MC, Kane, Adams, and McEachern acted in good faith and in a manner that each reasonably could have believed to be in the best interests of RDI in taking the actions complained of herein, which was not the case, they failed to engage in a process to decide and act on an informed basis in view of the nature and importance of the decisions made. Indeed, the lack of process was contemporaneously memorialized by each of directors Storey and Gould. Storey referred to a "kangaroo court," and Gould predicted that they all would be sued for breaching their fiduciary duties. (Appendix Ex. [23] (Gould Dep. Ex. 318); Appendix Ex. [24] (Kane Dep. Ex. 116).) Adams and Kane acknowledged that their conduct entailed picking sides in the family dispute to threaten Plaintiff with termination and thereafter to carry out the termination threat after Plaintiff declined succumb to the coercion. (Appendix Ex. [29] (Adams Dep. Ex. 85 at GA00005544–45; *see also* Appendix Ex. [17] (TS 8/3/16 Dep. Tr. 65:12-66:20).) The result was that his termination was a *fait accompli* determined by EC, MC, Kane, Adams, and McEachern prior to the first (May 21, 2015) supposed special RDI Board of Directors meeting at which the subject was raised. (Appendix Ex. [24] (Kane Dep. Ex. 116); Appendix Ex. 8 (TS0000073); Appendix Ex. [30] (EC 6/16/16 Dep. Tr. 175:17-176:8); Appendix Ex. [4] (Storey 2/12/16 Dep. Tr. at 96:5-91:4, 98:21-100:8, 100:14-101:11); Appendix Ex. [31] (Adams 4/28/16 Dep. Tr. at 98:7-17; 98:18-99:22); Appendix Ex. [21] (Adams 4/29/16 Dep. Tr. 378:15-370:5); *see also* Appendix Ex. [18] (TS 8/31/16 Dep. Tr. 66:22-67:20) and Appendix Ex. [19] (Dep. Ex 131).) This conduct and the lack of process alone constitutes a breach of the duty of care.

C. Defendants Must and Cannot Satisfy the Entire Fairness Standard

"If the shareholder succeeds in rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the 'entire fairness' of the transaction."

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McMullin v. Brand, 765 A.2d 910, 917 (Del. 2000). *Horwitz v. SW. Forest Indus., Inc.*, 604 F.Supp. 1130, 1134 (D. Nev. 1985), which defendants cite for the platitude that the business judgment rule applies to claims of breach of fiduciary duty against a director, is not to the contrary and does not address circumstance of where, as here, the plaintiff has rebutted the presumption of the business judgment rule.[4] In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), the Nevada Supreme Court adopted the entire fairness doctrine, citing *Oberly v. Kirby*, 592 A.2d 445, 469 (Del. 1991). *Id.* at 640 n. 61, 137 P.3d at 1185 n. 61 Under that doctrine, when a transaction is effected or approved by directors with an interest therein, "[t]he interested directors bear the burden of proving the entire fairness of the transaction in all its aspects, including both the fairness of the price and the fairness of the directors' dealings." *Oberly*, 592 A.2d at 469; *accord Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011) ("Once entire fairness applies, the defendants must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price.") (quotation omitted).

Under the entire fairness test, "[d]irector defendants therefore are required to establish to the *court's* satisfaction that the transaction was the product of both fair dealing and fair price." *Cinerama, Inc.* v. *Technicolor,* 663 A.2d 1156, 1163 (Del. 1995) (*quoting Cede & Co. v. Technicolor,* 634 A.2d 345, 361 (Del. 1993). Thus, a test of entire fairness is a two-part inquiry into the fair-dealing, meaning the process leading to the challenged action and, separately, the end result. *In re Tele-Commc'ns Inc. Shareholders Litig.,* 2005 Del. Ch. LEXIS 206, at *235, 2005 WL 3642727, at *9 (Del. Ch. Sept. 29, 2005).

The Motion makes no mention of this standard. In addition the Motion does not discuss the "omnipresent specter" that the Defendants were acting primarily in their own interests or for entrenchment purposes. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *see also eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010).

[4] Citing NRS §§ 78.139 and 78.140, the Interested Director Defendants in a footnote (Motion at 20, fn. 5) posit that "an 'entire fairness' review can be triggered only" under the particular circumstances addressed by those two statutory provisions. NRS § 78.139 concerns the duties of directors in circumstances where there is a change or potential change of control of the corporation and NRS 78.140 is Nevada's version of the standard statutory modification of the common law principal that all interested director transactions are void. By their terms, on their face, those two statutory provisions do not speak to circumstances other than those described above. Understandably, no authority is cited for the obviously unsupported and erroneous conclusion proffered in that footnote.

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The entire fairness requirement entails "exacting scrutiny" to determine whether the challenged actions were entirely fair. *Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 n.9 (Del. 1994). Under the entire fairness standard, the challenged action itself must be objectively fair, independent of the beliefs of the director defendants. *Geoff v. II Cindus.Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006); *see also Venhill Ltd. P'ship ex rel. Stallkamp*, No. CIV.A. 1866-VCS, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008). "The fairness test therefore is "an inquiry designed to assess whether a self-dealing transaction should be respected or set aside in equity." *Venhill*, 2008 WL 2270488 at *22.[5]

Here, Defendants cannot carry their burden of proving the entire fairness of their actions in threatening to terminate and terminating Plaintiff as President and CEO of RDI. They cannot carry their burden of demonstrating the entire fairness of the "process" leading to the termination threats and the termination. They cannot carry their burden of showing that the threatened termination and the termination were objectively fair, independent of the personal beliefs of any or all of Kane, Adams, McEachern, EC and MC.[6]

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

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

[6] The Interested Director Defendants apparently intend to defend their decision to terminate JJC under NRS 78.138.2(b) by asserting reliance on counsel. (See Motion at 19:17 ("utilized the services of outside counsel") and Motion at p. 20, fn 4) ("the fact that the RDI Board utilized both the Company's outside counsel and its own counsel, separately retained, when evaluating Plaintiff's performance and its duties is further evidence of the exercise of protected business judgment.") However, the Interested Director Defendants have failed to produce any documents concerning advice from counsel and, at their depositions, invariably refused to disclose such information on the grounds that it is privileged. As the Court previously ruled (and admonished counsel for the Interested Director Defendants), they cannot have it both ways. Plaintiff respectfully submits that the Court cannot consider the claimed

First, as to the process, the evidence shows that EC, MC, Kane, Adams, and McEachern had communicated and agreed, prior to the May 19, 2015 agenda EC distributed that listed "status of President and CEO" as the first item, to vote to terminate Plaintiff as President and CEO of RDI. It is undisputed that there had been no prior discussion at RDI board meeting of the possible termination of Plaintiff as President and CEO. There also is no dispute that, at the time, both Directors Storey and Gould objected to the lack of process. Storey used the term "kangaroo court." Gould observed that all of the directors could be sued for breaching their fiduciary duties. In short, the "process" leading to the threat to terminate Plaintiff if he did not resolve trust and estate disputes with MC and EC and to terminate him all was set in private communications among EC, MC, Kane, Adams and McEachern prior to the supposed May 21 board meeting.

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

Of course, the termination vote did not occur on May 29, 2015 because a tentative resolution had been struck by Plaintiff with his sisters. When that resolution did not come to fruition, EC convened another supposed special board meeting on June 12, 2015 and the threatened termination vote was held. Kane, Adams and McEachern (and EC and MC) each voted to terminate Plaintiff as President and CEO and the "process" concluded. Thus, the "process" consisted of secret machinations and agreements, attempted extortion and execution on the extortion threat. No conceivable interest of RDI or its shareholders persuasively or honestly can be argued in an unavailing effort to prove that the "process" was entirely fair.

Likewise, the end result, whether the threatened termination of Plaintiff if he did not resolve disputes with his sisters on terms satisfactory to the two of them, the termination of him after he failed to do so, or both, is not a result the individual defendants can demonstrate was objectively fair. There is nothing objectively fair about attempted extortion. Nor is there anything

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reliance on counsel in connection with the Motion or any other Motion brought by the Interested Director Defendants.

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objectively fair about executing on an extortion threat when it fails to bring about the conduct sought. The individual defendants cannot satisfy their burden of showing that the end result, the termination of Plaintiff after he failed to resolve disputes with this sisters on terms satisfactory to the two of them, was objectively fair.

D. The Interested Director Defendants' Efforts to Avoid Having Their Actions As Fiduciaries Evaluated As Such Is Mistaken, and Damning

The Defendants devote the first two sections of their "ARGUMENT" (Motion at 14:6-17:9) to arguments that effectively assert that the actions of the directors of RDI in threatening to terminate JJC and then terminating him when he did not acquiesce to their threats are actions that ought not be analyzed as the actions of directors as fiduciaries. In support, they cite inapposite cases concerning, for example, termination of an employee (an operating manager). (*See* Motion at 14: 13-14, citing *Ingle v. Gilmore Motor Sales, Inc.*, 73 N.Y.2d 183, 190 (1989) and holding that "the law of employment relations" should be the exclusive applicable legal construct where the plaintiff also is the terminated person (*See* Motion at 14:15-18 (citation omitted).) This is a different version of the same argument the Court rejected previously in denying the motion by RDI to stay this case and compel arbitration. Indeed, the interested director defendants invocation of RDI's bylaws—rather than JJC's employment agreement (Motion at 15:14-21)—tacitly acknowledges that the conduct at issue here is that of defendants as directors, not RDI as the employer. In this regard (only), their citation to *Klassen v. Allegro Dev. Corp.*, C.A. Case No. 8262-VCL, 2013 WL 5967028, at *15 (Del. Ch. Nov.7, 2013) for the proposition that "[o]ften it is said that a board's most important task is to hire, monitor, and fire the CEO[,]" unintentionally points up what is at issue here, namely, whether the Director defendant breached fiduciary duties in threatening to terminate and terminating the CEO of RDI.[7]

In short, these arguments are damning because they show that the Interested Director Defendants are desperate to avoid analysis of their actionable conduct as fiduciaries.

E. The Interested Director Defendants' "Economic Harm" Argument Is

[7] The interested director defendants cite *Klassen* for the proposition that "Directors need not give a CEO advance notice of a plan to remove him at a regular board meeting." (Motion at 21;6.) Here, however, the supposed board meeting was a special meeting first convened on May 21, 2016, following a May 19, 2016 E-mail from EC that attached an agenda that included a purposefully vague and misleading agenda item entitled" status of president and CEO."

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Erroneous, as a Matter of Law

The Individual Director Defendants assert that, to avoid summary judgment, Plaintiff must produce "cognizable evidence" showing "that the breach [of fiduciary duty] proximately caused the damages" claimed incurred by the Company. For that proposition, they cite *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008). (Motion at 14:18-24.) The Individual Director Defendants also assert that, to sustain a fiduciary duty claim, there must be "cognizable evidence" of "economic harm suffered" by the Company resulting from the alleged breaches of fiduciary duty, citing a federal district court case from Colorado and an Arizona state court case. (Motion at 22:13-21.)

The Individual Director Defendants' "economic harm" argument is mistaken as a matter of law and is in reality a disguised exercise at question-begging. The Individual Director Defendants argue that their complained of conduct is governed by the business judgment rule. However, Plaintiff has introduced evidence sufficient to rebut the presumptions of the rule and require the Individual Director Defendants to satisfy the entire fairness test, as to which they bear the burden. Part of that burden is to show that the challenged result was entirely fair. The Individual Director Defendants' "economic harm" argument, therefore, begs the question of what is the standard by which the Individual Director Defendants' conduct is to be assessed.

The Delaware Supreme Court in *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993), *modified* 636 A.2d 956 (Del. 1994), concluded that a requirement that a plaintiff show proof of loss "may" be "good law" in a tort action seeking to recover damages for negligence, but that such a requirement does not apply to a breach of fiduciary duty claim where the issue is the appropriate standard of review of the director defendants' challenged conduct. *Id.* at 370. The Delaware Supreme Court explained that that is the proper rule of law because "[t]he purpose of a trial court's application of an entire fairness standard of review to a challenged business transaction is simply to shift to the defendant directors the burden of demonstrating to the court the entire fairness of the transaction ." *Id.* at 369.

In a subsequent decision in the same case, the court emphasized that "[t]o inject a requirement of proof of injury into the [business judgment] rule's formulation for burden shifting

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purposes is to lose sight of the underlying purpose of the rule." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1166 (Del. 1995). Explaining further, the Delaware Supreme Court stated that "[t]to require proof of injury as a component of the proof necessary to rebut the business judgment presumption would convert the burden shifting process from a threshold determination of the appropriate standard of review to a dispositive adjudication on the merits." *Id.*

Separately and, contrary to the "economic harm" argument proffered by the Individual Director Defendants in most—if not all—of their MSJ's, the Delaware Supreme Court has made clear that the courts may "fashion any form of equitable and monetary relief as may be appropriate." *Technicolor*, 663 A.2d at 1166 (quoting *Technicolor*, 634 A.2d at 371).

Here, the Individual Director Defendants' repeated erroneous reliance on an imaginary "economic harm" requirement ignores the nature of this action, which is for breach of fiduciary duty—an action in equity in which equitable relief may be sought and obtained.

Here, the prayer for relief in Plaintiff's SAC includes several requests for equitable relief, relating both to the termination of Plaintiff and to subsequent actions of the Individual Director Defendants to entrench themselves in control of the Company. Such relief may be sought and secured by way of a breach of fiduciary duty claim.

"A general common law presumption is that a director's or officer's conflict of interest can result in the voiding of a transaction." Keith Paul Bishop & Jeffrey P. Zucker, Bishop and Zucker on Ne*vada Corporations and Limited Liability Companies*, § 8.16, 8-44 (2013). The Nevada Supreme Court in *Kendall v. Henry Mountain Mines, Inc.,* stated that directorial conflicts are such that the challenged action of the directors "may be avoided by the corporation or its stockholders." 78 Nev. 408, 410-11, 374 P.2d 889, 890 (1962) (*quoting Marsters v. Umpqua Valley Oil, Co.*, 90 P. 151, 153 (Or. 1907).

Here, as demonstrated above, the decisions of Kane and Adams to terminate Plaintiff as President and CEO of RDI, after he failed to acquiesce to their threats to terminate him if he did not resolve trust and estate litigation with EC and MC on terms satisfactory to the two of them, was a decision with respect to which each of Kane and Adams lacked both disinterestedness and independence, and with respect to which each failed to act independently. Instead, each simply

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picked sides in a family dispute and power struggle as it suited their own quasi-familial, financial and/or other personal interests, as well as the personal interests of EC and MC. The decision to remove Plaintiff as President and CEO of RDI raises exactly the sort of conflicts and conflicted decision-making and consequence that "may be avoided by the corporation or its stockholders."

That is particularly so given the nature of the decision and the nature of subsequent actions taken to the same end. The subsequent actions include the effective dismantling of RDI's Board of Directors, including by the creation of the EC Committee populated by EC and MC and the two individuals most personally and financially beholden to them, Kane and Adams, and the usurpation of the authority of RDI's Board of Directors. That is even more true given the misleading public disclosure, both by commission and omission, caused by EC and those other defendants who act at her behest and direction. All of these actions constitute ongoing breaches of fiduciary duty, and each and all of them were undertaken to usurp management and control of the Company, in derogation of the interests of all RDI shareholders other than EC and MC. Those type of actions constitute or give rise to irreparable injury. *See Vanderminden v. Vanderminden,* 226 A.D.2d 1037, 1041 (1996) (the "alleged harm, an opportunity for defendants to shift the balance of power and assume management and control of the company, and may properly be viewed as irreparable injury" (*citing Matter of Brenner v. Hart Sys.,* 114 A.D.2d 363, 366, 493 N.Y.S.2d 881, 884 (1985))).

Additionally, although not required to do so, given the nature of the claims made and the relief sought, plaintiff has produced evidence of damages. For example, Plaintiff has claimed, and defendant's own documents duplicative or redundant compensation including, for example, monies paid to third-party consultants (e.g., Edifice) and/or monies paid to MC arising from the fact that MC has no prior real estate development experience, which requires the third-party consultants be paid to do what is part of her jobPlaintiff has claimed and publicly available information shows diminution in the price at which RDI stock traded in the days following disclosure of the termination of Plaintiff, as well as on the day of and following disclosure of the selection of EC as permanent President and CEO.

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Plaintiff has claimed and evidence shows corporate waste and monetary damages to RDI, including from the inflated salary paid to MC and including from what amounted to a gift of $200,000 to MC (supposedly for services she had provided over a number of preceding years, for which neither her father is the former CEO or the board saw fit to compensate her at the time) and a gift of $50,000 Adams (for serving as a director over the course of the preceding year, during which there was nothing memorializing his supposed special services as such, much less the notion that he should receive special compensation for those services which only were identified after the fact).

F. The Interested Director Defendants' Argument that Plaintiff Is an Inadequate Derivative Plaintiff Is Mistaken and Has Been Rejected by the Court Previously

The (understandably) next to last arguments made in the Motion attempt to revive the subjects of demand futility and adequacy of the derivative plaintiff, which the Interested Director Defendants twice argued and lost on motions to dismiss. (Motion at 23:18- and 28:16.) Nothing has changed, except that the intervening plaintiffs have given up and gone home, which is of no moment. These arguments remain unavailing as a matter of law. Plaintiff respectfully refers the Court to his prior briefing of these issues, and incorporates same herein.

First, in response to the individual defendants' MSJs, Plaintiff has introduced substantial evidence of self-dealing entrenchment conduct by the Interested Director Defendants—who still comprise a majority of the Board of Directors. For example, the evidence shows that and how EC, MC, Kane, and Adams misused their positions as directors to enable EC and MC to exercise an option supposedly held by the estate to acquire 100,000 shares of RDI Class B voting stock. The evidence also shows that and how EC, MC, Kane, Adams, and McEachern acted to force Storey to resign and to replace him and fill a new director slot with unqualified individuals effectively selected by and loyal to EC and MC. Of course, this is in addition to evidence regarding Plaintiffs' termination, which was merely the beginning of an ongoing course of entrenchment motivated conduct.

Second, the Motion's demand argument is unavailing as a matter of law, for several reasons. First, a majority of the current Board of Directors are the same directors with respect to

whom the Court previously found demand excused. That the composition of the RDI Board has changed therefore is a "red herring." Under both these so-called *Aronson* and *Rales* tests, the entire board need not suffer from disqualifying interest or lack of independence to excuse demand, because where "there is not a majority of independent directors . . . demand would be futile." *Beam*, 845 A.2d at 1046, n. 8; *see, e.g.*, *Beneville v. York*, 769 A.2d 80,82 (Del. Ch. 2000) (demand is excused where the board is evenly divided). Second, demand futility is assessed based on "the circumstances at the commencement of a derivative suit." *Aronson v. Lewis*, 473 A.2d 805, 810 (Del. 1984). That is because, in assessing whether demand is excused, "[i]t is th[e] board [at the time the derivative complaint is filed], and no other, that has the right and responsibility to consider a demand by a shareholder to initiate a lawsuit to redress his grievances." *In re infoUSA, Inc. Shareholders Litig.*, 953 A.2d at 985-986. The simple reason for this rule of law is that "that is the board on which demand would be made." *In re VeriSign, Inc. Derivative Litig.*, 531 F. Supp 2d. 1173, 1189 (N.D. cal. 2007); *see also Kaufman v. Beal*, 1983 WL 2029, at *9 (Del. Ch. Feb. 25, 1983) (stating it "offends notions of fairness to require a plaintiff in a stockholder's derivative suit to make a new demand every time the Board of Directors of the corporation has changed").[8]

In sum, the renewed demand futility made in the Motion is unavailing.

The Interested Director Defendants also revive their factually and legally deficient arguments that plaintiff is not an adequate derivative representative. (Motion at 23:18- 28:26.) The Court previously rejected these arguments based on the same claimed facts (except for the intervening plaintiffs dropping out) and same asserted law.

The interested director defendants once again assert that "economic antagonisms" exist, that the remedy sought is personal and that other litigation is pending. The supposed "economic

[8] The two cases cited in the Motion are not to the contrary. Each reflect nothing other than that a poorly pleaded complaint will require substantially additional work on the part of the court, including to determine what claims are direct and what claims are derivative. Thus, in *MCG Capital Corp. v. Maginn*, No. CIV.A. 4521-CC, 2010 WL 1782271 (Del. Ch. May 5, 2010) an unpublished opinion, the court found that the complaint contained both direct and derivative claims, that it failed to specify which was which and that the parties disagreed, concluding "that after undergoing this exercise I appreciate more fully MacDuff's sentiment: 'confusion now hath made his masterpiece.'" *Id.* at *4. Similarly, *Khanna v. McMinn*, No. CIV.A. 20545-NC, 2006 WL 1388744 (Del. Ch. May 9, 2006) was an action in which the plaintiffs made claims relating to six separate transactions (other than disclosure claims) allegedly resulting from breaches of fiduciary duty. Those six separate transactions did not all arise out of the same set of facts and circumstances or even make the same claims against the same directors in each instance. As such, the case is readily distinguishable.

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antagonisms" once again incorrectly assume that Plaintiff is not a significant shareholder and that the value of his RDI stock, and the stock held by the trust of which his children are three of five beneficiaries, pales in comparison to the value of the compensation to which he would be entitled pursuant to his executive employment agreement. There is no dispute the facts are exactly to the contrary. That one remedy sought also relates to Plaintiff's position as CEO is a function of the fact that the termination of Plaintiff as CEO was the beginning of the ongoing course of entrenchment activities that are the subject of this lawsuit. That equitable relief is available because of the lack of disinterest and lack of independence on the part of Adams and Kane in threatening to terminate Plaintiff and then terminating him does not change the fact that such relief is available and here, appropriate. The claim that Plaintiff is using this derivative action to obtain a favorable settlement another action is nothing more than interested director defendants imputing to Plaintiff exactly the conduct in which they engaged, when they threatened Plaintiff with termination if he did not settle trust and estate disputes with EC and MC on in terms satisfactory to the two of them. They proffered no evidence the Plaintiff has reciprocated, because there is none. Likewise, the Interested Director Defendants simply word processed their factually erroneous arguments that Plaintiff invoked the name "Corleone" to refer in this action to defendant Kane when, as evidence shows, it was Kane himself who used that name.

Literally the only portion of this argument that is new, or different, is the claim that Plaintiff has no shareholder support. Of course, the Court knows that claim is inaccurate, as reflected by the objections to the T2 Plaintiffs' request for court approval of their settlement, filed by the largest holders of both RDI class A and class B stock.

In sum, the revived demand and adequacy of plaintive arguments remain unveiling, as a matter of law.

G. The Interested Director Defendants Rely on Inapposite Authority Concerning Employment Matters and Cases

Finally, the Interested Director Defendants assert that "Plaintiff's reinstatement demand is unsupportable and untenable." (Motion at 20:27– 30:21.) In support of that conclusion, they cite in case after case in which the plaintiff sought relief personally as a terminated employee. This

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simply is a different version of the Company's unsuccessful motion to compel arbitration which explicitly (as compared to here, implicitly) was predicated on the notion that because Plaintiff is a former executive, he has no rights as an RDI shareholder. That conclusion is erroneous as a matter of law, as the Court previously determined.

Perhaps recognizing that Plaintiff, the court, or both will recognize their slightly disguised arguments as a rehash of what the Company previously argued unsuccessfully, the Interested Director Defendants also make a "long period of time" since termination argument and an "irreparable animosity between the parties" argument. The first of those arguments ignores the fact that, rather than hiring a CEO pursuant to a CEO search process, the defendants instead aborted that process and hired one of their own, EC. The second argument assumes, incorrectly, that RDI is a private company and that the interests of public shareholders do not matter, both of which are erroneous and show the cases cited to be inapposite.

V. CONCLUSION

For the forgoing reasons, Plaintiff respectfully submits that Individual Defendants' Motion for Summary Judgment (No. 1) should be denied.

DATED this 13th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2016, I caused a true and correct copy of the foregoing to be electronically served to all parties of record via this Court's electronic filing system to all parties listed on the E-Service Master List.

/s/ Luz Horvath
An employee of Lewis Roca Rothgerber Christie LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation;

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG

CASE NO. A-15-719860-B
DEPT. NO. XI
Coordinated with:
CASE NO. P-14-082942-E
DEPT. NO. XI
CASE NO. A-16-735305-B
DEPT. NO. XI
Jointly administered

PLAINTIFF JAMES J. COTTER, JR.'S OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 2) RE: THE ISSUE OF DIRECTOR INDEPENDENCE

TOMPKINS, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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Rules

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Plaintiff James J. Cotter, Jr., ("JJC" or "Plaintiff"), by and through his attorney Mark G. Krum of Lewis Roca Rothgerber Christie LLP, files this Opposition to **INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 2) RE: THE ISSUE OF DIRECTOR INDEPENDENCE** filed by Reading International, Inc. (the "Motion"), as follows.

I. INTRODUCTION

This court should deny defendants' Motion for Partial Summary Judgment. Directorial independence is not a claim or an element of a claim. It is a factual question raised where, as here, directors seek to protect their conduct by invoking the business judgment rule. Thus, "[i]ndependence is a fact-specific determination made in the context of a particular case. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049-50 (Del. 2004); *see also Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2003) ("Directors must not only be independent, [they also] must act independently."). For such reasons, MSJ No. 2 seeks relief that cannot be obtained pursuant to Rule 56 and, even if that were not the case, raises exactly the type of factual determination that is not properly made on a Rule 56 motion for summary judgment.

The actual questions the Court would need to answer are questions not raised in MSJ No. 2. Those questions concern whether, with respect to challenged actions the individual director defendants seek to excuse by invoking the business judgment rule, the director defendants can establish that the majority of those making the challenged decisions were independent generally and independent specifically with respect to the challenged decisions. These are not questions that are properly resolved by way of a Rule 56 motion for summary judgment.

II. FACTUAL CLARIFICATION

Kane Maintained a Close Quasi-Familial Relationship with JJC, Sr. for Five Decades

The Director Defendants claim that the "evidence establishes that any 'deep friendship' was between Kane and the deceased James J. Cotter, Sr.—not with his daughters Ellen and

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Margaret Cotter." (Defs.' MSJ No. 2 at 16:18–19; *see also id.* at 1:26–28 ("First, 'the deep friendship' of which Plaintiff complains with respect to director Kane was actually between Kane and the now-deceased James J. Cotter, Sr.—not between Kane and the Cotter sisters.")) This is *exactly* the point Plaintiff makes.

The evidence shows that (1) Kane generally lacked independence from EC and MC because, among other things, of his five-decade long *quasi-familial* relationship with their father and Kane's understanding that their father intended for MC alone, not MC together with Plaintiff, to be the trustee of the voting trust (which was a fundamental issue and dispute between plaintiff, on one hand, and MC and EC on the other hand) and (2) with respect to decisions to threaten with termination and to terminate plaintiff, Kane lacked disinterestedness because, among other things, it was his view that the wishes of his five-decade deceased friend, JJC, Sr., were that MC along, not MC and Plaintiff together, would be the trustee of the voting trust that controlled RDI, which was one of the points on which MC and EC—and Kane—insisted that Plaintiff accept as part of a global resolution of disputes between Plaintiff, on one hand, and MC and EC, on the other hand.

Kane was a close friend of JJC, Sr. for five decades. Kane and JJC Sr. had known each other since attending a L.L.M. program at the NYU Law School in 1963 and "became fast friends" and had a "very close relationship." (Appendix Ex. [1] (Kane 5/2/16 Dep. 29:8–23, 32:20–25).) Kane served as an officer of both Craig Corporation, an entity controlled by JJC, Sr., and as a director of RDI a number of different times in the 1980s and 1990s, most recently returning as an RDI board member in 2004. (Appendix Ex. [1] (Kane 5/2/16 Dep. Tr. 15–16).) Although they had disputes that prompted Kane to resign a number of times, the two were "too good friends to let [things] fester too long." (Appendix Ex. [1] (Kane 5/2/16 Dep. Tr. 25:1–2).)

Kane in deposition repeatedly claimed that "I think I knew better than anybody what [Sr.] would have wanted. I've known him for—I knew him for 50 years." (Appendix Ex. [2] (Kane 5/3/16 Dep. Tr.264:2–4).) Kane has known the Cotter children since their births; he testified that they address him as "Uncle Ed." (Appendix Ex. [1] (Kane 5/2/16 Dep. Tr. 37).) This exceptionally close and lengthy personal relationship rendered Kane unable to make decisions as an independent and disinterested member of RDI's Board of Directors regarding matters that

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touched upon disputes between MC and EC, on one hand, and Plaintiff, on the other, hand.

First, Kane was well aware of the fundamental disputes between MC and EC, on one hand, and Plaintiff, on the other, regarding who would be the trustee of the Voting Trust that would control apparently seventy percent of RDI's class B voting stock:

> Q.: When you refer to "all issues within the family," to what were you referring?
>
> Kane: I can't recall. I see "litigation" there. That was one thing. But I can't recall what the other issues were at the time.
>
> Q.: Well, one of the issues was the lack of agreement regarding whether Margaret or Jim and Margaret would be the trustees of the voting trust, correct?
>
> Kane: Well, that's litigation in my mind.

(Appendix Ex. [1] (Kane 5/2/16 Dep. Tr. 128:7–19); *see also id.* at 210:20—211:3 (confirming that Kane understood that "one of the issues in dispute was who would control the—the trust that held class B voting stock"); 211:5–18 (noting Kane's understanding that there were two outcomes: (1) either MC would sole trustee of the voting trust under the so-called 2013 Amendment or (2) JCJ and MC would be co-trustees of the voting trust under the so-called 2014 Amendment); *see also* Appendix Ex. [2] (Kane 5/3/16 Dep. Tr.276:15–20).)

Second, Kane has his own opinion about what JJC, Sr. intended in that regard. Kane's opinion was that it was JJC, Sr.'s wishes that MC alone be trustee of the voting trust.

> Q: Referring you, Mr. Kane, to your testimony about your understanding as to why in the 2013 amendment Margaret had been designated as trustee of the voting trust, how did you come to have that understanding?
>
> Kane: Mr. Cotter informed me. In one of our conversations he said he was making Margaret the trustee of the voting stock. And I asked him why. And he told me -- and it's right in my brain, it's imprinted on it -- that "that will force them to work together." That's a quote.
>
> Q: What else did you say or what else did he say in that conversation about either the trust documentation or [t]he Cotter children working together?
>
> Kane: Excuse me. Repeat that, please.
>
> Q.: What else did he say, if anything, during that conversation about the trust documentation?
>
> Kane: Nothing that I can recall.

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Q.: What else, if anything, did he say during that conversation about prompting or forcing the three -- his three Cotter children to work together?

Kane: *He didn't need to say anything. I knew what he was talking about.*

Q.: What was your understanding at the time?

Kane: Understanding was that their diverse personalities, and there had been some incidents -- I call incidents, nothing specific or difficult -- at board meetings that I thought it was a good idea to make Margaret, given the background -- I was surprised, *but I thought it was a good idea that he made Margaret the sole trustee.*

(Appendix Ex. [2] (Kane 5/3/16 Dep. Tr. 257:22–259:6 (emphasis supplied); *see also id.* at 264:5–11 ("We would have regular meetings in Laguna just the two of us, talk over strategy, talk over his children, talk over all issues. And it was reflected in his comment to me that he was giving Margaret the voting power to force them to work together. *So, I knew that's what he wanted.*") (emphasis supplied); Appendix Ex. [3] (Kane 6/9/16 Dep. Tr. 602:8–17).) Kane testified further at his deposition as follows:

Q.: Were you about to tell me something about whether you thought the 2014 amendment reflected what you understand to be Jim Cotter, Sr.'s wishes?

Kane: That's what the Court will decide. I don't -- I try to stay out of That. I have my own opinion, but I don't have all the facts.

Q.: What's the basis for your opinion? The conversation that you described to us already?
Kane: Yes.

Q.: Anything else?

Kane: 50 years of friendship. And so I think I knew him in some respects better than any member of his family.

Q.: Okay. And your opinion is that based on the facts you have –

Kane: Yes.

Q.: and not considering the facts you acknowledge you do not have –

Kane: I don't know if there are any.

Q.: Right. But based on the facts you have, you think it's the 2013 amendment that reflects Jim Cotter, Sr.'s wishes?

Kane: Yes.

(Appendix Ex. [2] (Kane 5/3/16 Dep. Tr. 277:2–278:4 (objection omitted).)

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Third, that is exactly what Kane acted to make happen, by sending emails to Plaintiff pressuring him to resolve his disputes with his sisters by acceding to their demands. On the evening of May 28th Kane wrote Plaintiff stating, "Ellen is going to present you with a global plan to end the litigation and move the Company forward. *If you agree to it*, you, Ellen and Margaret will work in a collaborative manner *and you will retain your title*." (Appendix Ex. [4] (Dep. Ex. 118 at EK 00000396 (emphasis supplied).) Kane further warned, "If it is a take-it-or-leave-it, then I STRONGLY ADVISE YOU TO TAKE IT, even though I have not seen or heard the particulars." (Appendix Ex. [4] (Dep. Ex. 118 at EK 00000396).)

On May 29, 2015, the vote to terminate Plaintiff was not had, because Plaintiff appeared to have reached an agreement with MC and EC satisfactory to the two of them. (Appendix Ex. [1] (Kane 5/2/16 Dep. Tr. (191:6–24).)

When that tentative agreement did not come to fruition, Kane resumed his advocacy toward Plaintiff, including on June 11, 2015, stating: "I do believe that if you give up what you consider 'control' for now to work cooperatively with your sisters," Kane admonished, "you will find that you will have a lot more commonality than you think." (Appendix Ex. [5] (Kane Dep. Ex. 306 at p. EK 00001613).) "Otherwise," Kane threatened, "you will be sorry for the rest of your life, they and your mother will be hurt and your children will lose a golden opportunity." (*Id.*) Tellingly, Kane also wrote:

> "[F]or now I think you have to concede that Margaret will vote the B stock. As I said, you dad told me that giving Margaret the vote was his way of 'forcing' the three of you to work together. Asking to change that is a *nonstarter*."

(Appendix Ex. [5] (Kane Dep. Ex. 306 (emphasis original)).)

The termination vote went forward on June 12, 2015. (191:25–192:11). Kane voted to terminate Plaintiff:

> Kane: I—I said to him at one point, "Take it. You have nothing to lose. You're going to get terminated if you don't. If you can work it out with your sisters, it will go on and I will support you. I'll even make a motion to see if the company will reimburse the legal fees." I did not want him to go. And you, I'm sure, see emails in there to that effect. Even though I voted—was voting against him, I wanted him to stay as C.E.O.
>
> * * *

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Q.: But that resolution did not come to pass because Jim Cotter, Jr., rejected it, correct?

Kane: He rejected it, yes.

Q.: And he got himself terminated, right?

Kane: Yes.

(Appendix Ex. [1] (Kane 5/2/16 Dep. Tr.194–195 (objection omitted).)

The Director Defendants insist that "there is no evidence that Plaintiff's mother has chosen sides in the intra-family dispute, that she has related this choice to Codding, or that Codding would consider that view to be any way material to her exercise of her duties as an RDI director." (Defs.' MSJ No. 2 at 2:17–19.) In fact, Plaintiff's mother has chosen sides: EC lives with her mother. (JJC Dec. at ¶ 24.) Additionally, after the "civil war erupted" between the Cotter siblings, Mary Cotter reacted by constantly calling Director Kane for advice on how to react and what to do. (Appendix Ex. [6] (JJC 5/16/16 Dep. Tr. 105:15–23).)

Michael Wrotniak has nothing more to recommend him as an RDI director than his and his wife's close, personal relationship with MC, which make them beholden to her. MC has known Michael and Patricia Wrotniak since college, and MC describes Patricia Wrotniak as a "close" friend whom she sees on a regular basis in social settings. (Appendix Ex. [7] (MC 5/13/16 Dep. Tr. 322–323).) Patricia Wrotniak was one of a select few friends to whom MC sent a tribute email regarding her father's passing, inviting Patricia Wrotniak to the funeral and celebratory mass. (Appendix Ex. [8] (MC00006333).)

Trisha Wrotniak was MC's roommate in her freshman year of college at Georgetown University. (JJC Dec. at ¶ 23.) MC and Trisha Wrotniak have been life-long best friends starting with their first year in college together. (JJC Dec. at ¶ 23.) Michael Wrotniak also went to Georgetown University where he met his wife Trisha Wrotniak and also developed a very close friendship with MC. (JJC Dec. at ¶ 23.) Plaintiff believes that because MC has few friends, her relationship with Trisha and Michael Wrotniak is extremely important and close. (JJC Dec. at ¶ 23.) MC has spent a great deal of time with the Wrotniaks over the years, as they live in Bronxville just outside of New York City, close to MC. (JJC Dec. at ¶ 23.) MC became like an aunt to the Wrotniaks' children. (JJC Dec. at ¶ 23.) MC and the Cotter children's mother, Mary,

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know the Wrotniaks very well also, as they have all attended social events in New York, such as birthdays and cocktail parties MC has hosted at her apartment in New York City. (JJC Dec. at ¶ 23.) Plaintiff believes MC's oldest child refers to Trisha and Michael Wrotniak as aunt and uncle. (JJC Dec. at ¶ 23.) Michael Wrotniak's communication with Plaintiff has been very limited and guarded given his knowledge of this lawsuit and his close relationship with MC. (JJC Dec. at ¶ 23.)

The documents also bear out the compromising relationship: before and after JJC, Sr.'s passing, MC corresponded extensively with both Michael and Patricia Wrotniak regarding MC providing show tickets for the Wrotniaks and the women's respective vacation plans. (Appendix Ex. [9-13] (MC00000901, -1201, -3887, -6355, -7906,).) For example, Michael Wrotniak, whom the Director Defendants portray as a distant acquaintance of MC's, began an email to her, "Hi M, I hope you had nice Thanksgiving with your kiddies—I am sure this year was more difficult than most with the adults—but day by day," after which he asked for two tickets to STOMP. (*Id.* at MC00007906.)

Like Director Wrotniak, Judy Codding owes her role as director exclusively to the fact of her friendship with MC. For example, MC used her RDI computer (and assistant) to process invoices for Judy Codding's travel. (Appendix Ex. [14] (MC00004424, -4425.) Judy Codding also approached MC in an attempt to procure tickets to the musical *Hamilton*. (Appendix Ex. [15] (MC00013935.) EC first met Judy Codding at Mary Cotter's home in a social setting. (Appendix Ex. [16] (EC 5/19/16 Dep. Tr. 307:19–308).)

Judy Codding has a very close personal relationship with Plaintiff's mother, and over the more than thirty years she has known Plaintiff's mother, Ms. Codding has become close with EC and MC in turn. (JJC Dec. at ¶ 24.) On October 13, 2015, Plaintiff met Ms. Codding, and she expressed to Plaintiff that RDI is a family business and that the only people who should manage RDI should be one of the Cotters and that Ms. Codding would help make sure of that, whether it be Ellen or Plaintiff. (JJC Dec. at ¶ 24.)

Ms. Codding's reaction to the bid from Paul Heth reflected her unwavering loyalty to EC. (JJC Dec. at ¶ 24.) Before the board meeting at which the Board was going to discuss the bid, Ms.

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Codding asked Plaintiff's views on the bid and indicated that there was no way that the bid should even be considered (clearly having spoken to EC about it before the board meeting). (JJC Dec. at ¶ 24.)

There is no dispute that EC and MC lack independence, a fact they freely concede: "The Individual Defendants, for the purposes of this motion, do not contest the independence of Ellen and Margaret Cotter as RDI directors with respect to the transactions and/or corporate conduct at issue." (Defs.' MSJ No. 2 at p. 14 n.2.)

Similarly, the Director Defendants agree with Plaintiff's position regarding Adams: that he was financially dependent on MC and EC. "Adams' income from GWA Capital Partners and GWA Investments has been inconsistent and limited in recent years, and—outside some recent stock or asset sales—his compensation relating to RDI and/or the Cotter family entities has represented a noteworthy portion of his annual income." (Defs.' MSJ No. 2 at p. 25:15–17.)

Defendants do not dispute that at the time he acted to terminate Plaintiff, Adams—by his own admission—was financially dependent on the Cotter sisters: he received a majority of his income from entities controlled by them. First, Adams was to be paid, was paid, and is paid $1,000 per week pursuant to an agreement with through JC Farm Management Co. (Appendix Ex. [17] (GA 4/28/16 Tr. 41:16–42:25).) Adams testified that the "person who [initially] made the decision that [he] would be paid $52,000 a year" was JJC, Sr., and that the person that makes that decision today is "the estate," which he understands and agrees is controlled by MC and EC. (Appendix Ex. [17] GA 4/28/16 Tr. (28:12–29:2).)

Second, Adams helps manage four real estate developments around the country in which JJC, Sr. invested, for which Adams received a 5 percent interest in the ventures. (Appendix Ex. [17] GA 4/28/16 (41:16–42:25).) Adams already has received about $30,000 from one real estate venture, and stands to be paid significant additional compensation, potentially more than $100,000, which he will receive from the Estate. (Appendix Ex. [17] (Adams 4/28/16 Dep. Tr. 52:6–52:3, 54:3–55:4, 56:12–58:10).) It is EC and MC (as executors) who will approve these payouts. (*Id.*) Adams continues to report to the Cotter sisters in these Cotter business roles unrelated to RDI. (55:5–21, 56:12–58:10, 161:15–162:12).)

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To attempt to cover up these facts, Defendants' second summary judgment motion overemphasizes the importance of Adams's savings, claiming he "has a net worth of nearly $1 million," meaning in Defendants' judgment that "focusing on the importance of RDI and/or Cotter family entities to Adam's *yearly* income vastly overstates the materiality of such funds on his *overall* economic picture." (Defs.' MSJ No. 2 at 25:26–28, 26:2.) First, the proffered figure is inaccurate. Defendants themselves earlier report that Adams's net worth is "approximately $900,000," (*id.* at 8:28), which lower figure is consistent with Adams's own testimony, (Appendix Ex. [17] (Adams 4/28/16 Dep. Tr. 36:18–25). Second, such a statement discounts that Adams, at 65 years of age, is statistically likely to live at least 20 more years. *See, e.g.*, Social Security Administration, Calculators: Life Expectancy, https://ssa.gov/planners/lifeexpectancy.html (last visited Sept. 29, 2016) ("A man reaching age 65 today can expect to live, on average, until age 84.3."). In connection with his divorce, Adams submitted declarations related to his expenses, and they total, conservatively, about $63,222 per year or $5,268.50 per month. (*See* Appendix Ex. [18] (Adams Dep. Ex. 53 at JCOTTER014973).) Were Adams to spend money at even this conservative rate, he would not be able to support himself for the remainder of his expected lifespan. Furthermore, if Adams wishes to enjoy the standard of living to which he is accustomed and to provide for the future, he needs to earn additional money. Therefore, Adams cannot maintain a living without the Cotter income he has come to rely upon. His financial dependence on the Cotter sisters for his living deprived him of independence generally and it made him interested particularly with respect to Plaintiff's termination.

Similarly, the Director Defendants emphasize that "Adams, as advocated by director Gould, later voluntarily resigned as a member of RDI's Compensation Committee on May 14, 2016." (Defs.' MSJ No. 2 at p. 26 n.7.) If Adams lacked independence for purposes of Cotter income, he indisputably lacked independence for purposes of Cotter employment and status, whether terminating Plaintiff, making EC CEO, or making MC executive vice president of New York real estate development.

If Adams sincerely believed he had done nothing untoward, he would not have hid his dependence on Cotter family businesses on his D&O questionnaire—but he mentioned none of

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that. (Appendix Ex. [19] (Adams Dep. Ex. 55).) Defendant Gould became aware from Adams's deposition testimony that Adams depended upon "the Cotter family" for "a great percentage" of his "earnings." (App. Ex. [20] (WG 6/08/16 Dep. Tr. 32:1–5).) Consequently, Mr. Gould expressed to EC and to Craig Tompkins that Gould "did not believe [Adams] was independent for purposes of serving on the . . . compensation committee." (*Id.* at 33:14–18; *see also id.* at 36:2–7.) Gould reasoned that "clearly if Mr. Adams's income was substantially derived from Reading and the Cotter family, if his whole livelihood depended on them, he could not be independent in passing on the compensation of the Cotter family members." (*Id.* at 33:21–34:7.) Adams later resigned from the RDI compensation committee. (*Id.* at 36:8–10.) Gould agreed that Mr. Adams was a "vocal proponent in support of terminating" Plaintiff. (*Id.* 36:19–22.)

NASDAQ Independence Issue

Director Defendants repeatedly claim that Adams is independent under NASDAQ Rule 5605(a)(2). (*See, e.g.*, Defs.' Mot. Sum. J. No. 2 at 2:23, 7:23, 10:7, 26:9, and 26 n.7.) However, a board's determination that a director is independent for the purposes of listing standards does not mean that the director is independent as a matter of Delaware law. *Teamsters Union 25 Health Serv. & Ins. Plan v. Baiera*, 199 A.3d 44, 61 (Del. Ch. 2015); *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 315 (Del. Ch. 2010) (declining to find that a director was independent as a matter of Delaware law even though he was independent under New York Stock Exchange rules because of investments made by a large stockholder of the company into the director's business and because of donations the stockholder made to candidates the director suggested in his capacity as a political operative). The issue of independence under NASDAQ standards is irrelevant to the question of independence under the substantive law that will decide this case.

III. ARGUMENT

A. Summary Judgment Standard

Where Plaintiff properly identifies additional facts necessary to oppose the motion and seeks additional time to conduct this discovery, summary judgment is improper. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 117-18, 110 P.3d 59, 62 (2005). Under NRCP 56(f), the party opposing a motion for summary judgment may request the denial or continuance

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of a motion for summary judgment to obtain additional affidavits or conduct further discovery. Rule 56(f) "requires that the party opposing summary judgment provide an affidavit stating the reasons why denial or continuance of the motion for summary judgment is necessary to allow the opposing party to obtain further affidavits or discovery." *Choy v. Ameristar Casinos*, 127 Nev. 265 P.3d 698, 700 (2011). Where it is "unclear whether genuine issues of material fact exist" a Rule 56(f) continuance allows for "proper development of the record." *Aviation Ventures,* 121 Nev. at 115, 110 P.3d at 60.

B. RDI Improperly Seeks Summary Judgment of Contested Factual Issues

RDI's motion seeks summary judgment "on the *issue* of director independence," not on any of their claims. *See* Motion at p. 1 (emphasis added). While NRCP 56 authorizes partial summary judgment on a particular claim, or even a dispositive element of that claim, RDI does not seek that relief. Instead, RDI inappropriately seeks determination of contested factual *issues*, *i.e.* director independence and interestedness. *See* Motion at pp. 14-15 (no citation to any claim in the Second Amended Complaint, and only addressing issue of director interestedness).

The Delaware Supreme Court has been clear that director "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); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 468 (S.D.N.Y. 2013) (same); *In re Finisar Corp. Derivative Litig.*, 542 F. Supp. 2d 980, 988 (N.D. Cal. 2008) (same). "Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry . . . ." *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015).

Defendants' argument that director independence is a question of law is unavailing. *See* Motion at pp.14-15, citing *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), *aff'd sub nom., Kahn v. M & F Worldwide,* 88 A.2d 635 (Del. 2014).[1] It ignores the clear teaching from

[1] *See, e.g., SEPTA v. Volgenau,* C.A. No. 6354-VCN, 2013 WL 4009193, at *12-21 (Del. Ch. Aug. 5, 2013) (same); *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) (same); *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000) (same).

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Delaware's highest court, the Delaware Supreme Court, and is contrary to a more recent Court of Chancery opinion. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049; *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61. In short, director independence is a factual determination which should not be determined on a motion for summary judgment.

Similarly, a director's disinterestedness is a clear-cut 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.") "Whether a director is 'interested' or 'independent' is generally regarded as a question of fact, depending on the circumstances of the case."*Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 880 (S.D.N.Y. 1986); *Patrick v. Allen*, 355 F. Supp. 2d 704, 712 (S.D.N.Y. 2005) (same).

In short, the Defendant directors' motives and intent that play into whether they were interested or independent, as well as their credibility about their reasons for acting as they did, are squarely questions of fact. These fact-specific inquiries cannot be resolved by summary judgment.

C. Legal Analysis Applicable Here

1. Director Defendants' Fiduciary Duties.

The power of directors to act on behalf of a corporation is governed by their fiduciary relationship to the corporation and to its shareholders. *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006) (citations omitted). Generally, those duties are described as the duty of care and the duty of loyalty. *Id.* The duty of good faith may be viewed as implicit in the duties of care and loyalty, or as part of a "triumvirate" of fiduciary duties. *See In re BioClinica, Inc. Shareholder Litig.*, No. CV 8272-VCG, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

a. The Duty of Care

The duty of care typically is described as requiring directors to act on an informed basis. *Schoen*, 137 P.3d at 1178. Whether directors acted on an informed basis "turns on whether the directors have informed themselves "prior to making a business decision, of all material information reasonably available to them." *Smith v. Van Gorkom*, 488 A. 2d 858, 872 (Del. 1985)

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(*quoting Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984). Due care thus is a function of the decision-making process, not the decision. *See, e.g., Citron v. Fairchild Camera & Instrument Corp.*, 569 A. 2d 53, 66 (Del. 1989). This necessarily raises "[t]he question [of] whether the process employed [in making the challenged decision] was either rational or employed in a good faith effort to advance the corporate interests." *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 339 (Bankr. D.D.C. 2006).

b. The Duty Of Loyalty

The director's duty of loyalty requires that directors "maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Schoen*, 137 P.3d at 1178 (citations omitted). The duty of loyalty was described in the seminal Delaware Supreme Court case of *Guth v. Loft* as follows:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and [to] its shareholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate . . . director, peremptorily and inexorably, the most scrupulous observance of his duty [of loyalty], not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation [or its shareholders] . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interests.

Guth v. Loft, 5 A.2d 503, 510 (Del. 1939).

The duty of loyalty is "unremitting." *See, e.g., Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). The duty of good faith, discussed elsewhere herein, is one element of the duty of loyalty. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The terms "loyalty" and "good faith," like the terms "independence" and "candor," are "words pregnant with obligation" and "[d]irectors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor." *In re Tyson Foods, Inc., Consol. Shareholder Litig.*, 2007 WL 2351071, at *4 (Del. Ch. Aug. 15, 2007).

c. The Duty of Good faith

The element of good faith requires the director to act with a "loyal state of mind."

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Hampshire Group, Ltd., v. Kuttner, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). 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.*

d. The Duty of Disclosure

"Whenever directors communicate publicly or directly with shareholders about the corporation's affairs . . . directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty." *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). "Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors [of the corporation]." *Id.* at 10-11. When directors communicate with stockholders, they must do so with "complete candor." *In Re Tyson Foods*, 2007 WL 2351071, at *3.

e. Directors' Fiduciary Duties Are Owed to All Shareholders, Not Just the Controlling Shareholder(s)

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); *see also McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000) (finding that directors are required to make informed, good faith decisions about whether to the sale of a corporation to a third party that had been proposed and negotiated by a controlling stockholder would maximize the value for minority stockholders).

2. The Business Judgment Rule Is a Rebuttable Presumption, Rebutted Here

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The business judgment rule is a rebuttable 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 was taken in the best interests of the company." *See, e.g. In Re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (*quoting Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).[2] In Nevada, the business judgment rule is codified in NRS 78.138.3, which provides that "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation."

The business judgment rule typically is articulated as consisting of four elements, namely, (i) a business decision, (ii) disinterestedness and independence, (iii) due care, and (iv) good faith. *Roselink Investors, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 2016 (S.D.N.Y. 2004) (internal citations omitted). The presumptions of the business judgment rule are rebutted where it is shown that any of the four elements above was not present. *Id.* at 216-17. Here, at least each of the last three elements is absent.

As to MC and EC, there is no dispute that, as to at least any and all matters of disagreement between them and JJC, including but not limited to ultimate control of RDI by controlling the voting trust as trustee(s), immediate control of RDI, whether by removing JJC as CEO, constraining his authority as CEO and/or having a newly activated and repopulated executive committee, and matters involving the employment status, titles and compensation of MC and EC, among other things, MC and EC lack disinterestedness and lack independence. The Interested Director Defendants admit that in their summary judgment motions, including as follows:

> The Individual Defendants, for the purposes of this motion [regarding "director independence"], do not contest the independence of Ellen and Margaret Cotter as RDI directors with respect to the transactions and, or corporate conduct at issue---which are addressed in the Individual Defendants' other, contemporaneously-filed summary judgment motions.

[2] Due to the development of Delaware case law with respect to issues of corporate law, Nevada courts find Delaware case law persuasive authority. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 26, 62 P.3d 720, 737 (2003) (noting that "the case law . . . [of] Delaware is persuasive authority" when interpreting Nevada's corporate law).

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("Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence" at p. 14, fn. 2.)

a. Individual Defendants' Lack of Disinterestedness

With respect to disinterestedness, because the business judgment rule presumes that directors have no conflict of interest, 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). Thus, a director must be disinterested in the challenged conduct in particular and, as a general matter, otherwise independent. *Beam*, 845 A.2d at 1049.

As the Interested Director Defendants acknowledge, EC and MC lack disinterestedness with respect to the challenged actions, starting with the threat to terminate Plaintiff as President and CEO of RDI unless he resolved the California Trust Action on terms satisfactory to EC and MC, and continuing thereafter with the termination of him on account of his failure to do so.

The same is true, for largely the same reasons, for defendant Kane, who is called "Uncle Ed" by EC and MC and who, by his contemporaneous conduct demonstrated that he acted as "Uncle Ed" throughout to effectuate what he thought were JJC, Sr.'s wishes, and not as a disinterested RDI director exercising disinterested business judgment.

Likewise, Adams admittedly picked sides in a family dispute. He also demonstrated his lack of disinterestedness by, among other things, vigorously pursuing the EC and MC agenda, starting with the termination of Plaintiff as President and CEO, to further his own interest (including to be interim CEO) and to protect the interests of EC and MC, on whom he is financially dependent.[3]

b. Individual Defendants' Lack of Independence

Independence, as used in the context of an element of the business judgment rule, requires that a director is able to engage, and in fact engages, in decision-making "based on the corporate

[3] Plaintiff does not concede that McEachern was disinterested and/or independent. Because Plaintiff can prevail on this Motion without showing McEachern to have lacked disinterestedness or independence, he chooses not to address McEachern.

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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). Assessing directorial independence therefore "focus[es] on impartiality and objectiveness." *In Re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920, 938 (Del. Ch. 2003) (*quoting Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001), *rev'd in part on other grounds,* 817 A.2d 149 (Del. 2002), *cert. denied,* 538 U.S. 1032 (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. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam*, 845 A.2d at 1049-50.

Independence is lacking in situations in which a corporate fiduciary "derives a benefit *from the transaction* that is not generally shared with the other shareholders. In situations in which the benefit is derived by another (e.g., by EC and MC from Plaintiff acceding to their demands to resolve trust and estate disputes on terms acceptable to the two of them), the issue is whether the [corporate fiduciary]'s decision (e.g., Adams and/or Kane) resulted from that director being *controlled* by another." *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) (explaining the distinction between interest and independence). Control may exist where a corporate fiduciary has close personal or financial ties to or is beholden to another. (*Id.*)

A close personal friendship in which the director and the person with whom he or she has the questioned relationship are "as thick as blood relations" would likely be sufficient to demonstrate that a director is not independent. *In re MFW S'Holders Litig.*, 67 A.3d 496, 509 n.37 (Del. Ch. 2013).

Similarly, a director who is financially beholden to another person, such as a controlling stockholder, is not independent of that person. *In re Emerging Commc'n, Inc. S'Holders Litig.*,

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2004 WL 1305745, at *33 (Del. Ch. May 3, 2004). The Court of Chancery has found that directors who derive a substantial portion of their income from a controlling stockholder are not independent of that stockholder. *Id.* at *34. "In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the . . . personal consequences resulting from the decision." *Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (*quoting Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

Here, the conduct of EC, MC, Kane and Adams to extort Plaintiff into resolving trust and estate disputes on terms dictated by EC and MC are squarely and unequivocally efforts to obtain personal benefits for EC and MC not shared with other RDI shareholders.

Kane's personal relationship with JJC, Sr., Kane's view that JJC, Sr. intended MC control the Voting Trust, and Kane's actions to make that happen, among other things, demonstrate his lack of independence.

As shown by his own sworn testimony in his Los Angeles Superior Court divorce proceeding and in this case, Adams as a general matter is not independent of EC and MC, because he is financially dependent upon income he receives from companies that EC and MC control.

For such reasons, among others, each of Kane and Adams (and MC and EC) lacked independence and therefore are not entitled to the presumptions of the business judgment rule.

3. Defendants Must and Cannot Satisfy the Entire Fairness Standard

"If the shareholder succeeds in rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the 'entire fairness' of the transaction." *McMullin v. Brand,* 765 A.2d 910, 917 (Del. 2000). "[I]f the presumption is rebutted, the board's decision is reviewed through the lens of entire fairness, pursuant to which the directors lose the presumption of [the] business judgment [rule]." *Solomon v. Armstrong*, 747 A.2d 1098, 1112 (Del.Ch. 1999). *Horwitz v. SW. Forest Indus., Inc.*, 604 F.Supp. 1130, 1134 (D. Nev. 1985), which defendants cite for the platitude that the business judgment rule applies to claims of breach of fiduciary duty against a director, is not to the contrary and does not address circumstance of where, as here, the plaintiff has rebutted the presumptions of the business judgment rule.

Under the entire fairness test, "[d]irector defendants therefore are required to establish to

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the *court's* satisfaction that the transaction was the product of both fair dealing and fair price." *Cinerama, Inc.* v. *Technicolor,* 663 A.2d 1156, 1163 (Del. 1995) (*quoting Cede & Co. v. Technicolor,* 634 A.2d 345, 361 (Del. 1993). Thus, a test of entire fairness is a two-part inquiry into the fair-dealing, meaning the process leading to the challenged action and, separately, the end result. *In re Tele-Commc'ns Inc. Shareholders Litig.,* 2005 Del. Ch. LEXIS 206, at *235, 2005 WL 3642727, at *9 (Del. Ch. Sept. 29, 2005).

The Motion makes no mention of this standard. In addition the Motion does not discuss the "omnipresent specter" that the Defendants were acting primarily in their own interests or for entrenchment purposes. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *see also eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010).

The entire fairness requirement entails "exacting scrutiny" to determine whether the challenged actions were entirely fair. *Paramount Commc'ns, Inc. v. QVC Network Inc.,* 637 A.2d 34, 42 n.9 (Del. 1994). Under the entire fairness standard, the challenged action itself must be objectively fair, independent of the beliefs of the director defendants. *Geoff v. II Cindus.Inc.,* 902 A.2d 1130, 1145 (Del. Ch. 2006) subsequent proceedings, 2006 (Del. Ch. LEXIS 161, 2000 WL 2521441 (Del. Ch. Aug. 22, 2006); *see also Venhill Ltd. P'ship v. Hilman*, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008).

"The fairness test therefore is "an inquiry designed to access whether a self-dealing transaction should be respected or set aside in equity." *Venhill*, 2008 WL 2270488 at *22.[4]

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

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

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Here, Defendants cannot carry their burden of proving the entire fairness of their action.

IV. CONCLUSION

In light of the forgoing, plaintiff requests that this court deny the Motion for Partial Summary Judgment (No. 2).

DATED this 13th day of October, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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provisions of section 102(b)(7)): *In re Wheelabrator Techs., Inc. Sh. Litig.*, 1992 Del. Ch. LEXIS at *41 n.18, 1992 WL 212595, at *12 n.18 (Del. Ch. Sept. 1, 1992) (§102(b)(7) did not require dismissal where the plaintiffs pleaded that "the breach of the duty of disclosure wasn't intentional violation of the duty of loyalty").

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2016, I caused a true and correct copy of the foregoing to be electronically served to all parties of record via this Court's electronic filing system to all parties listed on the E-Service Master List.

/s/ Luz Horvath
An employee of Lewis Roca Rothgerber Christie LLP

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

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

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

APPEARANCES:

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

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

(Court was called to order)

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

THE COURT: What?

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

THE COURT: What order?

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

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

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

THE COURT: We're missing an important group.

MR. FERRARIO: That's true.

(Pause in the proceedings)

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

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

MR. WAITE: Correct.

(Pause in the proceedings)

THE COURT: What time were we going to start?

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

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

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

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

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

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

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

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

(Pause in the proceedings)

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

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

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

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

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

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

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

THE COURT: Do you have people attending by phone?

MR. FERRARIO: Excuse me?

THE COURT: Do you have people attending by phone?

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

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

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

THE COURT: Who's on the telephone?

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

THE COURT: Lovely. Thank you.

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

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

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

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

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

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

THE COURT: Maybe.

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

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

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

THE COURT: You should have lived it.

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

THE COURT: You were here, yeah.

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

THE COURT: Not a former CEO.

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

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

MR. FERRARIO: But --

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

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

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

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

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

MR. FERRARIO: I did.

THE COURT: Okay.

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

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

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

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

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

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

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

MR. FERRARIO: They could tell him.

THE COURT: Yeah.

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

THE COURT: Correct.

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

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

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

THE COURT: Well, it depends --

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

THE COURT: Depends upon what the testimony is.

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

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

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

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

MR. FERRARIO: Okay.

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

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

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

to "provided to"?

MR. FERRARIO: I think if --

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

MR. FERRARIO: Right.

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

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

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

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

them. Because it's changed over time.

MR. FERRARIO: Okay. But the briefing --

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

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

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

MR. FERRARIO: I understand.

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

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

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

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

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

THE COURT: Okay.

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

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

MR. FERRARIO: Thank you, Your Honor.

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

MR. KRUM: I do, Your Honor.

THE COURT: Okay.

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

MR. KRUM: Right. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS

VOLUME XII (PA2751–3000)

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PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS

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2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams	X, XI, XII	PA2318–2793
2016-10-13	Plaintiff James Cotter Jr.'s Opp'n to Defendant Gould's Motion for Summary Judgment	XII	PA2794–2830
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 1) Re Plaintiff's Termination and Reinstatement Claims	XII	PA2831–2862
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence	XII	PA2863–2890
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2016-10-26	1st Amended Order Setting Civil Jury Trial, Pre-Trial Conference, and Calendar Call	XIII	PA3083–3087
2017-11-09	Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Codding, Michael Wrotniak's Supplement to Motion for Partial Summary Judgment Nos. 1, 2, 3, 5 and 6	XIII	PA3088–3138 **(FILED UNDER SEAL)**
2017-11-20	Transcript of Hearing on Motion for Evidentiary Hearing re James Cotter, Jr. Motion to Seal Exhibits 2, 3, and 5 and to James Cotter's Motion In Limine No. 1	XIII	PA3139–3158
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2016-12-22	Notice of Entry of Order (on Motions for Summary Judgment Nos. 1-6)	XIII	PA3076–3082
2017-12-29	Notice of Entry of Order Regarding Defendants' Motions for Partial summary Judgment and Plaintiff's and Defendants' Motions in Limine	XV	PA3657–3667
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2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence	XII	PA2863–2890
2016-12-20	Reading International, Inc.'s Answer to Plaintiff's Second Amended Complaint	XIII	PA3046–3071
2016-03-29	Reading International, Inc's Answer to James J. Cotter, Jr.'s First Amended Complaint	I	PA73–94
2017-12-01	Request For Hearing On Defendant William Gould's Previously Filed Motion For Summary Judgment	XIII	PA3189–3204
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2016-10-27	Transcript from Hearing on Motions, October 27, 2016	XII, XIII	PA2891–3045
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2017-12-28	Transcript of Hearing on Motion for Reconsideration and for Stay	XV	PA3631–3655

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 **PETITIONER'S APPENDIX TO PETITION FOR WRIT OF MANDAMUS, XII (PA2751–3000)** was served by the following method(s):

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Courtesy Copy Hand Delivered

To:

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Court of Clark County,
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Las Vegas, Nevada 89101

Dated: January 2, 2018

By: /s/ PATRICIA FERRUGIA

	Year	Salary ($)	Bonus ($)	Stock Awards ($)(1)	Option Awards ($)(1)	Change in Pension Value and Nonqualified Deferred Compensation Earning ($)	All Other Compensation ($)	Total ($)
Ellen M. Cotter [2]	2015	402,000	250,000	--	–	--	25,465 [3]	677,465
Interim	2014	335,000	--	--	–	--	75,190 [3][4]	410,190
President and Chief Executive Officer, Chief Operating Officer - Domestic Cinemas	2013	335,000	--	--	–	--	24,915 [3]	359,915
James Cotter, Jr. [5] [9]	2015	195,417	--	--	50,027- -	--	16,161 [3]	261,605
Former President and Chief Executive Officer	2014	335,000	--	--	50,027- -	--	26,051 [3]	411,078
	2013	195,417	--	--	29,182- -	--	9,346 [3]	233,945
Dev Ghose [6]	2015	257,692	75,000		382,334	--	15,730 [3]	407,005
Chief Financial Officer and Treasurer	2014	--	--	--	–	--	–	–
	2013	--	--	--	–	--	–	–
Andrzej J. Matyczynski [7]	2015	324,000			33,010	150,000 (8)	27,140 [3]	534,150
Former Chief Financial Officer and Treasurer	2014	308,640			33,010	150,000 (8)	26,380 [3]	518,030
	2013	308,640	35,000	--	33,010	50,000 (8)	25,755 [3]	452,405
William Ellis	2015	350,000	60,000		57,194		28,330 [3]	495,524
General Counsel [10]	2014	71,795	10,000		9,532		2,500 [3]	93,827
	2013	--	--	--	–	--	–	–
Robert F. Smerling	2015	350,000	75,000	--	–	--	22,899 [3]	447,899
President – Domestic Cinema Operations	2014	350,000	65,000	--	–	--	22,421 [3]	437,421
	2013	350,000	25,000	--	–	--	21,981 [3]	396,981
Wayne Smith [11]	2015	274,897	71,478	--	–	--	2,600 [3]	348,975
Managing Director -Australia and New Zealand	2014	324,295	72,216	--	–	--	2,340 [3]	398,851
	2013	340,393	48,420	--	–	--	2,075 [3]	390,888

(1) Amounts represent the aggregate grant date fair value of awards computed in accordance with ASC Topic 718, excluding the effects of any estimated forfeitures. The assumptions used in the valuation of these awards are discussed in the Notes to our consolidated financial statements. Amounts do not include the value of restricted stock units that will not vest within 60 days following the date of which this information is provided.

(2) Ms. Ellen M. Cotter was appointed our interim President and Chief Executive Officer on June 12, 2015.

(3) Includes our matching employer contributions under our 401(k) plan, the imputed tax of key person insurance, and any automobile allowances. Aside from the car allowances only the employer contributions for the 401(k) plan exceeded $10,000, see table below. See the table in the section entitled "*Employee Benefits and Perquisites*" for the

amount of each individual's car allowance.

Name	Employer Contribution for 401(k) Plan 2015	2014	2013
Ellen M. Cotter	$10,600	$10,400	$10,200
James Cotter, Jr.	6,700	10,400	0
Dev Ghose	4,000	0	0
Andrzej J. Matyczynski	10,600	10,400	10,200
William Ellis	10,500	0	0
Robert F. Smerling	0	0	0
Wayne Smith	0	0	0

(4) Includes a $50,000 tax gross-up for taxes incurred as a result of the exercise of nonqualified stock options that were intended to be issued as incentive stock options.

(5) Mr. Cotter, Jr., served as our Chief Executive Officer until June 12, 2015. In the case of Mr. Cotter Jr., the "All Other Compensation" column includes $43,750 in severance payments paid pursuant to Mr. Cotter Jr.'s employment agreement. Of this amount, the Company has a claim against Mr. Cotter Jr. for approximately $18,000, which, if the Company is successful in this claim, may be recovered from Mr. Cotter Jr.

(6) Mr. Ghose became Chief Financial Officer and Treasurer on May 11, 2015, as such, he was paid a prorated amount of his $400,000 salary for 2015.

(7) Mr. Matyczynski resigned as our Chief Financial Officer and Treasurer on May 11, 2015, and acted as our Strategic Corporate Advisor until March 10, 2016.

(8) Represents the increase in the vested benefit of the DCP for Mr. Matyczynski. Payment of the vested benefit under his DCP will be made in accordance with the terms of the DCP.

(9) Mr. Cotter, Jr. had an annual base salary of $335,000 for 2015. As his employment ended in June 2015, Mr. Cotter, Jr. earned a prorated base salary of $195,417 for 2015, which includes his severance payment paid through the end of July 2015.

(10) Mr. Ellis became General Counsel and Corporate Secretary on October 20, 2014 as such he was paid a prorated amount of his $350,000 salary in 2014. Mr. Ellis submitted his resignation on February 18, 2016.

(11) Mr. Smith is paid in Australian Dollars. Amounts in the table above are shown in U.S. Dollars, using the conversion rates of 0.9684 for 2013, 0.9027 for 2014 and 0.7524 for 2015.

Grants of Plan-Based Awards

The following table contains information concerning the stock grants made to our named executive officers for the year ended December 31, 2015:

		Estimated Future Payouts Under Non-Equity Incentive Plan Awards			Estimated Futures Payouts Under Equity Incentive Plan Awards			All Other Stock Awards: Number of Shares of Stock or	All Other Option Awards: Number of Securities	Exercise or Base Price of Option	Grant Date Fair Value of Stock and Option
Name	Grant Date	Threshold ($)	Target ($)	Maximum ($)	Threshold (#)	Target (#)	Maximum (#)	Units (#) (1)	Underlying Options (#)(2)	Award ($/share) (3)	Awards ($) (4)
Ellen M. Cotter	-	-	-	-	-	-	-	-	-	-	-
James Cotter, Jr.	-	-			-	-	-	-	-	-	-

Dev Ghose	5-11-2015	-	-	-	-	-	-	100,000	13.42	$382,334
Andrzej J. Matyczynski	-	-	-	-	-	-	-	-	-	-
William Ellis	-	-	-	-	-	-	-	-	-	-
Robert F. Smerling	-	-	-	-	-	-	-	-	-	-
Wayne Smith (1)	7-16-2015	-	-	-	-	-	6,000	-	-	$84,000

(1) Mr. Wayne Smith was issued an award of restricted Class A Common Stock, which vests in equal installments on May 13, 2015 and May 13, 2016. The closing price per share for the Class A Common Stock on the date of grant was $14.00. The awards issued to Mr. Wayne Smith are related to his prior-year performance.

(2) Mr. Dev Ghose was issued an option to purchase 100,000 shares of Class A Common Stock at the commencement of his employment, which award vests in four equal installments.

(3) Options are granted with an exercise price equal to the closing price per share on the date of grant.

(4) Represents the total option value estimated as per ASC 718.

Nonqualified Deferred Compensation

Name	Executive contributions in 2015 ($)	Registrant contributions in 2015 ($)	Aggregate earnings in 2015 ($)	Aggregate withdrawals/distributions ($)	Aggregate balance at December 31, 2015 ($)
Andrzej J. Matyczynski	0	150,000	0	0	600,000

See "*Potential Payments upon Termination of Employment or Change in Control*".

On May 13, 2010, our stockholders approved the Plan at the annual meeting of stockholders in accordance with the recommendation of the Board of the Company. The Plan provides for awards of stock options, restricted stock, bonus stock, and stock appreciation rights to eligible employees, Directors, and consultants. The Board approved an amendment to the Plan to permit the award of restricted stock units on March 10, 2016. The Plan permits issuance of a maximum of 1,250,000 shares of Class A Stock. The Plan expires automatically on March 11, 2020.

Equity incentive bonuses may be awarded to align our executives' long-term compensation to appreciation in stockholder value over time and, so long as such grants are within the parameters of the Plan, historically were entirely discretionary on the part of Mr. Cotter, Sr. Other stock grants are subject to Board approval. Equity awards may include stock options, restricted stock, bonus stock, or stock appreciation rights.

If awarded, it is generally our policy to value stock options and restricted stock at the closing price of our common stock as reported on the NASDAQ Stock Market on the date the award is approved or on the date of hire, if the stock is granted as a recruitment incentive. When stock is granted as bonus compensation for a particular transaction, the award may be based on the market price on a date calculated from the closing date of the relevant transaction. Awards may also be subject to vesting and limitations on voting or other rights.

Outstanding Equity Awards

The following table sets forth outstanding equity awards held by our named executive officers as of December 31, 2015 under the Plan:

Outstanding Equity Awards at Year Ended December 31, 2015

		Option Awards				Stock Awards	
	Class	Number of Shares Underlying Unexercised Options Exercisable	Number of Shares Underlying Unexercised Options Unexercisable	Option Exercise Price ($)	Option Expiration Date	Number of Shares or Units of Stock that Have Not Vested	Market Value of Shares or Units that Have Not Vested ($)
James Cotter, Jr. [1]	A	25,000	20,000	6.31	06/02/2018	0	0
Ellen M. Cotter	A	20,000	–	5.55	03/06/2018	0	0
William Ellis[2]	A	8,815	40,000	8.94	12/31/2016	0	0
Dev Ghose	A	25,000[3]	75,000	13.42	05/10/2020	0	0
Andrzej J. Matyczynski	A	25,000	–	6.02	08/22/2022	0	0
Robert F. Smerling	A	43,750	–	10.24	05/08/2017	0	0
Wayne Smith	A	–	–	–	–	3,000[4]	42,000

(1) Mr. Cotter, Jr. has stated that he has unvested options to acquire 50,000 shares of Class A Stock at an exercise price of $6.31 per share, expiring February 6, 2018, of an original stock option grant of 100,000 Class A Stock. Mr. Cotter, Jr. exercised 50,000 stock options in June 2015. The Company's position is that all unvested options expired upon the termination of Mr. Cotter, Jr.'s employment. The matter is under review by the Compensation Committee.

(2) Mr. Ellis submitted his resignation on February 18, 2016, effective March 11, 2016. As part of his separation agreement, 20,000 of the 40,000 remaining unvested shares will vest on October 20, 2016. Thereafter, no additional options will vest.

(3) 25,000 of Mr. Ghose's options vested on May 11, 2016.

(4) Mr. Smith was granted 6,000 restricted shares of Class A stock on July 16, 2015, which vest over two years in annual installments.

Option Exercises and Stock Vested

The following table contains information for our named executive officers concerning the option awards that were exercised and stock awards that vested during the year ended December 31, 2015:

		Option Awards		Stock Awards	
Name	Class	Number of Shares Acquired on Exercise	Value Realized on Exercise ($)	Number of Shares Acquired on Vesting	Value Realized on Vesting ($)
James J. Cotter, Sr.	B	100,000	1,024,000	–	–
James Cotter, Jr. [1]	A	50,000	315,500	–	–
James Cotter, Jr.	A	12,500	48,375	–	–
James Cotter, Jr.	A	10,000	83,500	–	–
Ellen M. Cotter	B	50,000	512,000	–	–

Andrzej J. Matyczynski	A	35,100	180,063	--	--

(1) Mr. Cotter, Jr. has stated that he has unvested options to acquire 50,000 shares of Class A Stock at an exercise price of $6.31 per share, expiring February 6, 2018, of an original stock option grant of 100,000 Class A Stock. Mr. Cotter, Jr. exercised 50,000 stock options in June 2015. The Company's position is that all unvested options expired upon the termination of Mr. Cotter, Jr.'s employment. The matter is under review by the Compensation Committee.

Equity Compensation Plan Information

The following table sets forth, as of December 31, 2015, a summary of certain information related to our equity incentive plans under which our equity securities are authorized for issuance:

Plan Category	Number of securities to be issued upon exercise of outstanding options, warrants and rights (a)	Weighted average exercise price of outstanding options, warrants and rights (b)	Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column (a)) (c)
Equity compensation plans approved by security holders (1)	486,565 (2)	$ 8.68	551,800
Equity compensation plans not approved by security holders			
Total	486,565		

(1) These plans are the Company's 1999 Stock Option Plan and 2010 Stock Incentive Plan.

(2) Represents outstanding options only.

Pension Benefits

The following table contains information concerning pension plans for each of the named executive officers for the year ended December 31, 2015:

Name	Plan Name	Number of Years of Credited Service	Present Value of Accumulated Benefit as of 12/31/2015 ($)	Payments During Last Fiscal Year ($)
Andrzej J. Matyczynski	DCP	6	600,000	$ --

Potential Payments upon Termination of Employment or Change in Control

The following paragraphs provide information regarding potential payments to each of our named executive officers in connection with certain termination events, including a termination related to a change of control of the Company, as of December 31, 2015:

Mr. Dev Ghose – Termination without Cause. Under his employment agreement, we may terminate Mr. Ghose's employment with or without cause (as defined) at any time. If we terminate his employment without cause or fail to renew his employment agreement upon expiration without cause, Mr. Ghose will be entitled to receive severance in an amount equal to the salary and benefits he was receiving for a period of 12 months following such termination or non-renewal. If the termination is in connection with a "change of control" (as defined), Mr. Ghose would be entitled to severance in an amount equal to the compensation he would have received for a period two years from such termination.

Mr. William Ellis – Termination without Cause. Mr. Ellis resigned his employment effective March 11, 2016. We have entered into a separation agreement with Mr. Ellis which provides, among other things, that, in consideration of the payment to Mr. Ellis of $205,010 (to be paid in 19 equal semi-monthly installments of $10,790) and the vesting of options to acquire 20,000 shares of our Class A Common Stock on October 15, 2016, Mr. Ellis has agreed to be available to advise us on matters on which he previously worked until December 31, 2016. Mr. Ellis' employment agreement contained a noncompetition clause that did not extend beyond his termination.

Mr. Wayne Smith — Termination of Employment for Failing to Meet Performance Standards. If Mr. Smith's employment is terminated by the Board for failing to meet the standards of his anticipated performance, Mr. Smith will be entitled to a severance payment of six months' base salary.

Mr. Andrzej J. Matyczynski – Deferred Compensation Benefits. During 2012, Mr. Matyczynski was granted an unfunded, nonqualified deferred compensation plan ("DCP") that was partially vested and was to vest further so long as he remained in our continuous employ. If Mr. Matyczynski were to be terminated for cause, then the total vested amount would be reduced to zero. The incremental amount vested each year was made subject to review and approval by our Board. Please see the "*Nonqualified Deferred Compensation*" table for additional information.

Upon the termination of Mr. Matyczynski's employment, he will be entitled under the DCP agreement to payment of the vested benefits under his DCP in annual installments following the later of (a) 30 days following Mr. Matyczynski's 65th birthday or (b) six months after his separation from service for reasons other than his death or termination for cause. The DCP was to vest over seven years and with full vesting to occur in 2019 at $1,000,000 in deferred compensation. However, in connection with his employment as EVP Global Operations, the Company and Mr. Matyczynski agreed that the Company would cease making contributions to the DCP on April 15, 2016 and that the final contributions by the Company to the DCP would be $150,000 for 2015 and $21,875 for 2016, satisfying the Company's obligations under the DCP. Mr. Matyczynski's agreement contains nonsolicitation provisions that extend for one year after his retirement.

Under Mr. Matyczynski's agreement, on his retirement date and provided there has not been a termination for cause, Mr. Matyczynski will be entitled to a lump sum severance payment in an amount equal to $50,000, less certain offsets.

Robert F. Smerling – Retirement Benefit. In March 2016, the Compensation Committee approved a one-time retirement benefit for Robert Smerling, President, Cinema Operations, due to his significant long-term service to the Company. The retirement benefit is the average of the two highest total cash compensation (base salary plus cash bonus) years paid to Mr. Smerling in the then most recently completed five year period.

No other named executive officers currently have employment agreements or other arrangements providing benefits upon termination or a change of control. The table below shows the maximum benefits that would be payable to each person listed above in the event of such person's termination without cause or termination in connection with a change in control, if such events had occurred on December 31, 2015, at price equal to the closing price of the Class A stock on that date, which was of $13.11.

Mr. Ellis' agreement terminated when his employment ended as of March 11, 2016. As such, his information is excluded from the table below.

	Payable on upon Termination without Cause ($)			Payable upon Termination in Connection with a Change in Control ($)			Payable upon Retirement ($)
	Severance Payments	*Value of Vested Stock Options*	*Value of Health Benefits*	*Severance Payments*	*Value of Vested Stock Options*	*Value of Unvested Stock Options Accelerated*	*Benefits Payable under Retirement Plans or the DCP*
Ellen Cotter	0	151,200	0	0	151,200	0	0
Dev Ghose	400,000	0	23,040	800,000	0	0	0
Wayne Smith	175,000	39,330[1]	0	0	39,330[1]	39,330[1]	0
Andrzej J. Matyczynski	50,000[2]	177,250	0	0	177,250	0	600,000
Robert F. Smerling	0	125,562	0	0	125,562	0	415,000[3]

(1) Represents value of restricted stock award rather than stock option.

(2) Mr. Matyczynski's severance payment is payable upon his retirement, and is subject to certain offsets as set forth in his agreement, and is subject to certain offsets.

(3) Mr. Smerling's one-time retirement benefit is based on the average of the two highest total cash compensation years paid to Mr. Smerling in the most recently completed five-year period. The figure quoted in the table represents the average of total compensation paid for years 2015 and 2014.

CERTAIN RELATIONSHIPS AND RELATED PARTY TRANSACTIONS

The members of our Audit Committee are Douglas McEachern, who serves as Chair, Edward Kane, and Michael Wrotniak. Management presents all potential related party transactions to the Audit Committee for review. Our Audit Committee reviews whether a given related party transaction is beneficial to our Company, and approves or bars the transaction after a thorough analysis. Only Committee members disinterested in the transaction in question participate in the determination of whether the transaction may proceed. See the discussion entitled "*Review, Approval or Ratification of Transactions with Related Persons*" for additional information regarding the review process.

Sutton Hill Capital

In 2001, we entered into a transaction with Sutton Hill Capital, LLC ("SHC") regarding the master leasing, with an option to purchase, of certain cinemas located in Manhattan including our Village East and Cinemas 1, 2, 3 theaters. In connection with that transaction, we also agreed (i) to lend certain amounts to SHC, to provide liquidity in its investment, pending our determination whether or not to exercise our option to purchase and (ii) to manage the 86th Street Cinema on a fee basis. SHC is a limited liability company owned in equal shares by the Cotter Estate and/or the Cotter Trust and a third party.

As previously reported, over the years, two of the cinemas subject to the master leasing agreement have been redeveloped and one (the Cinemas 1, 2, 3 discussed below) has been acquired. The Village East is the only cinema that remains subject to this master lease. We paid an annual rent of $590,000 for this cinema to SHC in each of 2015, 2014, and 2013. During this same period, we received management fees from the 86th Street Cinema of $151,000, $123,000 and $183,000.

In 2005, we acquired (i) from a third party the fee interest underlying the Cinemas 1, 2, 3, and (ii) from SHC its interest in the ground lease estate underlying and the improvements constituting the Cinemas 1, 2, 3. The ground lease estate and the improvements acquired from SHC were originally a part of the master lease transaction, discussed above.

In connection with that transaction, we granted to SHC an option to acquire at cost a 25% interest in the special purpose entity (Sutton Hill Properties, LLC ("SHP") formed to acquire these fee, leasehold and improvements interests. On June 28, 2007, SHC exercised this option, paying $3.0 million and assuming a proportionate share of SHP's liabilities. At the time of the option exercise and the closing of the acquisition of the 25% interest, SHP had debt of $26.9 million, including a $2.9 million, non-interest bearing intercompany loan from the Company. As of December 31, 2015, SHP had debt of $19.4 million (again, including the intercompany loan). Since the acquisition by SHC of its 25% interest, SHP has covered its operating costs and debt service through cash flow from the Cinemas 1, 2, 3, (ii) borrowings from third parties, and (iii) pro-rata contributions from the members. We receive an annual management fee equal to 5% of SHP's gross income for managing the cinema and the property, amounting to $153,000, $123,000 and $183,000 in 2015, 2014, and 2013, respectively. This management fee was modified in 2015, as discussed below, retroactive to December 1, 2014.

On June 29, 2010, we agreed to extend our existing lease from SHC of the Village East Cinema by 10 years, with a new termination date of June 30, 2020. This amendment was reviewed and approved by our Audit Committee. The Village East lease includes a sub-lease of the ground underlying the cinema that is subject to a longer-term ground lease between SHC and an unrelated third party that expires in June 2031 (the "cinema ground lease"). The extended lease provides for a call option pursuant to which Reading may purchase the cinema ground lease for $5.9 million at the end of the lease term. Additionally, the lease has a put option pursuant to which SHC may require Reading to purchase all or a portion of SHC's interest in the existing cinema lease and the cinema ground lease at any time between July 1, 2013 and December 4, 2019. SHC's put option may be exercised on one or more occasions in increments of not less than $100,000 each. We recorded the Village East Cinema building as a property asset of $4.7 million on our balance sheet based on the cost carry-over basis from an entity under common control with a corresponding capital lease liability of $5.9 million.

In February 2015, SHP and we entered into an amendment to the management agreement dated as of June 27, 2007 between SHP and us. The amendment, which was retroactive to December 1, 2014, memorialized our undertaking to SHP with respect to $750,000 (the "Renovation Funding Amount") of renovations to Cinemas 1, 2, 3 funded or to be funded by us. In consideration of our funding of the renovations, our annual management fee under the management agreement was increased commencing January 1, 2015 by an amount equivalent to 100% of any incremental positive cash flow of Cinemas 1, 2, 3 over the average annual positive cash flow of the Cinemas 1, 2, 3 over the three-year period ended December 31, 2014 (not to exceed a cumulative aggregate amount equal to the Renovation Funding Amount), plus a 15% annual cash-on-cash return on the balance outstanding from time to time of the Renovation Funding Amount, payable at the time of the payment of the annual management fee. Under the amended management agreement, we are entitled to retain ownership of (and any right to depreciate) any furniture, fixtures and equipment purchased by us in connection with such renovation and have the right (but not the obligation) to remove all such furniture, fixtures and equipment (at our own cost and expense) from the Cinemas upon the termination of the management agreement. The amendment also provides that, during the term of the management agreement, SHP will be responsible for the cost of repair and maintenance of the renovations. In 2015, we received a management fee of $153,000. This amendment was approved by SHC and by the Audit Committee of our Board.

OBI Management Agreement

Pursuant to a Theater Management Agreement (the "Management Agreement"), our live theater operations were, until recently, managed by Off-Broadway Investments, LLC ("OBI Management"), which is wholly owned by Ms. Margaret Cotter, the daughter of the late Mr. James J. Cotter, Sr., the sister of Ellen M. Cotter and James Cotter, Jr., and a member of our Board. The Management Agreement was terminated effective March 10, 2016 in connection with the retention by our Company of Margaret Cotter as a full time employee. The Theater Management Agreement generally provided for the payment of a combination of fixed and incentive fees for the management of our four live theaters. Historically, these fees have equated to approximately 21% of the net cash flow generated by these properties. OBI was paid $589,000 with respect to 2015. This includes $389,000 for theater management services performed in 2015 and $200,000 for property development services with respect to our Company's Union Square and Cinemas 1,2,3 properties, some of which property development services were provided in periods prior to 2015 and during the period ended March 10, 2016. We paid $397,000 and $401,000 in fees for theater management services with respect to 2014, and 2013, respectively. No fees were paid in these periods for property development services. We also reimbursed OBI for certain travel expenses, shared the cost of an administrative assistant, and provided office space at our New York offices. The fees payable to OBI for the period January 1, 2016 through and including March 9, 2016, will be prorated.

OBI Management historically conducted its operations from our office facilities on a rent-free basis, and we shared the cost of one administrative employee of OBI Management. We reimbursed travel related expenses for OBI Management personnel with respect to travel between New York City and Chicago in connection with the management of the Royal George complex. Other than these expenses, OBI Management was responsible for all of its costs and expenses related to the performance of its management functions. The Management Agreement renewed automatically each year unless either party gave at least six months' prior notice of its determination to allow the Management Agreement to expire. In addition, we could terminate the Management Agreement at any time for cause.

Effective March 10, 2016, Margaret Cotter became a full time employee of the Company and the Management Agreement was terminated. As Executive Vice-President Real Estate Management and Development - NYC, Ms. Cotter will continue to be responsible for the management of our live theater assets, will continue her role heading up the pre-redevelopment of our New York properties and will be our senior executive responsible for the actual redevelopment of our New York properties. Pursuant to the termination agreement, Ms. Cotter has given up any right she might otherwise have, through OBI, to income from STOMP.

Ms. Cotter's compensation as Executive Vice-President was set as part of an extensive executive compensation process. For 2016, Ms. Cotter's base salary will be $350,000, she will have a short term incentive target bonus opportunity of $105,000 (30% of her base salary), and she was granted a long term incentive of a stock option for 19,921 shares of Class A common stock and 4,184 restricted stock units under the Company's 2010 Stock Incentive Plan, as amended, which long term incentives vest over a four year period.

Live Theater Play Investment

From time to time, our officers and Directors may invest in plays that lease our live theaters. The play STOMP has been playing in our Orpheum Theatre since prior to the time we acquired the theater in 2001. The Cotter Estate and/or the Cotter Trust and Mr. Michael Forman own an approximately 5% interest in that play, an interest that they have held since prior to our acquisition of the theater.

Shadow View Land and Farming, LLC

Director Guy Adams has performed consulting services for James J. Cotter, Sr., with respect to certain holdings that are now controlled by the Cotter Estate and/or the Cotter Trust (collectively the "Cotter Interests"). These holdings include a 50% non-controlling membership interest in Shadow View Land and Farming, LLC (the "Shadow View Investment" and "Shadow View" respectively), certain agricultural interests in Northern California (the "Cotter Farms"), and certain land interests in Texas (the "Texas Properties"). In addition, Mr. Adams is the CFO of certain captive insurance entities, owned by a certain trust for the benefit of Ellen M. Cotter, James Cotter, Jr., and Margaret Cotter (the "captive insurance entities").

Shadow View is a consolidated subsidiary of the Company. The Company has from time to time made capital contributions to Shadow View. The Company has also, from time to time, as the managing member, funded on an interim basis certain costs incurred by Shadow View, ultimately billing such costs through to the two members. The Company has never paid any remuneration to Shadow View. Mr. Adams' consulting fees with respect to the Shadow View Interest were to have been measured by the profit, if any, derived by the Cotter Interests from the Shadow View Investment. He has no beneficial interest in Shadow View or the Shadow View Investment. His consulting fees with respect to Shadow View were equal to 5% of the profit, if any, derived by the Cotter Interests from the Shadow View Investment after recoupment of its investment plus a return of 100%. To date, no profits have been generated by Shadow View and Mr. Adams has never received any compensation with respect to these consulting services. His consulting fee would have been calculated only after the Cotter Interests had received back their costs and expenses and two times their investment in Shadow View. Mr. Adams' consulting fees would have been 2.5% of the then-profit, if any, recognized by Shadow View, considered as a whole.

The Company and its subsidiaries (i) do not have any interest in, (ii) have never conducted any business with, and (iii) have not made any payments to, the Cotter Family Farms, the Texas Properties and/or the captive insurance entities.

Document Storage Agreement

In consideration of the payment of $100 per month, our Company has agreed to allow Ellen M. Cotter and Margaret Cotter to keep certain files related to the Cotter Estate and/or the Cotter Trust at our Los Angeles Corporate Headquarters. This arrangement, however, has not been implemented.

Review, Approval or Ratification of Transactions with Related Persons

The Audit Committee has adopted a written charter, which includes responsibility for approval of "Related Party Transactions." Under its charter, the Audit Committee performs the functions of the "Conflicts Committee" of the Board and is delegated responsibility and authority by the Board to review, consider and negotiate, and to approve or disapprove on behalf of the Company the terms and conditions of any and all Related Party Transactions (defined below) with the same effect as though such actions had been taken by the full Board. Any such matter requires no further action by the Board in order to be binding upon the Company, except in the case of matters that, under applicable Nevada Law, cannot be delegated to a committee of the Board and must be determined by the full Board. In those cases where the authority of the Board cannot be delegated, the Audit Committee nevertheless provides its recommendation to the full Board.

As used in the Audit Committee's Charter, the term "Related Party Transaction" means any transaction or arrangement between the Company on one hand, and on the other hand (i) any one or more directors, executive officers or stockholders holding more than 10% of the voting power of the Company (or any spouse, parent, sibling or heir of any such individual), or (ii) any one or more entities under common control with any one of such persons, or (iii) any entity in which one or more such persons holds more than a 10% interest. Related Party Transactions do not include matters related to employment or employee compensation related issues.

The charter provides that the Audit Committee reviews transactions subject to the policy and determines whether or not to approve or ratify those transactions. In doing so, the Audit Committee takes into account, among other factors it deems appropriate:

- the approximate dollar value of the amount involved in the transaction and whether the transaction is material to us;
- whether the terms are fair to us, have resulted from arm's length negotiations and are on terms at least as favorable as would apply if the transaction did not involve a Related Person;
- the purpose of, and the potential benefits to us of, the transaction;
- whether the transaction was undertaken in our ordinary course of business;
- the Related Person's interest in the transaction, including the approximate dollar value of the amount of the Related Person's interest in the transaction without regard to the amount of any profit or loss;
- required public disclosure, if any; and
- any other information regarding the transaction or the Related Person in the context of the proposed transaction that would be material to investors in light of the circumstances of the particular transaction.

INDEPENDENT PUBLIC ACCOUNTANTS

Summary of Principal Accounting Fees for Professional Services Rendered

Our independent public accountants, Grant Thornton LLP, have audited our financial statements for the fiscal year ended December 31, 2015, and are expected to have a representative present at the Annual Meeting, who will have the opportunity to make a statement if he or she desires to do so and is expected to be available to respond to appropriate questions.

Audit Fees

The aggregate fees for professional services for the audit of our financial statements, audit of internal controls related to the Sarbanes-Oxley Act, and the reviews of the financial statements included in our Forms 10-K and 10-Q provided by Grant Thornton LLP for 2015 and 2014 were approximately $931,500 and $661,700, respectively.

Audit-Related Fees

Grant Thornton LLP did not provide us any audit related services for 2015 or 2014.

Tax Fees

Grant Thornton LLP did not provide us any products or any services for tax compliance, tax advice, or tax planning for 2015 or 2014.

All Other Fees

Grant Thornton LLP did not provide us any services for 2015 or 2014, other than as set forth above.

Pre-Approval Policies and Procedures

Our Audit Committee must pre-approve, to the extent required by applicable law, all audit services and permissible non-audit services provided by our independent registered public accounting firm, except for any *de minimis* non-audit services. Non-audit services are considered *de minimis* if (i) the aggregate amount of all such non-audit services constitutes less than 5% of the total amount of revenues we paid to our independent registered public accounting firm during the fiscal year in which they are provided; (ii) we did not recognize such services at the time of the engagement to be non-audit services; and (iii) such services are promptly submitted to our Audit Committee for approval prior to the completion of the audit by our Audit Committee or any of its members who has authority to give such approval. Our Audit Committee pre-approved all services provided to us by Grant Thornton LLP for 2015 and 2014.

STOCKHOLDER COMMUNICATIONS

Annual Report

A copy of our Annual Report on Form 10-K for the fiscal year ended December 31, 2015 is being provided with this Proxy Statement.

Stockholder Communications with Directors

It is the policy of our Board that any communications sent to the attention of any one or more of our Directors in care of our executive offices will be promptly forwarded to such Directors. Such communications will not be opened or reviewed by any of our officers or employees, or by any other Director, unless they are requested to do so by the addressee of any such communication. Likewise, the content of any telephone messages left for any one or more of our Directors (including call-back number, if any) will be promptly forwarded to that Director.

Stockholder Proposals and Director Nominations

Any stockholder who, in accordance with and subject to the provisions of the proxy rules of the SEC, wishes to submit a proposal for inclusion in our Proxy Statement for our 2017 Annual Meeting of Stockholders, must deliver such proposal in writing to the Annual Meeting Secretary at the address of our Company's principal executive offices at 6100 Center Drive, Suite 900, Los Angeles, California 90045. Unless we change the date of our 2017 annual meeting by more than 30 days from the anniversary of the prior year's meeting, such written proposal must be delivered to us no later than December 23, 2016 to be considered timely. If our 2017 Annual Meeting is not held within 30 days of the anniversary of our 2016 Annual Meeting, to be considered timely, stockholder proposals must be received no later than ten days after the earlier of (a) the date on which notice of the 2017 Annual Meeting is mailed, or (b) the date on which the Company publicly discloses the date of the 2017 Annual Meeting, including disclosure in an SEC filing or through a press release. If we do not receive notice of a stockholder proposal on or before March 8, 2017, the proxies that we hold may confer discretionary authority to vote against such stockholder proposal, even though such proposal is not discussed in our Proxy Statement for that meeting.

Our Boards will consider written nominations for Directors from stockholders. Nominations for the election of Directors made by our stockholders must be made by written notice delivered to our Secretary at our principal executive offices not less than 120 days prior to the first anniversary of the date that this Proxy Statement is first sent to stockholders. Such written notice must set forth the name, age, address, and principal occupation or employment of such

nominee, the number of shares of our Company's common stock that is beneficially owned by such nominee and such other information required by the proxy rules of the SEC with respect to a nominee of the Board.

Under our governing documents and applicable Nevada law, our stockholders may also directly nominate candidates from the floor at any meeting of our stockholders held at which Directors are to be elected.

OTHER MATTERS

We do not know of any other matters to be presented for consideration other than the proposals described above, but if any matters are properly presented, it is the intention of the persons named in the accompanying proxy to vote on such matters in accordance with their judgment.

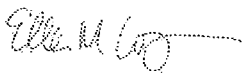
DELIVERY OF PROXY MATERIALS TO HOUSEHOLDS

As permitted by the Securities Exchange Act of 1934, only one copy of the proxy materials are being delivered to our stockholders residing at the same address, unless such stockholders have notified us of their desire to receive multiple copies of the proxy materials.

We will promptly deliver without charge, upon oral or written request, a separate copy of the proxy materials to any stockholder residing at an address to which only one copy was mailed. Requests for additional copies should be directed to our Corporate Secretary by telephone at (213) 235-2240 or by mail to Corporate Secretary, Reading International, Inc., 6100 Center Drive, Suite 900, Los Angeles, California 90045.

Stockholders residing at the same address and currently receiving only one copy of the proxy materials may contact the Corporate Secretary as described above to request multiple copies of the proxy materials in the future.

By Order of the Board of Directors,



Ellen M. Cotter
Chair of the Board

May 19, 2016

PROXY VOTING INSTRUCTIONS

YOUR VOTE IS IMPORTANT. PLEASE VOTE TODAY.
We encourage you to take advantage of Internet or telephone voting.
Both are available 24 hours a day, 7 days a week.
Internet and telephone voting is available through 11:59 p.m., PT, on June 1, 2016.

VOTE BY INTERNET WWW.FCRVOTE.COM/RDI

Use the Internet to transmit your voting instructions and for electronic delivery of information up until 11:59 p.m., PT, on June 1, 2016. Have your proxy card in hand when you access the web site and follow the instructions to obtain your records and to create an electronic voting instruction form.

OR

VOTE BY TELEPHONE 1-800-[illegible]

Use any touch-tone telephone to transmit your voting instructions up until 11:59 p.m., PT, on June 1, 2016. Have your proxy card in hand when you call and then follow the instructions.

OR

VOTE BY MAIL

Mark, sign and date your proxy card and return it in the postage-paid envelope we have provided to: First Coast Results, Inc., P.O. Box [illegible], Ponte Vedra Beach, FL [illegible].

If you vote your proxy by Internet or by telephone, you do NOT need to mail back your proxy card. Your Internet or telephone vote authorizes the named proxies to vote your shares in the same manner as if you marked, signed and returned your proxy card.

CONTROL NUMBER

If submitting a proxy by mail, please sign and date the card below and fold and detach card at perforation before mailing.

READING INTERNATIONAL ANNUAL MEETING PROXY CARD

BOARD OF DIRECTORS – The Board of Directors recommends a vote FOR all nominees listed.

Proposal 1

(01) Ellen M. Cotter (02) Guy W. Adams (03) Judy Codding (04) James J. Cotter, Jr. (05) Margaret Cotter
(06) William D. Gould (07) Edward L. Kane (08) Douglas J. McEachern (09) Michael Wrotniak

FOR ALL ☐ WITHHOLD ALL ☐ FOR ALL EXCEPT ☐

To withhold your vote for any individual nominee(s), mark "For All Except" box and write the number(s) of the nominee(s) on the line below.

____

Proposal 2. Other Business. In their discretion, the proxies are authorized to vote upon such other business as may properly come before the meeting and at and with respect to any and all adjournments or postponements thereof. The Board of Directors at present knows of no other business to be presented by or on behalf of the Company or the Board of Directors at the meeting.

THIS PROXY CARD IS VALID ONLY WHEN SIGNED AND DATED.

____
Signature

____
Signature (Capacity)

____
Date

NOTE: Please sign exactly as your name appears hereon. Joint owners should each sign. When signing as attorney, executor, administrator, trustee or guardian, please give full title as such. If the signer is a corporation, please sign full corporate name by authorized officer, giving full title as such. If a partnership, please sign in partnership name by authorized person, giving full title as such.

SIGN, DATE AND MAIL YOUR PROXY TODAY,
UNLESS YOU HAVE VOTED BY INTERNET OR TELEPHONE.

IF YOU HAVE NOT VOTED BY INTERNET OR TELEPHONE, PLEASE DATE, MARK, SIGN AND RETURN THIS PROXY PROMPTLY. YOUR VOTE, WHETHER BY INTERNET, TELEPHONE OR MAIL, MUST BE RECEIVED NO LATER THAN 11:59 P.M. PACIFIC TIME, JUNE 1, 2016.
TO BE INCLUDED IN THE VOTING RESULTS, ALL VALID PROXIES RECEIVED PRIOR TO 11:59 P.M. PACIFIC TIME, JUNE 1, 2016 WILL BE VOTED.

SEE REVERSE SIDE

△ If submitting a proxy by mail, please sign and date the card in ink/s above and fold and detach card at perforation before mailing. △

READING INTERNATIONAL

ANNUAL MEETING OF STOCKHOLDERS

June 2, 2016, 11:00 a.m.

THIS PROXY IS SOLICITED ON BEHALF OF THE BOARD OF DIRECTORS

The undersigned hereby appoints Ellen M. Cotter and Andrzej Matyczynski, and each of them, the attorneys, agents, and proxies of the undersigned, with full powers of substitution to each, to attend and act as proxy or proxies of the undersigned at the Annual Meeting of Stockholders of Reading International, Inc. to be held at the Courtyard by Marriott Los Angeles Westside, located at 6333 Bristol Parkway, Culver City, California 90230 on Thursday, June 2, 2016 at 11:00 a.m., local time, and at and with respect to any and all adjournments or postponements thereof, and to vote as specified herein the number of shares which the undersigned, if personally present, would be entitled to vote.

The undersigned hereby ratifies and confirms all that the attorneys and proxies, or any of them, or their substitutes, shall lawfully do or cause to be done by virtue hereof, and hereby revokes any and all proxies heretofore given by the undersigned to vote at the Annual Meeting. The undersigned acknowledges receipt of the Notice of Annual Meeting and the Proxy Statement accompanying such notice.

THE PROXY, WHEN PROPERLY EXECUTED AND RETURNED PRIOR TO THE ANNUAL MEETING, WILL BE VOTED AS DIRECTED. IF NO DIRECTION IS GIVEN, IT WILL BE VOTED "FOR" PROPOSAL 1, AND IN THE PROXY HOLDERS' DISCRETION AS TO ANY OTHER MATTER THAT MAY PROPERLY COME BEFORE THE ANNUAL MEETING OR ANY POSTPONEMENT OR ADJOURNMENT THEREOF.

SEE REVERSE SIDE

EXHIBIT 13

Mark G. Krum (SBN 10913)
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996
Tel: 702-949-8200
Fax: 702-949-8398
E-mail:mkrum@lrrc.com

Attorneys for Plaintiff
James J. Cotter, Jr.

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG TOMPKINS, and DOES 1 through 100, inclusive,

Defendants.

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

Case No. P-14-082942-E
Dept. No. XI

Case No. A-16-735305-B
Dept. No. XI

Jointly Administered

Business Court

JAMES J. COTTER, JR.'S AMENDED RESPONSES TO EDWARD KANE'S FIRST SET OF REQUESTS FOR ADMISSION

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

COMES NOW, James J. Cotter, Jr. ("Plaintiff" or "Responding Party") and hereby serves his responses to Edward Kane's ("Defendant" or "Propounding Party") First Set of Requests for Admission (the "Requests").

GENERAL OBJECTIONS

Responding Party incorporates the following general objections into each specific response and objection set forth below:

(1) Responding Party objects to the Requests to the extent they seek documents or information which is protected by (or which cannot be provided without disclosing) attorney client privilege, the attorney-work product doctrine and/or otherwise is privileged or protected from disclosure, including in particular communications of counsel of record for Plaintiff in this action, which communications will not be produced or logged;

(2) Responding Party objects to the Requests to the extent they seek documents or information the production or disclosure of which violates any person or entity's right to privacy;

(3) Responding Party objects to the Requests to the extent they seek documents or information not in Responding Party's possession, custody, or control;

(4) Responding Party objects to the Requests to the extent they seek documents or information within the possession or control of the Propounding Party, or seeks documents or information which is publicly available and/or which otherwise is uniquely or equally available to the Propounding Party;

(5) Responding Party objects to the Requests to the extent they seek information or documents that constitute or disclose confidential,

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proprietary, or developmental commercial or business information or research, or seeks documents or information otherwise protected from disclosure;

(6) Responding Party objects to the Requests to the extent they attempt or purport to impose obligations exceeding those authorized or imposed by the Nevada Rules of Civil Procedure;

(7) Responding Party objects to the Requests insofar as they seek documents or information beyond the time and scope of matters at issue in the captioned action and/or which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; and

(8) Responding Party objects to the Requests because they generally are unlimited as to time, meaning that they generally provide no time frame or date range to limit the scope of documents or information requested.

(9) Responding Party is conducting discovery and an ongoing investigation of the facts and law relating to this action, including certain of the Requests. Responding Party's objections and responses are based on the present knowledge, information and belief of Responding Party, as well as the documents in Responding Party's possession, custody or control. For these reasons, among others, the objections and responses provided are made without prejudice to Responding Party's right to produce evidence of subsequently discovered facts or to supplement, modify or otherwise change or amend the objections and responses or to rely on additional evidence in pretrial proceedings and trial. Responding Party expressly reserves the right to amend, supplement, or modify these objections and responses.

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REQUESTS FOR ADMISSION

REQUEST NO. 1

Admit that, prior to June 12, 2015, you referred to Edward Kane as "Uncle Ed" on one or more occasions.

RESPONSE TO REQUEST NO. 1

Responding Party admits that, over the course of his life prior to June 12, 2015, he addressed Edward Kane as "Uncle Ed" on one or more occasions in interactions between Edward Kane and Responding Party.

REQUEST NO. 2

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Executive Committee.

RESPONSE TO REQUEST NO. 2

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Executive Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 2, and on that basis denies Request No. 2.

REQUEST NO. 3

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Audit and Conflicts Committee.

RESPONSE TO REQUEST NO. 3

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Audit and Conflicts Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 3, and on that basis denies Request No. 3.

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REQUEST NO. 4

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Compensation and Stock Options Committee.

RESPONSE TO REQUEST NO. 4

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Compensation and Stock Options Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 4, and on that basis denies Request No. 4.

REQUEST NO. 5

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Tax Oversight Committee.

RESPONSE TO REQUEST NO. 5

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Edward Kane on the Board's Tax Oversight Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 5, and on that basis denies Request No. 5.

REQUEST NO. 6

Admit that, on about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Guy Adams on the Board's Executive Committee.

RESPONSE TO REQUEST NO. 6

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Guy Adams on the Board's Executive Committee, and

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Responding Party therefore lacks information sufficient to admit or deny Request No. 6, and on that basis denies Request No. 6.

REQUEST NO. 7

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Guy Adams on the Board's Compensation and Stock Options Committee.

RESPONSE TO REQUEST NO. 7

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Guy Adams on the Board's Compensation and Stock Options Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 7, and on that basis denies Request No. 7.

REQUEST NO. 8

Admit that, on or about May 15, 2014, you agreed as a member of RDI's Board of Directors to put Douglas McEachern on the Board's Audit and Conflicts Committee.

RESPONSE TO REQUEST NO. 8

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported minutes of a May 15, 2014 RDI Board of Directors meeting, does not refresh Responding Party's memory regarding whether he agreed as a member of RDI's Board of Directors to put Douglas McEachern on the Board's Audit and Conflicts Committee, and Responding Party therefore lacks information sufficient to admit or deny Request No. 8, and on that basis denies Request No. 8.

REQUEST NO. 9

Admit that, prior to your termination as CEO of RDI, you served as Chairman of the Executive Committee of RDI's Board of Directors.

RESPONSE TO REQUEST NO. 9

Responding Party admits that he "served" as Chairman of the Executive Committee only in that he was appointed by the Board as Chairman of the Executive Committee of RDI's Board of

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Directors, but not that he took any action in any capacity, including Chairman, as a member of such committee, which took no action.

REQUEST NO. 10

Admit that, as a member of RDI's Board of Directors, you did not vote against the $50,000 "bonus" to Ellen Cotter referenced in paragraph 40 of your FAC.

RESPONSE TO REQUEST NO. 10

Responding Party admits that he abstained from voting on the $50,000 "bonus" to Ellen Cotter at the Board meeting at which it was approved, and admits that he otherwise did not vote against the $50,000 "bonus" to Ellen Cotter referenced in paragraph 40 of the FAC.

REQUEST NO. 11

Admit that, as a member of RDI's Board of Directors, on or about November 13, 2014 you approved a 20% base salary increase for Ellen Cotter effective January 1, 2015.

RESPONSE TO REQUEST NO. 11

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including purported Board minutes, does not refresh Responding Party's memory regarding whether on or about November 13, 2014 he approved a 20% base salary increase for Ellen Cotter effective January 1, 2015, and Responding Party therefore lacks information sufficient to admit or deny Request No. 11, and on that basis denies Request No. 11.

REQUEST NO. 12

Admit that, as a member of RDI's Board of Directors, you voted in favor of the increased director compensation referenced in paragraph 42 of your FAC.

RESPONSE TO REQUEST NO. 12

Responding Party admits that he voted in favor of the increased director compensation.

REQUEST NO. 13

Admit that, as a member of RDI's Board of Directors, you did not oppose a resolution in January 2015 that you could not be "terminated [as CEO] without the approval of the majority of the independent directors."

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RESPONSE TO REQUEST NO. 13

Responding Party admits that he abstained on voting on such resolution and that he did not otherwise oppose it.

REQUEST NO. 14

Admit that the term "independent directors," as used in the January 2015 Board resolution regarding termination of Cotter family members, referred to Edward Kane, Guy Adams, Douglas McEachern, Tim Storey, and Bill Gould.

RESPONSE TO REQUEST NO. 14

Responding Party admits Request No. 14.

REQUEST NO. 15

Admit that RDI's full Board of Directors discussed the possibility of your termination on May 21, 2015.

RESPONSE TO REQUEST NO. 15

Responding Party admits that his termination was discussed on May 21, 2015 in the presence (in person and/or telephonic) of all members of the RDI Board of Directors.

REQUEST NO. 16

Admit that RDI's full Board of Directors discussed the possibility of your termination on May 29, 2015.

RESPONSE TO REQUEST NO. 16

Responding Party admits that his termination was discussed on May 29, 2015 in the presence (in person and/or telephonic) of all members of the RDI Board of Directors.

REQUEST NO. 17

Admit that RDI's full Board of Directors discussed the possibility of your termination on June 12, 2015.

RESPONSE TO REQUEST NO. 17

Responding Party admits that his termination was discussed on June 12, 2015 in the presence (in person and/or telephonic) of all members of the RDI Board of Directors.

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REQUEST NO. 18

Admit that, on or about December 9, 2015, you requested at a meeting of the RDI's Board of Directors that the recorded Board minutes contain less detail going forward than had generally been contained in previous sets of minutes.

RESPONSE TO REQUEST NO. 18

Responding Party admits that, in response to Ellen and Craig Tompkins' stated unwillingness to add his suggested comments to RDI's Board minutes which included certain statements made at board meetings by certain directors, he stated that RDI's board minutes should then not contain statements made by other directors if such statements included in the minutes were selectively used to support a particular point of view of the drafter of the minutes to support certain actions taken by the Board.

REQUEST NO. 19

Admit that, as a member of RDI's Board of Directors, on or about October 5, 2015, you voted in favor of approving First Coast Results as the Inspector of Elections for the 2015 Annual Shareholder's Meeting.

RESPONSE TO REQUEST NO. 19

Responding Party admits that he voted in favor of approving First Coast Results as the Inspector of Elections for the 2015 Annual Shareholder's Meeting.

REQUEST NO. 20

Admit that, prior to your termination as CEO of RDI, you did not state an objection at any meeting of the Board of Directors regarding any purported delay in circulation of minutes of Board meetings.

RESPONSE TO REQUEST NO. 20

Responding Party denies Request No. 20.

REQUEST NO. 21

Admit that, prior to May 21, 2015, you never stated at any Board of Directors meeting that you believed Edward Kane lacked sufficient disinterestedness to serve on RDI's Board.

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RESPONSE TO REQUEST NO. 21

Responding Party admits Request No. 21.

REQUEST NO. 22

Admit that, prior to May 21, 2015, you never stated at any Board of Directors meeting that you believed Guy Adams lacked sufficient disinterestedness to serve on RDI's Board.

RESPONSE TO REQUEST NO. 22

Responding Party admits Request No. 22.

REQUEST NO. 23

Admit that, prior to May 21, 2015, you never stated at any Board of Directors meeting that you believed Douglas McEachern lacked sufficient disinterestedness to serve on RDI's Board.

RESPONSE TO REQUEST NO. 23

Responding Party admits Request No. 23.

REQUEST NO. 24

Admit that you authorized RDI's May 11, 2015, 10-K/A filing to be submitted to the Securities and Exchange Commission bearing your signature.

RESPONSE TO REQUEST NO. 24

Responding Party admits that he authorized RDI's May 11, 2015, 10-K/A filing to be submitted to the Securities and Exchange Commission bearing his signature in the form that he last reviewed and approved on May 8, 2015.

REQUEST NO. 25

Admit that, on or about May 8, 2015, you authorized your signature be appended to a certification pursuant to the Sarbanes-Oxley Act of 2002 stating the following with respect to RDI's Form 10-K/A: "Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."

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RESPONSE TO REQUEST NO. 25

Responding Party admits that on May 8, 2015, with respect to the 10-K/A filing in the form that he last reviewed and approved on May 8, 2015, he authorized his signature to be appended to a certification pursuant to the Sarbanes-Oxley Act of 2002 stating the following with respect to RDI's Form 10-K/A: "Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report."

REQUEST NO. 26

Admit that, on or about May 8, 2015, you authorized your signature be appended to a certification that certified pursuant to the Sarbanes-Oxley Act of 2002 that you reviewed the Annual Report on Form 10-K/A of RDI.

RESPONSE TO REQUEST NO. 26

Responding Party admits that on May 8, 2015, with respect to the 10-K/A filing in the form that he last reviewed and approved on May 8, 2015, he authorized his signature to be appended to a certification that certified pursuant to the Sarbanes-Oxley Act of 2002 that he reviewed the 10-K/A Annual Report on Form.

REQUEST NO. 27

Admit that the document attached hereto as Exhibit 1, bates stamped GA00005636 through GA 00005666, is a true and correct copy of the 10-K/A filing made by RDI with the Securities and Exchange Commission on or about May 11, 2015.

RESPONSE TO REQUEST NO. 27

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including Exhibit 1, bates stamped GA00005636 through GA 00005666, is insufficient to enable Responding Party to admit or deny this request. Responding Party therefore presently lacks information sufficient to admit or deny Request No. 27, and on that basis denies request No. 27.

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Las Vegas, NV 89169-5996

REQUEST NO. 28

Admit that, upon learning that you were potentially going to be terminated as CEO of RDI, you caused numerous emails relating to RDI to be sent from the RDI servers to your personal email account for litigation purposes.

RESPONSE TO REQUEST NO. 28

Responding Party has made reasonable inquiry and the information known or readily obtainable by Responding Party, including emails, is insufficient to enable Responding Party to admit or deny this request. Responding Party therefore lacks information sufficient to admit or deny Request No. 28, and on that basis denies request No. 28.

REQUEST NO. 29

Admit that it is not in the best interests of RDI's stockholders to reinstate you as CEO of RDI.

RESPONSE TO REQUEST NO. 29

Responding Party denies Request No. 29.

DATED this 27th day of July, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

/s/ Mark G. Krum
Mark G. Krum (Nevada Bar No. 10913)
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5958
(702) 949-8200
Attorneys for Plaintiff James J. Cotter, Jr.

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2016, I caused a true and correct copy of the foregoing **JAMES J. COTTER, JR.'S AMENDED RESPONSES TO EDWARD KANE'S FIRST SET OF REQUESTS FOR ADMISSION** was electronically served to all parties of record via this Court's electronic filing system to all parties listed on the E-Service Master List.

DATED this 27th day of July, 2016.

/s/ Jessie M. Helm
An employee of Lewis Roca Rothgerber Christie LLP

Lewis Roca ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

EXHIBIT 14

Confidential – Filed Under Seal

EXHIBIT 15

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants, and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	)	Case No. A-15-719860-B Case No. P-14-082942-E Related and Coordinated Cases

Complete caption, next page.

VIDEOTAPED DEPOSITION OF GUY ADAMS

LOS ANGELES, CALIFORNIA

THURSDAY, APRIL 28, 2016

VOLUME I

REPORTED BY: LORI RAYE, CSR NO. 7052

JOB NUMBER: 305144

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	Case No. A-15-719860-B P-14-082942-E
T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al., Plaintiffs, vs. MARGARET COTTER, ELLEN COTTER, GUY WILLIAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG TOMPKINS, and DOES 1 through 100, inclusive, Defendants, and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	

A. That Ellen -- excuse me. That Margaret was not qualified to run a development project in New York City.

Q. As you sit here today, have you ever heard anyone offer the opinion that she is qualified to supervise real estate development activities with respect to those two New York City properties?

A. At -- at any time?

Q. Right.

A. Yes.

Q. Who and when?

A. Well, one person is myself. I went to New York, December, and I wanted to see these properties myself. And Mike Wrotniak came up to New York and Ed Kane was on the phone.

Q. December of --

A. '15.

Q. Okay. Please go ahead.

A. And we had -- what we have for a developer is a -- that's not the right term. We've employed a company that does development in New York. That's their job. I can't think of their name right now. And we -- Margaret also had -- the architect was there. He -- she had the

construction people there. And she also had the -- the head leasing agent that was going to rent the place. She may have had maybe a space planner. One other person was there. It was a big meeting.

And before the meeting, the construction people took us all through the building and talked about what they were going to do to start the construction process. And I noticed Margaret would intervene and say, Well, show them this down in the corner over there. You can actually go to the wall and see where the city street is. And he says, Oh, yeah, we have to shore all this up. The construction guy said that.

And Ellen would say, Now, tell him about this. And she's just -- her command of all the problems in the building that have to be overcome were -- were impressive to me. And then we went up to the meeting and they had the overhead slides and stuff showing it with the turtle top.

Q. I'm sorry. Who is the "they"?

A. I'm sorry. The people I named, the contractors, the developers, the head leasing broker. And they all got a moment to talk about -- the architect people got to talk about building the building. The construction people got to talk

about the intricacies of building in the city -- building in the city of New York, and the most interesting part was the leasing guy that we have hired to lease this property was like the biggest leasing guy in that area of New York. And he was in there and he would rattle off problems he would have leasing it, the good and the bad, to inform us.

I'm giving you a very brief synopsis, but what I learned from that meeting was the level of her involvement. And while I said earlier in my testimony, she doesn't have experience developing, she's hired a development -- a company that that's what they do, they develop. And her knowledge and command of the facts, and while everybody was giving their presentation, she would make comments about it. And I was very impressed.

And after the meeting, I asked Michael Wrotniak what he thought, and he, too, was favorably impressed with her work in that field and what she was doing.

Q. Wrotniak has no real estate development experience either; correct?

MR. TAYBACK: Objection; foundation.

THE WITNESS: Can I answer that?

EXHIBIT 16

8-K 1 rdi-20151113x8k.htm 8-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 OR 15(d) of the Securities Exchange Act of 1934

Date of report (Date of earliest event reported): November 13, 2015

Reading International, Inc.
(Exact Name of Registrant as Specified in its Charter)

Nevada	**1-8625**	**95-3885184**
(State or Other Jurisdiction of Incorporation)	(Commission File Number)	(IRS Employer Identification No.)

6100 Center Drive, Suite 900, Los Angeles, California	**90045**
(Address of Principal Executive Offices)	(Zip Code)

Registrant's telephone number, including area code: **(213) 235-2240**

N/A
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 5.07. Submission of Matters to a Vote of Security Holders.

The Company held its Annual Meeting of Stockholders on November 10, 2015. The stockholders considered two proposals which are included in its proxy statement on Form DEF 14A filed with the Securities and Exchange Commission on October 20, 2015. The proposals voted upon and the results of the vote were the following:

Proposal 1: To elect nine Directors to serve until the Company's 2016 Annual Meeting of Stockholders and thereafter until their successors are duly elected and qualified

	FOR	WITHHOLD
Ellen M. Cotter	1,294,544	138,968
Guy W. Adams	1,324,103	109,409
Judy Codding	1,325,103	108,409
James J. Cotter, Jr.	1,291,860	141,652
Margaret Cotter	1,294,544	138,968
William D. Gould	1,294,792	138,720
Edward L. Kane	1,324,103	109,409
Douglas J. McEachern	1,331,094	102,418
Michael Wrotniak	1,325,103	108,409

Proposal 2: To ratify the appointment of Grant Thornton LLP as the Company's independent auditors for the fiscal year ended December 31, 2015

FOR	AGAINST	ABSTAIN
1,649,828	3,135	1,048

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

READING INTERNATIONAL, INC.

Date: November 13, 2015

By: /s/ Ellen M. Cotter
Name: Ellen M. Cotter
Title: Chief Executive Officer

EXHIBIT 17

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs. Case No.

MARGARET COTTER, ELLEN COTTER, Guy Adams, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive, A-15-719860-B
Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,
Nominal Defendant.

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF JAMES COTTER, JR.
Los Angeles, California
Tuesday, May 17, 2016
Volume II

Reported by:
JANICE SCHUTZMAN, CSR No. 9509
Job No. 2312191
Pages 298 - 567

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,
Plaintiffs,
vs.
MARGARET COTTER, ELLEN COTTER, Guy Adams, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG TOMPKINS, and DOES 1 through 100, inclusive,
Defendants.
and
READING INTERNATIONAL, INC., a Nevada corporation,
Nominal Defendant.

Videotaped Deposition of JAMES COTTER, JR., Volume II, taken at 865 South Figueroa Street, 10th Floor, Los Angeles, California, commencing at 9:38 a.m. and ending at 4:37 p.m., Tuesday, May 17, 2016, before Janice Schutzman, CSR No. 9509.

PAGES 298 - 567

characterization of your testimony. I made my objections. You can respond.

THE WITNESS: I agree.

BY MR. TAYBACK:

Q. As a board member, have you followed Margaret Cotter's performance as director of real estate? 04:23PM

MR. KRUM: Objection, assumes facts not in evidence.

THE WITNESS: As a board member? 04:24PM

BY MR. TAYBACK:

Q. Yes.

MR. KRUM: Same objection.

THE WITNESS: To the extent I've been given the information, yes. 04:24PM

BY MR. TAYBACK:

Q. Do you feel like you haven't been given information on her performance?

MR. KRUM: Same objection.

THE WITNESS: I haven't been given enough information to assess her performance. 04:24PM

BY MR. TAYBACK:

Q. What information do you feel like you need that you haven't been given?

A. Reports on the current status of those 04:24PM

Electronically Filed
10/13/2016 06:43:26 PM

CLERK OF THE COURT

OPP
MARK G. KRUM (Nevada Bar No. 10913)
MKrum@LRRC.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
(702) 949-8398 fax

Attorneys for Plaintiff
James J. Cotter, Jr.

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation;

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG

CASE NO. A-15-719860-B
DEPT. NO. XI

Coordinated with:

CASE NO. P-14-082942-E
DEPT. NO. XI

CASE NO. A-16-735305-B
DEPT. NO. XI

Jointly administered

PLAINTIFF JAMES J. COTTER, JR.'S OPPOSITION TO DEFENDANT GOULD'S MOTION FOR SUMMARY JUDGMENT

[Business Court Requested: [EDCR 1.61]

[Exempt From Arbitration: declaratory relief requested; action in equity]

TOMPKINS, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

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LEWIS ROCA ROTHGERBER CHRISTIE

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff James J. Cotter, Jr., ("JJC" or "Plaintiff"), by and through his attorney Mark G. Krum of Lewis Roca Rothgerber Christie LLP, files this Opposition to Defendant Gould Motion for Summary Judgment (the "Motion"), as follows.

I. INTRODUCTION

The motion for summary judgment (the "Motion") brought by defendant William Gould "(Gould") should be denied, for a number of independent reasons.

First, the Motion fundamentally misapprehends, or purposefully mischaracterizes, the nature of the allegations made in this action, which assert an ongoing course of self-dealing undertaken for entrenchment purposes, not a series of unrelated fiduciary breaches. That matters, both as a matter of fact, in terms of what evidence is to be considered in assessing the actual claims made, as a matter of law.

Second, the Motion is predicated on an incomplete and inaccurate depiction of the actual facts. As the evidence cited herein shows, there are at a minimum significant disputed material facts concerning both (i) affirmative actions by Gould as a RDI director and, separately, (ii) affirmative choices by Gould to fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for his duties. Moreover, the Motion entirely ignores certain matters, such as Gould's response to the Offer, for example, and in other instances (Gould causing or allowing RDI to issue inaccurate and/or materially misleading SEC filings and RDI press releases), invokes reliance on the advice of counsel he has not produced.

Third, the Motion scrupulously avoids any discussion of the applicable legal standards given the actual facts, which goes to the threshold issue (beyond the Rule 56 summary judgment standard) of which party bears what burden. Separately, where, as here, the director defendant is sued for breaches of the duty of loyalty and the duty of disclosure, as distinct from only for breach of the duty of care, the entire legal rubric changes. Independent of that, the Motion also fails to address the meaning of applicable operative language, "intentional misconduct," from the exculpatory statute it erroneously attempts to invoke.

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Simply put, the Motion is a feel-good exercise that ignores disputed material facts that required that it be denied and is based upon erroneous legal analyses which, independently, require denial of the Motion.

II. STATEMENT OF FACTS

A. Gould Admittedly Fails to Fulfill His Fiduciary Responsibilities

The record regarding the circumstances of the termination of Plaintiff as President and CEO of RDI is reflected in Plaintiff's motion for summary judgment and the MSJ No. 1 of the Interested Director Defendants. The record reflects that a majority of the non-Cotter directors determined to pre-empt the ombudsman process and terminate Plaintiff as President and CEO if he did not acquiesce to his sisters' demands to resolve their trust and estate disputes on terms satisfactory to the two of them.

Remarkably, Gould had advance notice of this scheme to seize control RDI, but took no action to prevent it until it was a *fait accompli*. (Appendix Ex. [1] (Guy Adams Depo 4/28/16 83:12-90:10).) Instead, Gould sent untimely e-mails that served only to acknowledge that he and the other director defendants had breached their fiduciary duties by, among other things, failing to have a genuine process leading to the determination to terminate the President and CEO of a RDI, a public company. (Appendix Ex. [2] (Edward Kane Depo Ex. 115).)

At the supposed board meeting of May 21, 2015, Plaintiff raised the issue of Adams' financial dependence on companies controlled by EC and MC. (Appendix Ex. [3] (William Gould Depo. 6/8/16 30:14-32:8).) Gould was present for this and full well knew, as evidenced by his subsequent observation that Adams was conflicted from serving on the Board of Directors compensation committee and deciding compensation of any of the Cotter family members, that this was a critical issue that needed to be resolved. (*Id.* at 32:14-34:24.) That was because Adams' vote to terminate Plaintiff broke a two to tie has among the non-Cotter directors.. Nevertheless, Gould did not insist that Adams disclose this information, instead acquiescing to a course of fiduciary breaches that would not have been occurred that he done then what he did later, which was to observe that Adams was conflicted.

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Having just witnessed and effectively acquiesced to the seizure of control of RDI by Plaintiff's sisters and those beholden to them, Gould promptly exhausted his last ounce of fiduciary conscience. First, he failed to object to the appointment of an executive committee that he knew or should have known, based on the events of the previous Fall, including an October 22, 2014 e-mail from EC proposing that she and MC report to an executive committee rather than their brother as CEO, was a means by which EC and MC would circumvent and undermine the function of RDI's Board of Directors. Next, when EC asserted that Plaintiff was required to resign from the RDI Board of Directors based on a provision in his executive employment agreement, into which he has entered years after becoming a director, Gould mustered his last ounce of fiduciary responsibility and stated that that was not what Plaintiff's executive employment agreement provided.

When EC wrote Plaintiff on June 15, 2015 and told Plaintiff that he must resign from the RDI Board of Directors or he would be in breach of his executive employment agreement, Gould took no action. (Appendix Ex. [3] (William Gould Depo 6/8/16 244:16 – 246:6).) When RDI filed the Form 8-K on or about June 18, 2015, which Form 8-K erroneously asserted that Plaintiff was required to resign as a director upon termination of his employment has an executive at RDI, Gould took no action. This was the beginning of Gould's sad role as a collaborator.

Gould's role as a collaborator, who affirmatively chose not to do what he thought and sometimes acknowledged should be done, began soon thereafter. At a board meeting at which the board was asked to approve minutes from the (supposed) special board meetings of May 21 and 29, 2015 and June 12, 2015, at which Plaintiff objected and voted against approving the minutes because they contained significant factual inaccuracies, at which Tim Storey abstained, reflecting that he that too thought the minutes inaccurate (as he testified unequivocally in deposition in this case), Bill Gould voted to approve the minutes. When Plaintiff asked him afterwards why he had voted to approve inaccurate minutes, he said that, although he could not remember the meetings well enough to state that the minutes were accurate, he thought the ultimate descriptions of actions taken, meaning the termination of Plaintiff, the appointment of EC as interim CEO and the

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repopulation and activation of the executive committee, were accurate, and that he did not want him to fight about them.

B. Gould Watches as Storey is Involuntarily "Retired" and Acquiesces to Stacking the RDI Board With Unqualified Friends of EC and MC, after What He Acknowledged Was an Inadequate "Process"

In order to further secure their control of RDI, in addition to using the executive committee --to which Gould never objected-- to circumvent the full RDI Board of Directors, EC and MC used a supposed special nominating committee of Adams and McEachern to select nominees to stand for election at the 2015 annual shareholders meeting. (Appendix Ex. [4] (Guy Adams Depo 4/29/16 42:8-17).) EC and MC advised Adams and McEachern that they would not vote to reelect Storey, and Adams and McEachern communicated that to Storey and secured his "retirement." (*Id.* at 33:13 – 34:2.) The supposed special nominating committee selected Judy Codding, a 30 year family friend of Mary Cotter, Ellen's and Margaret's mother with whom Ellen lives, and Michael Wrotniak, a long-time personal friend of Margaret, for whom Wrotniak's wife is one of her best friends. (*Id.* at 283:20-285:9).

Gould was advised of Codding's nomination only days before it happened . (Appendix Ex. [3] (William Gould Depo 6/8/16 170:6-171:22).) Gould objected to having inadequate time to perform his duties as a director but nevertheless agreed to add Codding to the RDI Board. (*Id.* at 174:16-175:3.) Promptly after the Company disclose the addition of cutting to the RDF board, the company learned that she was embroiled in a highly publicized affair involving a criminal investigation and substantial bad press. (*Id.* at 176:23-178:24.)

Although Gould touts the supposed process in his Motion, his approval as a director of the hiring of MC as the (highly paid) senior executive at RDI responsible for development of the Company's valuable New York real estate—at a compensation level that his Motion shows was pegged to the position, not to MC, who had no prior real estate development experience and was completely unqualified for the position she was given—was an affirmative choice by Gould to waste Company monies (paid to MC) and risk the Company's valuable New York real estate, to acquiesce to the wishes of EC and MC.

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C. Gould Acts as a Collaborator in Ongoing Entrenchment Conduct—the CEO Search Committee

When Gould was included on the CEO search committee with EC, MC and McEachern, Gould had the opportunity to demand fulfillment of fiduciary responsibilities. He failed to do so, instead voluntarily effectuating the plan of EC and MC to secure control of RDI. The supposed CEO search committee is the subject and MSJ No. 5. Plaintiff respectfully refers the Court to his opposition to MSJ No. 5 regarding the CEO search committee, and incorporates it herein by reference.

What happened is that the CEO search committee failed to deliver on the promise of a completed search for a CEO, chose not to provide the full Board of Directors the final three candidates for interview and affirmatively pre-empted the Korn Ferry proprietary assessment process. In short, the CEO Search Committee aborted a search process and effectively fired the search firm touted to RDI shareholders, all to make EC, an ostensibly controlling shareholder, the CEO.

On or about August 4, 2015, the Board of Directors belatedly was provided draft minutes from the supposed board meetings of May 21, 2015, May 29, 2015 and June 12, 2015. The draft board minutes were dishonest fiction, prepared in an effort fabricate a record of deliberation where none in reality existed, to defend this lawsuit's claim of breach of fiduciary duty arising from the termination of Plaintiff as President and CEO of RDI. Plaintiff objected to the minutes and said as much. (Appendix Ex. [5] (James Cotter Depo 7/6/16 662:23-664:21).) Director Storey abstained from the vote to approve the minutes. (Appendix Ex. [6] (Timothy Storey Depo 2/12/16 164:20-166:5).) At his deposition, however, he testified that he viewed the minutes as materially inaccurate, stating that it would have taken him hours to correct them. (*Id.* at 165:13-166:3.) The critical point is that Gould, as a lawyer and a director decision-maker, full well understood that fictional minutes, depicting a course of deliberation that did not occur because the decisions have been made prior to the first supposed board meeting, were false and purposefully so, but he nevertheless voted to approve them.

D. Gould Does Not Dispute that He Stood by Idly as RDI Filed Inaccurate SEC Filings and Mislead Its Shareholders

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Gould admits that he knew that the statements made by EC at the June 12, 2015 board meeting to the effect that Plaintiff was required to resign as a director upon termination of his employment as executive officer were inaccurate. (Appendix Ex. [3] (William Gould Depo 6/8/16 244:16-245:14).) Gould said so at the time. (*Id.* at 244:16-245:14).) Nevertheless, after the Company on or about June 18, 2015 filed a Form 8-K with the SEC and issued a press release, both of which made the same statement that Gould new to be inaccurate, namely, that Plaintiff's executive employment agreement required him to resign as director upon termination of his executive employment, Gould took no action. He did not raise the issue with EC. He did not raise the issue with the Board. He simply acquiesced to the Company making a false SEC filing and issuing a false press release.

This purposeful and affirmative abdication of directorial responsibilities ia a practice Gould followed previously and since. Gould caused or allowed RDI to disseminate materially misleading if not inaccurate information to its public shareholders and/or affirmatively chose to allow RDI SEC filings and press release that contained materially misleading if not inaccurate information to remain uncorrected. Gould did so with respect to the following press release(s) and/or SEC filings, each of which was misleading if not inaccurate by omission, commission or both:

a. RDI on June 15, 2015 issued a press release stating that its board of directors "has appointed [EC] as interim President and [CEO], succeeding [JJC] . . . ." This press release was misleading because, among other things, it failed to address the circumstances of the purported termination of JJC as President and CEO, much less disclose that he purportedly had been terminated, much less that the purported termination was without cause, or even that JJC had filed this action;

b. On or about June 18, 2015, RDI filed with the SEC a Form 8-K which was materially misleading if not inaccurate in several respects, including that it stated

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that JJC was "required to tender his resignation as a director of [RDI] immediately upon termination of his employment [, that he had not done so and that RDI] considers such refusal as a material breach of [the] employment agreement [] and has given [JJC] thirty (30) days in which to resign . . ." The employment agreement in question, which is an exhibit to the Form 10-Q for period ending June 30, 2013 filed by RDI with the SEC, on its face not only does not require JJC to resign as a director in the event that he is terminated as an executive officer, but on its face contemplates that he may continue to serve as a director, which position he in fact held for many years prior to becoming an officer and entering into the subject employment agreement. Separately, the employment agreement contains a thirty (30) day cure provision with respect to breaches of the agreement which may constitute a basis for termination of JJC for cause, which defendants do not claim occurred here. Therefore, the characterization in the Form 8-K of what the Company has done for thirty (30) days is misleading both as to what the employment agreement provides and what the Company has done, which in fact is to assert that JJC is breach of an agreement which the Company purports to have terminated previously. Additionally, the Form 8-K is materially misleading in describing this action;

c. RDI has failed to file a Form 8-K with respect to the EC Committee, which is a development that materially deviates from the prior practices of RDI and RDI's SEC disclosures with respect to those practices.

d. On or about October 13, 2015, RDI filed with the SEC a Form 8-K which was materially misleading if not inaccurate. In particular, the description in that Form 8-K of defendant Storey "retir[ing]" from the RDI Board of Directors is misleading if

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not inaccurate. As alleged herein, Mr. Storey had been told that he would not be nominated to stand for reelection and he effectively was forced to resign as a director. The Form 8-K also is misleading if not inaccurate insofar as its descriptions of new board members Judy Codding and Michael Wrotniak suggest that their respective experiences described in the Form 8-K, such as Codding having experience in the field of education and/or Wrotniak having "considerable experience in international business, including foreign exchange risk mitigation," were the reasons those two persons were made Directors of RDI. The Form 8-K also is misleading if not inaccurate with respect to those two persons being made directors of RDI because it fails to disclose their respective personal relationships with Cotter family members. As alleged herein, Codding is a personal friend of Mary Cotter and Wrotniak and/or his wife are personal friends of MC.

e. On or about January 11, 2016, the Company issued a Form 8-K attaching a press release of that date. The press release included a statement by defendant Gould that said: "After conducting a thorough search process, it is clear that Ellen is best suited to lead Reading moving forward." That statement is materially misleading if not inaccurate, including because it implies erroneously that the selection of EC was the result of a (supposedly) "thorough search process."

f. On or about March 15, 2016, RDI filed with the SEC a Form 8-K which stated, among other things, that the RDI Board of Directors Compensation Committee and its Audit and Conflicts Committee each had approved payment of so-called "additional consulting fee compensation" of $200,000 to MC "for services rendered by her to the Company in recent years outside the scope" of a Theater Management Agreement dated January 1, 2002, between the Company's subsidiary, Liberty

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Theaters, Inc. and OBI, LLC, an entity wholly-owned by MC. The Form 8-K also stated that the RDI Board of Directors approved "additional special compensation" of $50,000 to be paid to Adams "for extraordinary services provided the Company and devotion of time in providing such services." The Form 8-K was materially misleading if not inaccurate because, among other things, those payments were awarded for reasons other and/or additional to those set in the Form 8-K.

g. On or about July 18, 2016, after failing to file a Form 8-K regarding the offer, the Company issued a press release regarding the offer. It stated that the "Board of Directors, after receiving input from management and its outside advisors, carefully evaluated the [offer]. Following this review, the Board of Directors determined that our stockholders would be better served by pursuing our independent, stand-alone strategic business plan..." The press release was materially misleading if not false because, among other things, no "independent, standalone strategic business plan" has been delivered by management to the Individual Director Defendants, either in connection with the offer or otherwise.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is only appropriate "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law.'" *Fergason v. LVMPD,* 364 P.3d 592, 595 (2015) (*citing* NRCP 56(c) (emphasis added)). "'[T]he moving party will bear the burden of persuasion, [and] that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence.'" *Id.* (*citing Cuzze v. Univ. & Cmty. Coll. Sys.,* 172 P.3d 131, 134 (2007)).

"'Put more simply: 'The burden of proving the nonexistence of a genuine issue of material fact is on the moving party.'" *Id.* (*citing Maine v. Stewart,* 857 P.2d 755, 758 (1993)). "When the

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party moving for summary judgment fails to bear his burden of production, 'the opposing party has no duty to respond on the merits and summary judgment may not be entered against him.'" *Id.* (*citing Maine,* 857 P.2d at 759 (reversing summary judgment where burden of production never shifted) (*citing Clauson v. Lloyd,* 103 Nev. 432, 435, 743 P.2d 631, 633 (1987) (reversing summary judgment where movant did not meet the test in NRCP 56)); *see* NRCP 56(e) (summary judgment burden shifts to the non-movant only when the motion is "made and supported as provided in this rule")).

"[I]n deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought." *Ferreira v. P.C.H. Inc.,* 774 P.2d 1041, 1042 (1989).

B. The Motion Mischaracterizes the Allegations and Claims Made and Ignores Law Regarding Them, to Create "Straw Man" Claims Against Which to Move

Gould's motion for summary judgment mischaracterizes the nature of the claims made in this case. Contrary to what the motions assume, Plaintiff has not made a smorgasbord of unrelated claims. Although Plaintiff's initial complaint, filed the day he was terminated, addressed the only actions about which he had prior knowledge, namely, the actions of the Interested Director Defendants to threaten him with termination if he did not resolve trust and estate disputes with EC and MC on terms satisfactory to them and, when he failed to do so, execution on that threat, Plaintiff's FAC and now pending SAC assert an ongoing course of conduct that amounts to entrenchment. The SAC pleads various actions and omissions, including but not limited to the matters raised in Gould's Motion, including Gould aborting the CEO search to make EC the new CEO, and Gould and other director defendants giving MC a highly compensated executive position for which she has no prior professional experience or educational qualifications, all as part of the ongoing course of entrenchment and self-dealing.[1]

[1] For example, although Gould ignores it altogether, the Offer has been parsed out to be the sole subject of MSJ No.3, as if the response of the individual director defendants must be assessed solely in view of the record they attempted to create at the single board meeting at which they supposedly deliberated about the Offer, and without regard to their historical conduct and relationships. (That said, their carefully prepared minutes of that one meeting clearly evidence the wishes of EC and MC to retain control of RDI and the fact that the other director defendants acceded to the wishes of MC and EC in failing to take no action in response to the Offer.)

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Simply put, in his MSJ, Gould has assumed out of existence the plain allegations of Plaintiff's SAC and the very nature of the complained of course of conduct. He has done so in an effort to create discrete stand-alone "straw man" claims to challenge in his motion for summary judgment. In doing so, he ignores well-developed law that the various complained of acts and omissions upon which Plaintiff's claims are based must be viewed and assessed collectively, not separately and in isolation, as the Interested Director Defendants' multiple MSJs ask the Court to do. *See, e.g., In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402 (Del. Jan. 15, 2016) (rejecting director defendants' contention that bylaw amendments should be viewed individually rather than collectively); *Carmody v. Toll Brothers., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (finding that particularized allegations that directors acted for entrenchment purposes sufficient to excuse demand); *Chrysogelos v. London*, 1992 WL 58516, at *8 (Del. Ch. 1992) ("None of these circumstances, if considered individually and in isolation from the rest, would be sufficient to create a reasonable doubt as to the propriety of the director's motives. However, when viewed as a whole, they do create such a reasonable doubt . . ."); *Cal. Pub. Emps.' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *__ (Del. Ch. 2002) (concluding that allegations that individually would be insufficient to show a lack of disinterestedness or independence were, taken together, sufficient to do so).

C. Directors' Fiduciary Duties

1. Director Defendants' Fiduciary Duties

The power of directors to act on behalf of a corporation is governed by their fiduciary relationship to the corporation and to its shareholders. *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006) (citations omitted). Generally, those duties are described as the duty of care and is the duty of loyalty. (*Id.*) The duty of good faith may be viewed as implicit in the duties of care and loyalty, or as part of a "triumvirate" of fiduciary duties.

a. The Duty of Care

The duty of care typically is described as requiring directors to act on an informed basis. *Schoen*, 137 P.3d at 1178. Whether directors acted on an informed basis "turns on whether the directors have informed themselves "prior to making a business decision, of all material

information reasonably available to them." *Smith v. Van Gorkom*, 488 A. 2d 858, 872 (Del. 1985) (*quoting Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984). Due care thus is a function of the decision-making process, not the decision. *See, e.g., Citron v. Fairchild Camera & Instrument Corp.*, 569 A. 2d 53, 66 (Del. 1989). This necessarily raises "[t]he question [of] whether the process employed [in making the challenged decision] was either rational or employed in a good faith effort to advance the corporate interests." *In re Greater Se. Cmty. Hosp. Corp. I*, 353 B.R. 324, 339 (Bankr. D.D.C. 2006).

b. The Duty of Loyalty

The director's duty of loyalty requires that directors "maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Schoen*, 137 P.3d at 1178 (citations omitted). The duty of loyalty was described in the seminal Delaware Supreme Court case of *Guth v. Loft, Inc.* as follows:

> "Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and [to] its shareholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate . . . director, peremptorily and inexorably, the most scrupulous observance of his duty [of loyalty], not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation [or its shareholders] . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interests."

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

The duty of loyalty is "unremitting." *See, e.g., Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). The duty of good faith, discussed elsewhere herein, is one element of the duty of loyalty. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The terms "loyalty" and "good faith," like the terms "independence" and "candor," are "words pregnant with obligation" and "[d]irectors should not take a seat at the board table prepared to offer only conditional loyalty, tolerable good faith, reasonable disinterest or formalistic candor." *In re Tyson Foods, Inc., Consol. S'holder Litig.*, 2007 WL 2351071, at *4 (Del. Ch. Aug. 15, 2007).

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c. The Duty of Good Faith

The element of good faith requires the director to act with a "loyal state of mind." *Hampshire Group, Ltd., v. Kuttner*, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). 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.*

d. The Duty of Disclosure

"Whenever directors communicate publicly or directly with shareholders about the corporation's affairs . . . directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty." *Malone v. Brincat*, 722 A.2d at 10. "Shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors [of the corporation]." *Id.* at 10-11. When directors communicate with stockholders, they must do so with "complete candor." *In re Tyson Foods*, 2007 WL 2351071, at *3. *Backman v. Polaroid Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) identifies two complimentary notions, one that the disclosures must not be "so incomplete as to mislead[,]" and the other that there is a duty to update in the event a prior disclosure becomes materially misleading in light of subsequent events. *Id.* at 16 and 17. Here, RDI to make disclosures that were misleading because they were incomplete and, with respect to at least the dynamic between Plaintiff and his sisters, and the EC Committee, misleading in light of subsequent events.

Any suggestion that directors of a public company have no responsibility for the SEC filings made by the company of which they are directors not only contradicts the allegations of the FAC, it is erroneous. One need only look at the Delaware Supreme Court opinion in *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) to see that it is viewed as an unremarkable proposition that directors are responsible for, and may have liability on account of, the disclosures of the company of which they are directors:

> "shareholders are entitled to rely upon the truthfulness of all information disseminated to them by the directors they elect to manage the corporate enterprise. Delaware directors disseminate information in at least three contexts: public statements made to the market, including shareholders; statements informing shareholders about the affairs of the corporation without a request for shareholder action; and, statements to shareholders in conjunction with a request for shareholder action. Inaccurate information in these contacts may be the result of a violation of the fiduciary duties of care, loyalty or good faith..."

Malone, 722 A.2d at 11.

An affirmative failure to cause an inaccurate or materially misleading disclosure, or even an affirmative choice not to correct one, constitutes a breach of the duty of loyalty, duty of disclosure or both. *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 914-15, 920, n.34 (Del. Ch. 2014) ("complaint alleges or pleads facts sufficient to support the inference that the disclosure violation was made in bad faith, knowingly or intentionally, the alleged violation implicates the duty of loyalty" and is relevant to the availability of the exculpatory provisions of section 102(b)(7)): *In re Wheelabrator Techs., Inc. S'holders. Litig.*, 1992 Del. Ch. LEXIS at *41 n.18, 1992 WL 212595, at *12 n.18 (Del. Ch. Sept. 1, 1992) (§102(b)(7) did not require dismissal where the plaintiffs pleaded that "the breach of the duty of disclosure wasn't intentional violation of the duty of loyalty"). The business judgment rule does not apply to duty of disclosure claims, because the issue in such instances is "whether shareholders have . . . been provided with appropriate information upon which an informed choice on a matter of fundamental corporate importance may be made." *In re Anderson, Clayton S'holders Litig.*, 519 A.2d 669, 675 (Del Ch. 1986).

e. Directors' Fiduciary Duties Are Owed to All Shareholders, Not Just the Controlling Shareholder(s)

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

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supported a reasonable inference that the board of directors breached its duty of loyalty by deciding not to cross the controlling stockholder); *see also McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000) (finding that directors are required to make informed, good faith decisions about whether to the sale of a corporation to a third party that had been proposed and negotiated by a controlling stockholder would maximize the value for minority stockholders).

2. The Business Judgment Rule Is a Rebuttable Presumption, Rebutted Here

The business judgment rule is a rebuttable 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 was taken in the best interests of the company." *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006) (*quoting Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).[2] In Nevada, the business judgment rule is codified in NRS 78.138.3, which provides that "[d]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation."

The business judgment rule typically is articulated as consisting of four elements, namely, (i) a business decision, (ii) disinterestedness and independence, (iii) due care and (iv) good faith. *See, e.g., Roselink Investors, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 2016 (S.D.N.Y. 2004) (internal citations omitted). The presumptions of the business judgment rule are rebutted where it is shown that any of the four elements above was not present. *Id.* at 216-17. Here, at least each of the last three elements is absent.

As to MC and EC, there is no dispute that, as to at least any and all matters of disagreement between them and JJC, including but not limited to ultimate control of RDI by controlling the voting trust as trustee(s), immediate control of RDI, whether by removing JJC as CEO, constraining his authority as CEO and/or having a newly activated and repopulated executive committee, and matters involving the employment status, titles and compensation of MC and EC, among other things, MC and EC lack disinterestedness and lack independence. The

[2] Due to the development of Delaware case law with respect to issues of corporate law, Nevada courts find Delaware case law persuasive authority. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 26, 62 P.3d 720, 737 (2003) (noting that "the case law . . . [of] Delaware is persuasive authority" when interpreting Nevada's corporate law).

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Interested Director Defendants admit that in their summary judgment motions, including as follows:

> The Individual Defendants, for the purposes of this motion [regarding "director independence"], do not contest the independence of Ellen and Margaret Cotter as RDI directors with respect to the transactions and, or corporate conduct at issue---which are addressed in the Individual Defendants' other, contemporaneously-filed summary judgment motions.

("Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence" at p. 14, fn. 2.)

a. Individual Defendants' Lack of Disinterestedness

With respect to disinterestedness, because the business judgment rule presumes that directors have no conflict of interest, 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) (internal citations and quotations omitted). Thus, a director must be disinterested in the challenged conduct in particular and, as a general matter, otherwise independent. *Beam*, 845 A.2d at 1049.

As the Interested Director Defendants acknowledge, EC and MC lack disinterestedness with respect to the challenged actions, starting with the threat to terminate Plaintiff as President and CEO of RDI unless he resolved the California Trust Action and other matters on terms satisfactory to EC and MC and continuing thereafter to date, including each of the matters raised in Gould's Motion.

The same is true, for largely the same reasons, for defendant Kane, who is called "Uncle Ed" by EC and MC and who, by his conduct throughout demonstrated that he acted as "Uncle Ed" throughout to effectuate what he thought were JJC, Sr.'s wishes, and not as a disinterested RDI director exercising disinterested business judgment.

Likewise, Adams repeatedly demonstrated his lack of disinterestedness by, among other things, vigorously pursuing the EC and MC agenda, starting with the termination of Plaintiff as President and CEO and the activation and repopulation of the executive committee with him as a

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member, and continuing to date with his reliable support for EC and MC to secure senior executive positions at, and rich compensation from, RDI.

b. Individual Defendants' Lack of Independence

Independence, as used in the context of an element of the business judgment rule, requires that a director is 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). Assessing directorial independence therefore "focus[es] on impartiality and objectiveness." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920, 938 (Del. Ch. 2003) (*quoting Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001), *rev'd in part on other grounds,* 817 A.2d 149 (Del. 2002), *cert. denied,* 538 U.S. 1032 (2003). *See also Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("[w]e 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. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam*, 845 A.2d at 1049-50.

Independence is lacking in situations in which a corporate fiduciary "derives a benefit *from the transaction* that is not generally shared with the other shareholders. In situations in which the benefit is derived by another (e.g., by EC and MC from Plaintiff acceding to their demands to resolve trust and estate disputes on terms acceptable to the two of them), the issue is whether the [corporate fiduciary]'s decision (e.g., Adams and/or Kane) resulted from that director being *controlled* by another." *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) (explaining the distinction between interest and independence). Control may exist where a corporate fiduciary has close personal or financial ties to or is beholden to another. (*Id.*)

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A close personal friendship in which the director and the person with whom he or she has the questioned relationship are "as thick as blood relations" would likely be sufficient to demonstrate that a director is not independent. *In re MFW S'holders Litig.*, 67 A.3d 496, 509 n.37 (Del. Ch. 2013).

Similarly, a director who is financially beholden to another person, such as a controlling stockholder, is not independent of that person. *In re Emerging Commc'n, Inc. S'holders Litig.*, 2004 WL 1305745, at *33 (Del. Ch. May 3, 2004). The Court of Chancery has found that directors who derive a substantial portion of their income from a controlling stockholder are not independent of that stockholder *Id.* at *34.

"In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the . . . personal consequences resulting from the decision." *Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (*quoting Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

Here, the evidence demonstrates that (1) with respect to all matters raised in Gould's Motion, EC and MC were not independent but, on the contrary, consistently had a personal stake in the disposition of those matters.

Kane's personal relationship with JJC, Sr., Kane's view of JCC, Sr.'s intentions, Kane's unwavering support of MC and EC, together with their personal stakes in the matters raised in Gould's Motion, evidence Kane's lack of independence.

As shown by his own sworn testimony in his Los Angeles Superior Court divorce proceeding and in this case, Adams as a general matter is not independent of EC and MC, because he is financially dependent upon income he receives from companies that EC and MC control.

For such reasons, among others, each of Kane and Adams (and MC and EC) lacked independence and the presumptions of the business judgment rule have been rebuffed.

c. Individual Defendants' Lack of Good Faith

The element of good faith requires the director to act with a "loyal state of mind." *Hampshire Group, Ltd., v. Kuttner*, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). 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] corporations do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *Id.*

d. The Individual Defendants Failed to Exercise Due Care

Even had the individual defendants acted in good faith and in a manner that each reasonably could have believed to be in the best interests of RDI in taking the actions complained of herein, which was not the case, they failed to engage in a process to decide and act on an informed basis in view of the nature and importance of the decisions made, for the reasons described herein, including but not limited to aborting the CEO search process.

3. Gould Cannot Satisfy the Entire Fairness Standard

a. Entire Fairness Is The Standard

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), the Nevada Supreme Court adopted the entire fairness doctrine, citing *Oberly v. Kirby*, 592 A.2d 445, 469 (Del. 1991). *Id.* at 640 n.61, 137 P.3d at 1185 n.61 Under that doctrine, when a transaction is effected or approved by directors with an interest therein, the director defendants "bear the burden of proving the entire fairness of the transaction in all its aspects, including both the fairness of the price and the fairness of the directors' dealings." *Oberly*, 592 A.2d at 469; *accord Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 459 (Del. Ch. 2011) ("Once entire fairness applies, the defendants must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price.") (quotation omitted).

"If the shareholder succeeds in rebutting the presumption of the business judgment rule, the burden shifts to the defendant directors to prove the 'entire fairness' of the transaction." *McMullin v. Brand,* 765 A.2d 910, 917 (Del. 2000). "[I]f the presumption is rebutted, the board's decision is reviewed through the lens of entire fairness, pursuant to which the directors lose the presumption of [the] business judgment [rule]." *Solomon v. Armstrong*, 747 A.2d 1098, 1112 (Del. Ch. 1999). *Horwitz v. Sw. Forest Indus., Inc.,* 604 F. Supp. 1130, 1134 (D. Nev. 1985),

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which defendants cite for the platitude that the business judgment rule applies to claims of breach of fiduciary duty against a director, is not to the contrary and does not address circumstance of where, as here, the plaintiff has rebutted the presumptions of the business judgment rule.

Gould's Motion simply ignores the factual and legal issues of disinterestedness, independence and entire fairness.

b. The Test Is a Fair Process and a Fair Result

Under the entire fairness test, "[d]irector defendants therefore are required to establish to the *court's* satisfaction that the transaction was the product of both fair dealing and fair price." *Cinerama, Inc.* v. *Technicolor,* 663 A.2d 1156, 1163 (Del. 1995) (*quoting Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993)). Thus, a test of entire fairness is a two-part inquiry into the fair-dealing, meaning the process leading to the challenged action and, separately, the end result. *In re Tele-Commc'ns Inc. S'holders Litig.,* 2005 WL 3642727, at *9 (Del. Ch. Sept. 29, 2005).

The Motion makes no mention of this standard. In addition the Motion does not discuss the "omnipresent specter" that the Defendants were acting primarily in their own interests or for entrenchment purposes. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *see also eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010).

The entire fairness requirement entails "exacting scrutiny" to determine whether the challenged actions were entirely fair. *Paramount Commc'ns, Inc. v. QVC Network Inc.,* 637 A.2d 34, 42 n.9 (Del. 1994), *quoted in Krasner v. Moffett,* 826 A.2d 277, 285, n.26, 287 n.40 (Del. 2003). Under the entire fairness standard, the challenged action itself must be objectively fair, independent of the beliefs of the director defendants. *Geoff v. IIC Indus., Inc.,* 902 A.2d 1130, 1145 (Del. Ch. 2006), subsequent proceedings, 2006 WL 2521441 (Del. Ch. Aug. 22, 2006); *see also Venhill Ltd. P'ship v. Hilman*, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008).

"The fairness test therefore is "an inquiry designed to access whether a self-dealing transaction should be respected or set aside in equity." *Venhill*, 2008 WL 2270488 at *22. Here, Defendants cannot carry their burden of proving the entire fairness of their actions, as part of an ongoing course of entrenchment oriented conduct, aborting the CEO search they touted to RDI

shareholders and the public to select EC for regions that had nothing to do with the skills and experience they had previously determined was necessary to even be a candidate for RDI's CEO position.

c. The Threat to Terminate Plaintiff, the Termination of Plaintiff and the Implementation of an Executive Committee

For the reasons explained in Plaintiff's motion for summary judgment and in his opposition to the interested director defendants' MSJ No. 1, these actions give rise to breaches of the duties of care and loyalty. Gould, who had advance warning from Adams of what was afoot, indisputably failed to take action to preserve the ombudsman process, which indisputably was aborted, as part of a scheme to threaten Plaintiff with termination, and if the threats failed, to terminate him and implement a long sought after executive committee, the purpose of which Gould full well knew was to enable EC and MC to avoid reporting to the RDI Board of Directors. Gould effectively argues that, although he breached his duty of care by failing to preserve the ombudsman process and by failing to cause a proper process to occur before Plaintiff was terminated, breaches of the duty of care does not give rise to liability. That analysis is erroneous because it incorrectly assumes that Gould has been sued solely for breach of the duty of care, which is not the case (See infra §III. C.5). Indeed, by his actions and purposeful inaction described herein, Gould has engaged in what constitutes intentional misconduct, such that he cannot avail himself of Nevada's exculpatory statute, which applies only to duty of care claims alone. (Id.)

d. Gould Made an Affirmative Choice to Abdicate His Fiduciary Responsibilities in Acquiescing to Stacking RDI's Board of Directors With Unqualified Loyalists

By his motion for summary judgment, Gould effectively admits that he did not have the opportunity to fulfill and did not fulfill his duty of care with respect to the addition of at least Codding, if not both Codding and Wrotniak, to the RDI Board of Directors. He effectively attempts to depict his conduct in this regard as mere negligence, for which he contends that he can have no liability because it does not constitute intentional misconduct. As observed herein, because Gould also has been sued for breach of the duty of loyalty, including the duty of disclosure, he cannot avail himself of Nevada's exculpatory statute, NRS 78.138(7). Even if he could, however, he made an affirmative choice not to fulfill his fiduciary duty of care, which

amounts to intentional misconduct as a director. (*Id.*) Finally, the suggestion in Gould's Motion (Motion at 17:14-17) that a controlling shareholder's rights under NASDAQ Listing Rules somehow limits or eliminates Gould's fiduciary duties as a director is both nonsensical and, as shown herein, wrong as a matter of law.

e. Gould's Conduct in Connection With the CEO Search Constitutes Breaches of the Duties of Care and Loyalty

Working with Korn Ferry, the CEO search committee created a position specification document that was agreed to be used to identify candidates, vet candidates, select those to be interviewed and, ultimately, select a new CEO. (Appendix Ex. [7] (William Gould Depo Ex. 115).) That was done right up to the point when EC declared her candidacy and was interviewed and the decision was made to simply disregard the approximate two dozen qualifications that have been agreed as those that would be used to select the new CEO.

First, as to the process, the evidence shows that the CEO search process was aborted and that Korn Ferry effectively was terminated promptly after EC announced her candidacy and was "interviewed." The Korn Ferry proprietary assessment of the full board interviews of three finalists likewise disappeared into the ether.

The fact that the CEO search committee approved a position specification document with approximately 2 dozen criteria, and simply ignored it after EC belatedly declared her candidacy, alone evidences breaches of the duties of care and loyalty. What possible explanation is there for utterly abandoning the criteria they had agreed should be used to identify candidates and select the new CEO other than that the CEO they selected was a controlling shareholder? In so acting, Gould demonstrated unremitting loyalty—to EC.

Equally damning is the fact that, position specification criteria notwithstanding, Gould and McEachern each solicited EC to become a candidate, according to EC, notwithstanding the fact that she failed to even approximate the criteria set out in the position specification. [EC Depo. 6/16/16 3:12 – 94:21]. Once EC declared her candidacy and met with the CEO search committee, the search promptly was aborted and Korn Ferry effectively was terminated. To insure that Korn Ferry's proprietary assessment did not show EC to be as unqualified as the position specification

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did, the CEO search committee directed that no assessments be performed, even though the Company had paid for that previously. Finally, in an effort to fabricate evidence suggesting that Korn Ferry had vetted EC, Tompkins instructed Korn Ferry—after EC had been selected – to create an EC resume in the Korn Ferry format, which evidences both a plan and an effort to conceal it. . (Appendix Ex. [8] (Robert Mayes Depo 8/18/16 63:21-64:23).) (Appendix Ex. [9] (Mayes Depo Ex. 422).) Separately, with respect to disclosure, the directors told RDI shareholders that the search would be conducted with an outside search firm.).) (Appendix Ex. [10] (Ellis Depo Ex. 347 Form 8K dated 6/12/15).) But they aborted the search and terminated the Korn Ferry and the search process. Nevertheless, in announcing the selection of EC, they issued a press release that touted the supposedly thorough process, further misleading RDI shareholders about what transpired. (Appendix Ex. [11] (Gould Depo Ex. 390).)

The agreed search process was to have resulted in the three final candidates being presented to the full Board of Directors for interview. The CEO search committee did not do that and not one board member other than Plaintiff objected. (Appendix Ex. [12] (McEachern Depo Ex. 119).) The agreed process was that Korn Ferry would perform a proprietary assessment of the finalists. The CEO search committee affirmatively insured that that did not happen and not one board member other than Plaintiff objected. . (Appendix Ex. [12] (McEachern Depo Ex. 119).) Simply put, the full board agreed to a process, the search committee began it and then aborted it to select EC, which the full board (excluding Plaintiff), including two directors (Codding and Wrotniak) who had been on the board for less than three months, accepted as if the process had never been discussed, much less agreed. Had they attempted to make a record of making a decision solely to accede to the wishes of EC and MC, they would have done little different. Indeed, one of the reasons stated for selecting EC was that she and MC were controlling shareholders.

The facts described herein, including immediately above, show that the January 11, 2016 press release that said the selection of EC was the result of a "thorough search process" was materially misleading if not inaccurate. The search process may or may not have been thorough through the interviews that occurred on or about November 22, 2015, but it was aborted and

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