

1 exhibits are on your own hard drive, then your exhibit list
2 must be what is on that drive. So if two of you get together
3 or three of you get together, everything that's on that drive
4 must be one exhibit list, because it cross-checks and makes
5 sure it validates.

6 THE COURT: So it's okay for the plaintiffs to have
7 one drive and an exhibit list of 1 through 9999 -- or up to
8 that number, and the defendants to decide jointly they're just
9 going to use the 10000 to 1999 [sic], have one drive, and one
10 exhibit list?

11 MS. WENDELL: That is okay. But based on the size,
12 you know, we're -- I think that, you know, it's better to
13 always have one --

14 THE COURT: Yeah. But you're asking for
15 cooperation?

16 MS. WENDELL: Yes.

17 THE COURT: Just because you worked for Commissioner
18 Biggar for however many years and you could make them
19 cooperate doesn't make I can as a trial judge.

20 All right. So anybody else have more stuff?

21 Yeah. Your history will never die.

22 MS. WENDELL: I know. It's going to follow me out
23 of here in February.

24 THE COURT: All right. Anybody else have any more
25 questions for my IT team or my Clerk's Office team so that

1 they can leave and not have to sit here through your motion
2 practice?

3 Dulce wants you to set the dry run date today. We
4 have a holiday coming up, and you have asked me to let you go
5 the second week. I'm going to be able to accommodate that
6 request. I found some victim to go the first week.

7 MR. FERRARIO: So we start on the 8th now?

8 THE COURT: Plan is for you to start on the 8th. So
9 when do you want your dry run to be with your staff to bring
10 over the lists and the drives? It doesn't have to be you
11 guys. It can be your paralegals.

12 MR. FERRARIO: But you said you want enough time in
13 case there's glitches. So --

14 MS. WENDELL: If there's a glitch, then you'll need
15 time to fix it.

16 MR. FERRARIO: So at least the week before -- we
17 need it two weeks before; right?

18 THE COURT: Two weeks before is the week of
19 Christmas, so we'll be here the 26th through the 29th working
20 that week.

21 MR. FERRARIO: And then you guys will be here to do
22 that?

23 MR. DOAN: We'll make it work.

24 THE COURT: Some of them will be here.

25 MR. FERRARIO: I think it has to be that week in

1 case there's a problem. Because then the following week is
2 short, and then we're right up on trial and won't be able to
3 correct any of the stuff.

4 MR. KRUM: So why don't we say the 29th?

5 THE COURT: You guys all okay with the 29th? What
6 time do you want to meet?

7 MR. KRUM: I think we need to talk to the people who
8 are going to do it.

9 THE COURT: Okay. I would recommend the morning.
10 And the reason I recommend the morning is typically on the
11 weekend of New Year's Eve they try and get everybody out of
12 downtown by about 2:00 o'clock because of all the things that
13 happen in the streets here on that weekend.

14 MR. KRUM: Understood.

15 THE COURT: So -- and we will tell you what
16 courtroom we are able to find. I'm pretty sure on that day I
17 could get a courtroom on this floor. And if you guys want a
18 morning, if you can accommodate that, we'll do that.
19 Otherwise --

20 MR. FERRARIO: I'm going to tell you, Judge,
21 [inaudible] people are going to be in this trial, I think if
22 you could convince Judge Sturman to let you have this for the
23 length of the trial, that would [inaudible].

24 THE COURT: She has a trial that I had to vacate
25 when her mom became ill that I think she's going to try and

1 restart in January. I will know better when she actually gets
2 back to town. But we will talk to her. Her courtroom and
3 Judge Johnson's courtrooms are equipped differently than the
4 other courtrooms, so they are a little bit bigger.

5 MR. FERRARIO: Yes. This would accommodate
6 [inaudible].

7 THE COURT: I was thinking of putting you in
8 Potter's courtroom and having a special corner for you.

9 MR. KRUM: Your Honor, I've just been reminded that
10 it was presumptuous of me to speak for others.

11 THE COURT: You want to talk to the staff members to
12 see who's taking the week off?

13 MR. KRUM: Here's the question. And I'm now taking
14 Mr. Ferrario's line. Would it be possible for us to start the
15 following week so we could make --

16 THE COURT: No. We won't get done. If we do that,
17 we won't get done in time for me to do my February stuff.
18 It's a five-week stack. It starts on the 2nd of January. So
19 if you need to talk to your teams and see if being here on
20 January 2nd at 8:00 o'clock in the morning is a preference for
21 them instead of the 29th, which gives you -- you lose the
22 weekend, but you're here the rest of the time. It gives you
23 almost two weeks to straighten it out.

24 MR. KRUM: Okay.

25 THE COURT: And that's okay with me. Even though

1 Mike would say he needs two weeks before, January 2nd is okay
2 with me.

3 MR. KRUM: Okay. We will check with our people.

4 THE COURT: Okay. So any other electronic exhibit
5 lists?

6 So, Dulce, just mark them down that they are
7 planning to visit with you on January 2nd. I'm fairly certain
8 I can find a courtroom on January 2nd, but there's no
9 guarantees on that day.

10 All right. 'Bye, guys. Thank you for being here.
11 Antoinette, thank you for being here. I know it's going to be
12 exciting again.

13 All right. That takes me to the motions. Do you
14 have a preferred order you'd like to argue them in? I usually
15 try and do the summary judgments and then go to the motions in
16 limine.

17 MR. KRUM: That would be our suggestion, as well.

18 MR. TAYBACK: That makes sense, Your Honor. You can
19 go numerical order is fine.

20 THE COURT: Whatever you want to do.

21 Can I have my calendar. I don't need -- well, I
22 have notes all over the motions, so --

23 MR. FERRARIO: Are we on the clock?

24 THE COURT: You have until five till 12:00. So
25 we've got an hour.

1 (Pause in the proceedings)

2 MR. TAYBACK: Mr. Krum was just suggesting that I
3 raise the parties' -- both filed joint motions -- or filed
4 motions to seal. We'd ask you to grant them.

5 THE COURT: Is there any objection to any of the
6 motions to seal? They weren't all motions to seal. Some of
7 them were motions to redact, and that was appropriate. The
8 motions to seal I do have a question for Mr. Morris's office,
9 and so I'll ask you -- hold on, if I can find the one I wrote
10 the page on. Got a question. It was a process question, not
11 a substance question, so let me hit it before we go to the
12 next step.

13 When you sent me a courtesy copy and the courtesy
14 copy had a sealed envelope in that did you also file the
15 sealed version of the document that has like this sealed
16 envelope that's with the Clerk's Office?

17 MS. LEVIN: I don't believe, Your Honor.

18 THE COURT: And we have to do it that way --

19 MS. LEVIN: Okay.

20 THE COURT: Because otherwise I can't even grant
21 your motion now, because then it's going to get screwed up.

22 MS. LEVIN: I understand, Your Honor. And I think
23 that this was based on our conversations with the clerk, who
24 said you cannot submit it until you have the order. And we
25 were saying, but that --

1 THE COURT: No. You submit it when you file the
2 motion. When you file the motion with it, which is why you
3 have to file them at the counter. You can't efile when you're
4 filing under seal.

5 MS. LEVIN: Right.

6 THE COURT: And that's why it gets screwed up.

7 So I have some process concerns about the
8 plaintiff's filings related to that, and I'm going to let you
9 and Dulce talk about those after we finish the hearing to see,
10 if we can.

11 I'm going to grant the motion, but it may be that
12 you have to do something different to have a motion that
13 actually goes with it to the Clerk's Office instead of an
14 order. Because having the order will not accomplish what you
15 want.

16 All right. So to the extent that you asked
17 previously for a motion to seal and/or redact, it appears to
18 be commercially sensitive information related to financial
19 issues, and there's some other sensitive information that
20 relates to individuals' personal information, so I'm going to
21 grant the requests for sealing and redacting that have been
22 submitted.

23 Okay. You're up. What motion do you want to start
24 with?

25 MR. TAYBACK: It'll be Summary Judgment Motion

1 Number 1. And it also -- there's -- relates to Summary
2 Judgment Motion Number 2. So I will argue them jointly. They
3 were at least opposed jointly, and we replied jointly with
4 respect to those two motions.

5 THE COURT: Okay.

6 MR. TAYBACK: I'm here on behalf of the director
7 defendants Michael Wrotniak, Judy Coddling, Douglas McEachern,
8 Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As
9 Your Honor will recall and as addressed in the briefing, Your
10 Honor said, and this is a truism, really, for any case, you've
11 got to analyze claims defendant by defendant, in this case
12 director by director, and transaction by transaction. And
13 that's, you know, just basic, basic legal analysis.

14 On top of that, sort of as an overlay, another thing
15 that I know Your Honor is well aware of is the recent law that
16 clarifies -- I see you chuckling --

17 THE COURT: I don't know anything about the Wynn-
18 Okada case. You don't know anything about it, because your
19 firm wasn't involved at all, and Mr. Ferrario doesn't know
20 anything, and Mr. Morris I'm sure was involved, too, because
21 he's been involved in some of the appellate process in that
22 case, too.

23 Right, Mr. Morris?

24 MR. MORRIS: Yes.

25 THE COURT: See, so we all know.

1 MR. TAYBACK: But all I need to know, all I need to
2 know and all I really care about here and all that matters
3 here is the language of the Supreme Court's opinion, because
4 that's really what animates the business judgment rule in
5 Nevada as we stand here now. And I think that combined with
6 the recent clarifications by the legislature regarding the
7 latitude afforded directors work together to set the bar very,
8 very high. I'm sure Your Honor has read the opinion multiple
9 times, applied it in that case, a case I'm not privy to, but
10 it's --

11 THE COURT: I did. I granted partial summary
12 judgment, which is on a writ.

13 MR. TAYBACK: And, as you well know --

14 THE COURT: Are we supposed to be calling somebody?

15 MR. FERRARIO: No.

16 THE COURT: I have a call-in number. I'm not in
17 charge of doing this.

18 (Pause in the proceedings)

19 THE COURT: Hold on. Apparently someone thinks
20 they're calling in.

21 MR. RHOW: It's okay, Your Honor. No need. I'm
22 here.

23 THE COURT: Oh. It was you?

24 MR. RHOW: Not necessary.

25 THE COURT: Okay. Good. I'm glad we don't have to

1 call you.

2 Okay. Keep going. So I granted partial summary
3 judgment, but I found some directors were not disinterested,
4 so not all of the directors were covered by the summary
5 judgment. I also in that case made a determination the
6 business judgment rule only applies to officers and directors,
7 it does not apply to the corporation itself. Just so you
8 know.

9 MR. TAYBACK: And I'm aware of that only through
10 having read the pleadings and having read now the court's
11 opinion here. But the question is as it applies to this case.
12 And as it applies to this case collectively that recent
13 guidance and the guidance from the legislature make it clear
14 that it's not really the province of a plaintiff or a court or
15 jury to come in and say the business judgment rule should be
16 overridden in order to second guess a particular decision made
17 by a corporation's directors or its officers. And if you
18 start at that premise, the idea that the applicable Nevada
19 statutes here elevate -- give that sort of latitude to
20 directors in the first instance and then you take it to sort
21 of the next level of analysis, that is to say, even if one
22 could rebut the presumption, even it's rebutted the standard
23 then for imposing liability is even higher, because there
24 remains still a two-prong test for which plaintiffs have to
25 show a material disputed issue of fact to proceed to trial.

1 Both an individual director on a particular transaction
2 breached their fiduciary duty and, secondly, that that
3 individual director did so with fraud, knowing -- as a knowing
4 violation of the law or engaged in intentional misconduct.

5 THE COURT: Well, you understand that finding is
6 only needed to make a determination as to whether the
7 individual officer or director is insulated from -- for
8 personal liability purposes, as opposed to derivative
9 liability, which would be funded through the corporation.

10 MR. TAYBACK: Correct.

11 THE COURT: Okay.

12 MR. TAYBACK: Though they are seeking personal
13 liability. Their complaint makes that clear..

14 THE COURT: I understand they are. But your motion
15 seemed to take the position that unless I found fraud they
16 need to be dismissed. And that's not how it works.

17 MR. TAYBACK: Well, but they do need to rebut the
18 presumption with respect to the business judgment rule.

19 THE COURT: That's a different issue, Counsel.

20 MR. TAYBACK: It is a different issue. And it's a
21 multiple-hurdle test.

22 THE COURT: Yes.

23 MR. TAYBACK: And with respect to that second hurdle
24 even the issue comes down to Your Honor's adjudicating their
25 claim for personal liability, then that's also part of the

1 motion.

2 But you don't need to get there, because they have
3 not established the evidence necessary to rebut the initial
4 presumption. And that's clear because when you look at what
5 governs the decision here by these individual directors on
6 termination, which I'm going to take that transaction because
7 that's the subject of our first motion for summary judgment,
8 if you look at that, what governs that decision are the
9 bylaws. And the bylaws which we've submitted are amply clear
10 that the board was given complete discretion, that officers,
11 including the CEO, serve at the pleasure of the board and can
12 be terminated with or without cause at any time.

13 With the bylaws being the operative rules of the
14 road, so to speak, and the law being what it is with respect
15 to the deference afforded boards and individual board members,
16 plaintiff's efforts to try to get around the idea that that
17 presumption should be applied here are based on generalized
18 allegations of disinterestedness. But you don't see specific
19 evidence in the record anywhere that any of the three
20 directors who voted to terminate Mr. Cotter, Jr. --

21 THE COURT: And you're including Mr. Adams in that,
22 are you?

23 MR. TAYBACK: I am including Mr. Adams in that.

24 THE COURT: Just checking. So what happens if I
25 make a determination that Mr. Adams is not disinterested? You

1 then do not have a majority of disinterested directors;
2 correct?

3 MR. TAYBACK: If you made that finding that would be
4 true. But it wouldn't change the liability, the claim against
5 Mr. McEachern or Mr. Kane.

6 THE COURT: You mean for personal liability?

7 MR. TAYBACK: I mean whether -- not whether or not
8 you can say we need to revisit that action, but whether or not
9 they were disinterested, whether they breached their fiduciary
10 duty. That would be adjudicated in their favor even if you
11 found against Mr. Adams on a particular transaction -- but I
12 would say you should not find against Mr. Adams on this
13 transaction. The evidence isn't that his -- that the decision
14 to terminate had any connection to his -- the level of his
15 income, the amount of his -- the amount of his income, the
16 amount of his expenditures, his continuity on the board.
17 There's no connectivity, which is required in order to find
18 disinterestedness even if disinterestedness was the standard.
19 Because I will say the standard in Nevada is not independence
20 for -- unless it's a transaction in which the director is on
21 both sides of the transaction or it's a change of control
22 circumstance. The termination of a CEO is an operational
23 matter where you don't get to the independence question unless
24 and until you have established a basis, a legitimate basis in
25 the law to show that the presumption should not apply.

1 In light of the law, in light of the bylaws, in
2 light of the undisputed evidence with respect to Mr. Adams,
3 Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Coddington --
4 and, of course, Mr. Wrotniak and Ms. Coddington weren't even on
5 the board at the time of this transaction -- the fact is that
6 there's no basis upon which to allow plaintiff's claim to
7 proceed.

8 The last point that I want to make with respect to
9 Summary Judgment Motion Number 1 and 2 as it relates to that
10 point is the plaintiff has tried to really muddy the law. And
11 I think whatever you ultimately decide on this motion for
12 summary judgment -- and I absolutely believe that these
13 defendants are entitled to summary judgment on this record,
14 but whatever you decide the parties will be well served by
15 understanding Your Honor's view of the law. Because we do not
16 see eye to eye with the plaintiffs on the law. They strive to
17 import this Delaware entire fairness test.

18 THE COURT: I rejected that in Wynn, because that
19 was the part that the Okada parties argued once the writ came
20 back on [inaudible].

21 MR. TAYBACK: And notwithstanding that, I believe
22 the plaintiffs are still advocating for it. It shows up in
23 their papers.

24 THE COURT: I understand it's in their briefing.

25 MR. TAYBACK: And the law at least in Nevada with

1 respect to that is that it doesn't apply here. Independence
2 for the same reasons is not required for the benefit of the
3 business judgment rule where, as here --

4 THE COURT: You don't think the Shoen case says that
5 independence is required for application of business judgment
6 rule?

7 MR. TAYBACK: In Shoen to the extent it says that at
8 all it says it in the context of demand futility. It's not
9 the presumption that we're talking about here. And in fact
10 that's -- I believe that's exactly what certainly the Wynn
11 Supreme Court --

12 THE COURT: There's two Shoen cases; right?

13 MR. TAYBACK: Yes.

14 THE COURT: There's the first Shoen case and the
15 second one that they gave a different name to.

16 MR. TAYBACK: Independence is not required unless
17 you have a director who's on both sides of a transaction.

18 THE COURT: Okay.

19 MR. TAYBACK: I believe the law is amply clear on
20 that.

21 THE COURT: Okay. I think their analysis is
22 slightly broader than that, but okay.

23 MR. TAYBACK: Given the bylaws, given the fact that
24 entire fairness does not apply, you cannot simply get past or
25 rebut the presumption of the applicability of the business

1 judgment rule by saying a director is biased, a director has
2 some family connection, a director has income that's
3 attributable to the company. And that's really what this case
4 comes down to. Where the facts here are frankly undisputed
5 summary judgment is warranted.

6 That's it for Summary Judgment 1 and 2, Your Honor,
7 unless you have any questions.

8 THE COURT: No. It's okay.

9 Mr. Krum, Mr. Morris?

10 MR. KRUM: Good morning, Your Honor. Thank you.

11 So I have some argument to make about what are
12 pervasive misstatements of the law that were made with respect
13 to Number 1, as well as the other ones. That said, if I'm
14 listening, you're prepared to deny Number 1, just as you did
15 previously, nothing has changed, including the law; and if
16 that's the case, I'll just defer those comments till we get to
17 something else.

18 THE COURT: Well, then let me ask you a question.
19 Because when I read all these I have notes all over them,
20 because some of them are interrelated and the
21 disinterestedness issue is an issue that is involved in some
22 of the motions in limine, as well as this.

23 Can you tell me what evidence, other than what is
24 listed on page -- you had -- in your brief you had a list of
25 all of the company activities that you believe show decisions

1 that were made by certain of the directors that showed they
2 were interested. Can you tell me, other than that list -- and
3 I can't, of course, find it right now, but I'm looking for it
4 -- is there any other information other than from Mr. Adams
5 that you have that would provide a basis for the Court to
6 determine that they are not disinterested?

7 MR. KRUM: I'm sorry. That who is not disinterested
8 with respect --

9 THE COURT: Anyone except Mr. Adams and the two Ms.
10 Cotters. The two Ms. Cotters I think is fairly easy. They
11 didn't even move, from what I can tell. But, for instance,
12 for Mr. Kane.

13 MR. KRUM: Certainly, Your Honor. In our -- first
14 let me say I think the list to which you're referring is a
15 list that I had understood the Court to request when we last
16 argued summary judgment motions and was intended, Your Honor,
17 to identify the particular matters which we contend give rise
18 to or constitute breaches of fiduciary duty in and of
19 themselves as well as together with other matters. And so --

20 THE COURT: I don't know that that's the reason you
21 did it. I found it. It is on pages 5 and 6. I'm on the
22 Supplemental Opposition to Motion for Summary Judgment Number
23 1 and 2 and Gould Motion for Summary Judgment, and there is a
24 list that includes threats of termination if you don't get
25 along with your sisters and resolve the probate case --

1 MR. KRUM: Yes.

2 THE COURT: -- exercise of the options, the
3 termination, the method of the CEO search. All of those are
4 company transactions. What I'm trying to find out is, other
5 than for Mr. Adams, is there other evidence of a lack of
6 disinterestedness that you have other than what is included in
7 the list of activities that relate to their work as directors
8 which are on pages 5 and 6 of that brief in the bullet points.

9 MR. KRUM: Let me answer it this way, Your Honor. 5
10 and 6 was our effort to do what I just said. And what that
11 is, to try to be clear, is to identify particular activities
12 that we thought would be the subject of, as is appropriate,
13 either instructions or interrogatories to the jury with
14 respect to these particular matters.

15 So let's take Number 1 bullet point, the first
16 bullet point, the threat by Adams, Kane, and McEachern to
17 terminate plaintiff if he did not resolve trust disputes with
18 his sisters on terms satisfactory to them. That, Your Honor,
19 from our perspective is separate from the termination which is
20 the subject of Number 1. And on this --

21 THE COURT: I see that. But let me have you fall
22 back, because I certainly understand those may be issues that
23 you may want to submit interrogatories or just to include in
24 jury instructions related to breaches of fiduciary duty by
25 someone who survives this motion, who I don't grant it on

1 behalf of.

2 But my question is different. Other than these
3 which you've argued in your brief are evidence of a lack of
4 disinterestedness separate and apart from Mr. Adams, who you
5 have other evidence that is presented related to a lack of
6 disinterestedness, is there any evidence that has been
7 attached to your various supplements and other motions related
8 to a lack of disinterestedness for the other directors known
9 as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Coddling, and Mr.
10 Wrotniak?

11 MR. KRUM: The answer is yes, Your Honor. So I'm
12 going to try to do it a couple ways.

13 THE COURT: Tell me where to go. Because I looked
14 through this whole pile of about 2 foot of paper last night
15 trying to find it, and the only one I could find specific
16 allegations of a lack of disinterestedness, besides the two
17 Cotter sisters, was Mr. Adams.

18 MR. KRUM: Okay. Well, so, for example, with
19 respect to Mr. Kane in the response to MSJ Number 1 and 2 we
20 introduced evidence that showed that Kane was of the view that
21 he knew best what James Cotter, Sr., wanted in his trust
22 documentation.

23 THE COURT: I see he understood what Mr. Cotter,
24 Sr.'s plan was. How does that make him have a lack of
25 disinterestedness?

1 MR. KRUM: Well, the answer, Your Honor, is he acted
2 on that. That was the basis on which he decided to vote to
3 terminate the plaintiff. He -- and, for example, the evidence
4 includes an email from Mr. Adams to Mr. Kane in April or early
5 May 2015 in which Mr. Adams says, "This was difficult. We had
6 to pick sides in this family dispute. But we can take comfort
7 that Sr. would have approved our decision." And so the point
8 from our perspective, Your Honor, is Kane, in acting as a
9 director, in fact acted to carry out what in his judgment were
10 the personal interests of Sr. with respect to his trust
11 planning. And on that basis he voted to terminate Mr. Cotter.
12 There are emails from Mr. Kane to Mr. Cotter telling him, I
13 don't know what the sisters' settlement is but I urge you to
14 take it. Well, we think the evidence also shows that he knew
15 what it was, that it entailed Mr. Cotter giving up control of
16 the issues they've been litigating.

17 THE COURT: Under the Shoen analysis do you believe
18 that that contact and that information is sufficient to show
19 that Mr. Kane is not disinterested?

20 MR. KRUM: Well, the answer is, yes, we do, Your
21 Honor. And I hasten to add that the way Shoen puts it is that
22 disinterestedness and independence are a prerequisite to
23 having standing to invoke the business judgment rule.

24 THE COURT: I'm aware of that. Which is why we're
25 having this discussion. So -- but usually we have either a

1 direct financial relationship, even if it's not on both sides
2 of the transaction, or we have a very close personal or
3 familial relationship with the people who are subject to the
4 transaction. And simply believing you understand Sr.'s plan
5 -- estate plan does not, I don't think, rise to that same
6 level to show a lack of disinterestedness; but I'm waiting for
7 you to give me a spin on that argument I may not have thought
8 of.

9 MR. KRUM: Sure, Your Honor. The answer is -- and I
10 say this because I appreciate what the finder of fact -- what
11 the Court has to do now and what the finder of fact has to do.
12 The evidence has to be assessed collectively, not
13 individually. And you understand that. We've cited cases for
14 that. The other side disputes that. There's "The complaint
15 of acts and omissions upon which plaintiff's claims are based
16 must be viewed and assessed collectively, not separately in
17 isolation." That's the Ebix case that we've cited. And there
18 are other cases for that proposition. The point, Your Honor,
19 is "assessing whether a director was independent and in a
20 particular instance acted independently or whether the
21 director was disinterested as required or whether -- and made
22 the decision based entirely on the corporate merits, not
23 influence by personal or extraneous considerations," that was
24 CVV Technicolor, that's the test. And so, Your Honor, in
25 Shoen, just to go back to that, "Independence can be

1 challenged by showing that the directors' execution of their
2 duties is unduly influenced." If Kane made a decision based
3 in any respect on his view that Sr. intended for one or both
4 of the sisters to have something and Jr. was in the way of
5 that, that, Your Honor, at a minimum survives summary judgment
6 so the finder of fact can make a determination after
7 considering all the evidence whether the director acted and
8 decided in that particular instance entirely on the corporate
9 merits. So what is --

10 THE COURT: Let's skip ahead, then. Mr. McEachern.
11 What evidence of disinterestedness do you have for Mr.
12 McEachern? And if you could tell me where in the briefing it
13 is, I will look at it again. But, as I've said, other than
14 Mr. Adams I did not see evidence of disinterestedness as
15 opposed to allegations of breach of fiduciary duty.

16 MR. KRUM: Mr. McEachern attempted to extort Mr.
17 Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter,
18 you need to go resolve your disputes with your sisters and
19 we're going to reconvene at 6:00 o'clock and if you don't
20 you'll be terminated. Now, there's no dispute about that. We
21 have in evidence the testimony --

22 THE COURT: I understand that that's one of your
23 claims of breach of fiduciary duty. But I'm trying to
24 determine if there was any additional evidence, other than
25 those items that are those bullet points you put in the brief,

1 which are on pages 5 and 6 of your supplemental opposition,
2 that goes to Mr. McEachern. And then I'm going to ask you the
3 same question for Mr. Gould and Ms. Coddington and Mr. Wrotniak.

4 MR. KRUM: Your Honor, as a threshold matter, the
5 presumption can be rebutted by showing conduct in derogation
6 of the presumption. It's not simply a interest or
7 disinterested phenomenon, cite Shoen. Let me be clear. I
8 don't want to talk past you. The other side argues there are
9 only two circumstances in which interestedness matters. Well,
10 that's belied by Shoen. It says, "Business judgment rule
11 pertains only to directors whose conduct falls within its
12 protections. Thus, it applies only in the context of a valid
13 interested director transaction --" that's 138 -- 78.140,
14 excuse me "-- or the valid exercise of business judgment by
15 disinterested director in light of their fiduciary duties."
16 And to be a valid exercise, Your Honor, it has to be made in
17 the interest of the corporation.

18 So Mr. McEachern -- let me go through the list
19 mentally. He attempted to extort Mr. Cotter to resolve the
20 trust disputes in favor of the sisters, he voted to terminate
21 -- he decided not to terminate after he understood an
22 agreement had been reached to resolve those disputes. And
23 when that didn't come to pass he voted to terminate. He,
24 along with Mr. Gould, chose the wishes of the controlling
25 shareholders. Rather than to complete the process he had set

1 up, they aborted the CEO search. So, Your Honor, that's
2 squarely within the Shoen language of manifesting a direction
3 of corporate conduct in such a way as to comport with the
4 wishes or interests of the person doing the controlling.

5 Now, I heard you. You view that as a fiduciary
6 breach.

7 THE COURT: An allegation of a fiduciary duty
8 breach.

9 MR. KRUM: Allegation of fiduciary duty breach,
10 right. But that's -- if proven, that rebuts the presumption,
11 and off we go.

12 I skipped over Mr. McEachern's role in involuntarily
13 retiring Mr. Storey. Mr. McEachern, together with Mr. Adams
14 and Mr. Kane, in October and November -- September or October
15 I guess it was of 2015 comprised the ad hoc first time one
16 time special nominating committee. That committee had two
17 roles. One was to tell noncompliant director Timothy Storey
18 that he wasn't going to be renominated, and they explained to
19 him that the sisters, who controlled the vote, had told him
20 they weren't going to vote to elect him so he could either
21 resign and get a year's benefits of some sort or just be left
22 off.

23 What else did that committee do? They approved Judy
24 Coddington and Michael Wrotniak. Did they undertake to search
25 for candidates? No. Did they do anything that one would do

1 as a director of a nominating committee to identify and
2 recruit directorial candidates? No. What did they do? They
3 did what they were asked and told. Ellen Cotter gave them
4 Judy Coddington, good friend of Mary Ellen Cotter, the mother,
5 with whom Ellen Cotter lives, and Michael Wrotniak, husband of
6 Patricia Wrotniak, one of Margaret Cotter's few good friends.
7 And they obviously did virtually nothing, because promptly
8 after the company announced Ms. Coddington had been added to
9 board a shareholder brought to their attention there were lots
10 of Google articles that raised questions about Ms. Coddington's
11 relationship with her prior employer and the prior employer's
12 conduct.

13 So on the nominating issue, Your Honor, on the board
14 stacking our view is that all evidences loyalty to the
15 controlling shareholders. And that, Your Honor, would be
16 somewhere in the range of lack of independence or
17 disinterestedness.

18 THE COURT: So, Mr. Krum, if we're going to get
19 through all the motions this morning I need you to wrap up.
20 Because I think I have all the information I need on Motion
21 for Summary Judgment Number 1.

22 MR. KRUM: Okay. Certainly, Your Honor.

23 So just to finish the bullet points which you
24 brought to my attention, these directors, Kane, Adams,
25 McEachern, they're all on record dating back to the fall of

1 2014 that, yes, we should find a position for Margaret Cotter
2 at the company so she can have health insurance, but, no, she
3 can't be running our real estate. Well -- that's in the
4 emails we have in the evidence actually, Your Honor, the first
5 time around. And there's some more from Mr. Gould or
6 McEachern. We had some additional testimony that we added
7 this time. And so what happens? Ellen Cotter is made CEO
8 after the aborted CEO search, she says, I want Margaret to the
9 have the senior executive position, for which she has no prior
10 experience and no qualifications. And what do these people do
11 as committee members and board members? They say, where do we
12 sign.

13 So, Your Honor, it's an ongoing, recurring,
14 pervasive lack of independence or disinterestedness. And the
15 conclusion of that, Your Honor, of course, was by what they
16 did in response to the offer -- and I've sort of wrapped up
17 the whole thing without talking about the law I intended to
18 discuss -- and that is they ascertained what the controlling
19 shareholders wanted to do and they did it in an hour-and-
20 twenty-five-minute telephonic board meeting.

21 I didn't discuss what I intended to discuss, but I
22 tried to answer your questions.

23 THE COURT: I understand, Mr. Krum. But the
24 briefing was very thorough, which is why I tried to hit the
25 questions --

1 MR. KRUM: Understood.

2 THE COURT: -- because I had some questions after
3 reading it.

4 So Motion for Partial Summary Judgment Number 1 is
5 granted in part. It is granted with respect to Edward Kane,
6 Douglas McEachern, William Gould, Judy Coddington, and Michael
7 Wrotniak.

8 It is denied as to Margaret Cotter, Ellen Cotter,
9 and Guy Adams because there are genuine issues of material
10 fact related to the disinterestedness of each of those
11 individuals. As a result, they cannot at this point rely upon
12 the business judgment rule.

13 MR. TAYBACK: Your Honor, is there a ruling on the
14 aspect of the motion that goes to inability to hold the
15 individuals personally liable for this claim?

16 THE COURT: For the three that I didn't grant the
17 business judgment?

18 MR. TAYBACK: Correct.

19 THE COURT: No, you do not get a ruling to that
20 effect.

21 Did you want to go to your next motion for summary
22 judgment?

23 MR. TAYBACK: Yes, Your Honor.

24 THE COURT: And I'm trying to be consistent with the
25 decision I made in the Wynn based upon the facts that seem to

1 be slightly different on the conduct of directors. I've got
2 this thing in my head that nobody understands but me, so I'm
3 trying to draw that line by asking questions so I can figure
4 out where that is. Mr. Ferrario knows nobody understands but
5 me. And I can't say it in a way the Supreme Court will
6 understand, because they don't understand it, except for Chris
7 Pickering, and she won't be deciding your appeal.

8 MR. TAYBACK: Your Honor, we have a second motion.
9 It's Motion Number 2. It's also woven through some of the
10 other motions. For the sake of just clarity I'll address
11 Motion Number 2 separately, and I'll only --

12 THE COURT: Briefly.

13 MR. TAYBACK: -- briefly. I'll only say this. Even
14 if you go to the -- well, I've certainly said my piece
15 already, and I think you can just incorporate what I've said
16 previously on this point, that independence I do not believe
17 is a legal prerequisite to the invocation of the business
18 judgment rule. Even if you look at the Shoen case, which Your
19 Honor has discussed, where it talks about interestedness and
20 the word it uses "interestedness," the quote there is, "To
21 show interestedness a shareholder must allege that --" it's
22 talking about allegations in that case "-- allege that a
23 majority of the board members would be, quote, 'materially
24 affected' either to benefit or detriment by a decision of the
25 board in a manner not shared by the corporation and the

1 stockholders." To the extent there is a question of
2 independence, it's not the generalized allegations that I
3 think pollute the claims here, the transaction-by-transaction
4 claims that the plaintiff seems to be asserting. You can't
5 just say independence is lacking because there's -- one of the
6 directors favored one of the board members versus one of the
7 others, favored the sisters versus the brother. You have to
8 show that there's a material impact in the transaction itself
9 that was being voted upon, and that's the contention that
10 we're making with respect to independence and how plaintiff's
11 claims, all of them against all of the individual defendants
12 transaction by transaction should fail under a summary
13 judgment standard.

14 With that I'll stop, and then I'll allow him to
15 address it, and then I've got on Motion Number 3.

16 THE COURT: Okay. Mr. Krum, anything else on Motion
17 Number 2?

18 MR. KRUM: Just briefly, Your Honor, because I think
19 we have a fundamental -- I'm going to repeat myself in one
20 respect -- misapprehension of law. This is not a check-the-
21 box exercise.

22 THE COURT: No, it is not.

23 MR. KRUM: So in Shoen the court says, "Thus, as
24 with the Aronson test, under the Brehm test, director
25 independence can be implicated by particularly alleging that

1 the directors' execution of their duties is unduly influenced,
2 manifesting a direction of corporate conduct in such a way as
3 to comport with the wishes or interests of the person doing
4 the controlling."

5 Now, we know that's a demand case, but that doesn't
6 change the law, it just changes the application of the law.
7 And so the point isn't any more complicated than what it said
8 elsewhere in Shoen, and that is "Directors' discretion must be
9 free from the influence of other interested persons."

10 So Motion Number 2 is -- it's nonsensical, because
11 that has to be assessed based on facts and based on the
12 particular application. You just did it with respect to
13 Number 1. And so it doesn't work that way. And the -- in
14 Rails the court said, of which Shoen is cited with approval,
15 "Directorial interest exists whenever divided loyalties are
16 present." And we have this ongoing set of transactions that
17 entail furthering and protecting the interests of the Cotter
18 sisters. That, Your Honor, is a perfect example of
19 circumstances that show divided loyalties. Thank you.

20 THE COURT: Thank you.

21 Motion for Summary Judgment Number 2 is granted in
22 part. To the extent that you asked me to make a determination
23 as to whether there has been a showing of a lack of
24 disinterestedness there is a lack of disinterestedness for
25 Margaret Cotter, Ellen Cotter, and Guy Adams.

1 With respect to the other directors who were
2 involved in the motion there does not appear to be sufficient
3 evidence presented to the Court to proceed with a claim of
4 lack of disinterestedness.

5 Okay. That takes you to Number 3.

6 MR. TAYBACK: Your Honor, with respect to the Motion
7 for Summary Judgment Number 3, which relates to what's called
8 the patent vision expression of interest --

9 THE COURT: Yeah.

10 MR. TAYBACK: -- there are --

11 THE COURT: The unaccepted offer which may not have
12 been a real offer.

13 MR. TAYBACK: Not may not have been. Was admitted
14 by plaintiff --

15 THE COURT: Eh, you know.

16 MR. TAYBACK: Was admitted by the plaintiff was
17 nonbinding expression of interest that could have been
18 withdrawn or rejected at any point in time. Moreover, when
19 you look -- that in and of itself disposes of the claim,
20 because there are no damages that flow from that. There
21 cannot be. And that Cook case, which is a Delaware case, but
22 the Cook case really makes that clear.

23 THE COURT: I thought I wasn't supposed to look at
24 Delaware law according to you. You know the legislature can't
25 tell the court what it's allowed to look at.

1 MR. TAYBACK: And I did know that.

2 THE COURT: Okay.

3 MR. TAYBACK: I'm encouraging you to look at it.

4 THE COURT: I'm looking at all sorts of things, but
5 I'm trying to interweave it into the legislative intent
6 related to business judgment and the protections that we
7 should give to officers and directors in Nevada.

8 MR. TAYBACK: Yeah. And I think what it is is it's
9 factually analogous. It's factually analogous.

10 THE COURT: Right. I just had to give you a hard
11 time. Anything else you want to tell me?

12 MR. TAYBACK: The only other thing that I would tell
13 you is that when you look at what it is that the board members
14 can look at with respect to the consideration of potential
15 change of control overtures, call it expression of interest or
16 anything else, it's nonexclusive. It says they may consider
17 any of the relevant facts. And here the undisputed evidence
18 is that they did consider a lot of relevant facts, including
19 the views of the plaintiff, the views of the two Cotter
20 sisters, including the presentations of the board. And
21 they're entitled to rely upon that. And the reasonableness of
22 the decision is not something that can be second guessed at
23 this juncture based upon the showing that plaintiff has made.

24 THE COURT: Mr. Krum. Let's skip past a couple of
25 those arguments and focus on a different issue. Other than as

1 evidence of breaches of fiduciary duty, do you have any claim
2 of specific damages to the failure to accept the unsolicited
3 offer?

4 MR. KRUM: Well, first, Your Honor, the notion that
5 it's nonbinding and therefore it cannot result in damages is
6 belied --

7 THE COURT: No. I asked you a very direct question.

8 MR. KRUM: I'm sorry.

9 THE COURT: Do you have damages that you have
10 provided me evidentiary basis for strictly related to the
11 failure of the company or the directors to accept the
12 unsolicited offer?

13 MR. KRUM: Mr. Duarte Solis speaks to that in his
14 expert opinion which was the subject of a motion in limine you
15 denied in October of last year.

16 THE COURT: I know. But I'm asking you a question.
17 Do you have specific evidence of damages related to the
18 decision by the board not to accept the unsolicited offer?

19 MR. KRUM: No. The answer I have is the one I just
20 gave, Your Honor.

21 THE COURT: All right. So that's the only answer
22 you have. Okay. Anything else you want to tell me?

23 MR. KRUM: I just wanted to say again on law,
24 different point, though, intentional misconduct, one of the
25 ways that occurs is where the fiduciary acts with a purpose

1 other than advancing the best interests of the corporation. I
2 think the evidence on this subject, Your Honor, the offer
3 raises a question of fact, a disputed question of material
4 fact as to whether that's what the directors did.

5 Another category of intentional misconduct is where
6 the fiduciary intentionally fails to act in the face of a
7 known duty to act, demonstrating a conscious disregard for his
8 duties. That is a pervasive and recurring phenomenon here,
9 and I submit, Your Honor, with respect to the so-called offer
10 that's what happened. So the point is, as I said before on
11 the offer in particular, Your Honor, it sort of bookends this
12 whole sequence of events, starting with the seizure of
13 control. And you've read the papers, so I'll leave it at
14 that.

15 THE COURT: Anything else?

16 MR. KRUM: No.

17 THE COURT: Okay. Because of the failure of damages
18 related to an unenforceable, unsolicited, nonbinding offer, I
19 am granting the motion.

20 However, that does not preclude the plaintiff from
21 utilizing that factual basis for claims of a breach of
22 fiduciary duty. Okay?

23 MR. TAYBACK: Or for other alleged -- to prove other
24 alleged breaches you're saying it might be admissible as
25 evidence.

1 THE COURT: Well, it may be additional evidence of
2 breach of fiduciary duty. But they don't get to claim any
3 damages from it, since they haven't established damages
4 related to that because of the legal issues related to the
5 nature of the offer.

6 So what is your next motion for summary judgment, if
7 any? I think there were six.

8 MR. SEARCY: Your Honor, I'm addressing Motion for
9 Summary Judgment Number 5. That relates to the CEO search.
10 And --

11 THE COURT: Ready for me to say denied?

12 MR. SEARCY: If you'll let me --

13 THE COURT: You can talk, Mr. Searcy, but we're
14 leaving here in 25 minutes whether you guys are done or not.

15 MR. SEARCY: All right. Well, if you're going to --
16 before you say denied then let me just address a few of the
17 points in it. If you're going to say granted, then I'll
18 certainly sit down.

19 THE COURT: I'm not going to say granted.

20 MR. SEARCY: The point, Your Honor, is that there's
21 no dispute on the material facts here. There was a process
22 that was undertaken by the board here to appoint a CEO. The
23 board appointed a special committee, the special committee
24 hired a search firm, that search firm went out and got
25 information, they interviewed candidates, those candidates

1 were selected by the search firm Korn Ferry, and they were
2 considered along with internal candidates. The board -- or
3 the committee, rather, interviewed Ellen Cotter and decided
4 that she was the best candidate, and the board agreed with
5 that decision. And in the context of the law here you have a
6 majority of disinterested directors who agreed with that
7 decision. There's a presumption that all of this was
8 conducted in good faith. There hasn't been a rebuttal of the
9 presumption here, Your Honor, and, as a result, the motion
10 should be granted.

11 Are there particular issues, though, that I can
12 address for Your Honor?

13 THE COURT: Not that will cause you to be able to
14 get me to change my mind on denied.

15 MR. SEARCY: Okay. Are there any that I can at
16 least make an effort on, Your Honor?

17 THE COURT: Nope.

18 MR. SEARCY: Thank you, Your Honor.

19 THE COURT: All right. So that motion is denied.
20 Can we go to Number 6.

21 MR. SEARCY: Number 6 is mine, as well.

22 THE COURT: This has to do with the special bonus to
23 Mr. Adams.

24 MR. SEARCY: That's correct, Your Honor. There are
25 three main issues here. One has to do with the exercise of

1 options, and in that case there was an executive committee
2 that considered those options. There's no doubt, no dispute
3 that that was an existing plan, that the committee received
4 advice from counsel, and approved of the -- approved of the
5 exercise of the options.

6 THE COURT: Okay. Anything else?

7 MR. SEARCY: In addition to that -- and that's --
8 again, that is an exercise that is presumed to be done in good
9 faith and especially here, where the statute provides that you
10 can obtain information. And that's what the committee did.

11 In addition to that, Your Honor, there's the issue
12 of the payment to Mr. Adams that you just raised. That again
13 was approved by the board, approved by unanimous board who
14 were disinterested in the subject and are entitled to business
15 judgment on that subject.

16 And finally, with respect to Margaret Cotter's
17 appointment it's certainly within the board's discretion to
18 decide that someone who's worked for the company and been
19 affiliated with the company for approximately 20 years or so
20 has the qualifications to take on that job. And as Mr.
21 Tayback said, hiring someone to fill a role is certainly --
22 that's an operational decision that's within the discretion of
23 a board of directors, and certainly they're entitled to be
24 able to exercise the business judgment when it comes to that,
25 especially here. And with all of these decisions, Your Honor,

1 you're talking about a decision made by a majority of
2 disinterested directors, directors that you've found to be
3 disinterested.

4 THE COURT: Some directors I found to be
5 disinterested.

6 MR. SEARCY: Well, for those directors, though, Your
7 Honor, that you found to be disinterested, they constitute a
8 majority of the decision makers here. And --

9 THE COURT: Well, they're protected. Those people
10 are protected.

11 MR. SEARCY: And exercising their business judgment
12 they approved these decisions.

13 THE COURT: Okay. Anything else?

14 MR. SEARCY: Thank you, Your Honor. That's it.

15 THE COURT: Denied.

16 So you had Number 4 I think we didn't get to. Was
17 Number 4 reserved for this time, or had I ruled on it
18 previously?

19 MR. TAYBACK: Your Honor, you --

20 MR. KRUM: You ruled on it previously.

21 THE COURT: Okay. So that takes me to your motions
22 in limine. There were two that I think are important. One is
23 Mr. Gould's motion in limine to exclude irrelevant and
24 speculative evidence.

25 MR. RHOW: Your Honor, can I speak on this one?

1 THE COURT: It's your motion.
2 MR. RHOW: Thank you, Your Honor.
3 MR. FERRARIO: Hey, come on. This is his first
4 time.
5 MR. RHOW: I feel honored to actually --
6 THE COURT: Here's my first question.
7 MR. RHOW: By the way, is it tentative to grant?
8 I'd like to know that first.
9 THE COURT: My first question for you is one that
10 I'm going to ask all the people in motions in limine. Did you
11 have an opportunity to meet and confer with opposing counsel
12 before you filed the motion to see if there were areas of
13 agreement?
14 MR. RHOW: The answer is I don't think we did.
15 THE COURT: You know, we have a rule.
16 MR. SEARCY: I'm going to have to disagree with Mr.
17 Rhow. We actually did meet and confer with Mr. Krum on the
18 phone.
19 MR. RHOW: Oh. I'm sorry.
20 MR. SEARCY: Mr. Rhow wasn't part of the meet and
21 confer, but his associate, Shoshana Bannett, was.
22 THE COURT: Oh. Okay. All right.
23 MR. RHOW: Okay. I had looked at -- I should have
24 looked at Mr. Searcy.
25 THE COURT: Because usually -- usually I get a

1 declaration that tells me, we met and conferred on this
2 date --

3 MR. RHOW: Correct.

4 THE COURT: -- so that I can then gauge whether
5 somebody's being unreasonable or not. So it's your motion.

6 MR. RHOW: Thank you, Your Honor.

7 I think the motion was short and sweet on purpose.
8 During the deposition of Mr. Cotter, Jr., and it lasted days
9 and days and days, and throughout the questioning it was quite
10 clear that he was testifying based on not what he saw, what he
11 heard, what he observed; he was literally saying, here's what
12 I think -- thought at the time, here's what I was thinking Mr.
13 Gould was thinking and others were thinking and so therefore I
14 believe the claim is sufficient because of my subjective
15 belief as to what other directors were thinking. If that's
16 going to be part of this trial, first, this trial's not going
17 to be four weeks, it's going to be eight weeks; but, second,
18 there's nothing in the law, there's nothing based on common
19 sense that tells you that what the subjective beliefs of the
20 plaintiff are none of that is relevant, none of that is
21 relevant under the law, none that is relevant under common
22 sense. So to streamline this case, if he's going to talk
23 about what he saw, what he heard, certainly that's admissible.
24 But if he's going to talk about what he believes, that's
25 subjective and should not be part of this trial.

1 THE COURT: Thank you.
2 Ms. Levin, is this your motion?
3 MS. LEVIN: Yes, Your Honor.
4 As we said in our opposition, we believe this is an
5 improper and premature motion just because Mr. Cotter
6 obviously will be here at trial testifying.
7 THE COURT: So you want me to rule on the questions
8 and answers as they're given. So if somebody asks him, well,
9 did you talk to Mr. Adams about what he was going to do, he
10 can then tell me what he said.
11 MS. LEVIN: Correct, Your Honor.
12 THE COURT: Well, what did you think he meant?
13 That's speculation.
14 MS. LEVIN: Unless, of course, he's got a basis for
15 his belief. And I think that some of the deposition
16 testimony, those responses were invited by the very questions.
17 So to the extent that he has a basis to believe -- you know,
18 to state his belief I think that, again, it should be
19 determined on the question by question.
20 THE COURT: Okay. So the motion is denied. It's
21 premature. It's an issue that has to be handled at trial
22 based upon the foundation that is laid related to the issue.
23 So -- and plus you won't be here. You won't be
24 here; right?
25 MR. RHOW: I'm sorry?

1 THE COURT: You won't be here; right?
2 MR. RHOW: I don't know. I hope not. Is Your Honor
3 saying I should not be here or that my client won't be here
4 then?
5 THE COURT: That's what the business judgment ruling
6 deals with; right? So I granted your client's business
7 judgment rule motion. Well, you know, he may be a witness.
8 MR. KRUM: I'm sorry, Your Honor. Did I miss
9 something?
10 THE COURT: What?
11 MR. KRUM: We haven't had that motion argued yet,
12 Mr. Gould's motion.
13 THE COURT: I included Mr. Gould because you briefed
14 it relate to all of the motions for summary judgment and I
15 asked you questions about all the directors, except Mr. Adams.
16 MR. KRUM: I'm sorry. I didn't understand that,
17 Your Honor. I didn't answer as to Mr. Gould.
18 THE COURT: Do you want to tell me an answer to Mr.
19 Gould?
20 MR. KRUM: I do, because we have a hearing set for
21 the 8th on his motion, which is why misunderstood that.
22 THE COURT: I used it because it was included in
23 your opposition, the supplement to those motions.
24 MR. KRUM: That was confusion that we created, and I
25 apologize. The reason we did that, Your Honor, is that we

1 didn't have an opportunity to prepare a Gould brief, but we
2 didn't want to be accused of doing nothing. And some of the
3 evidence in those motions in our view did relate to Gould, and
4 we therefore put him on there.

5 That said, he filed two pieces of paper, they asked
6 me if we could have the hearing today. I told them no, I
7 wanted to respond. So -- but let me try to answer your
8 question with respect to Mr. Gould. So we start, Your Honor,
9 as we do, with the threat to terminate and the termination.
10 And I respectfully submit --

11 THE COURT: I will tell you that on your Mr. Gould
12 you've got the same list that we've already talked about.
13 What I'm trying to find out is -- and I understand the threat
14 is part of what you've alleged related to Mr. Gould along with
15 the other six or seven bullet points that are on pages 5 and 6
16 of the opposition. Is there something else related to Mr.
17 Gould, something like you have with Mr. Adams that would
18 establish a lack of disinterestedness?

19 MR. KRUM: Let me answer, and then you'll decide.

20 THE COURT: Yeah. That's what I'm trying to pull
21 out of you.

22 MR. KRUM: So, for example, with respect to the
23 termination Mr. Cotter raised the question of Mr. Adams's
24 independence before a vote was taken, and Mr. Gould asked Mr.
25 Adams, well, can you tell us about that. And Mr. Adams got

1 mad and said in words or substance, no. And Mr. Gould said,
2 okay. That, Your Honor, is a perfect example of a failure to
3 act in the face of a known duty to act. We're not talking
4 about someone who is unfamiliar with fiduciary obligations
5 here. Mr. Gould is a corporate lawyer.

6 So we get to the -- we get to the executive
7 committee, same meeting, June 12. Ellen Cotter says, I want
8 to repopulate the executive committee, Mr. Gould, would you
9 like to be on it. His testimony, his deposition testimony was
10 that he declined because he knew that it would take a lot of
11 time. Now, if he knew that it would take a lot of time, Your
12 Honor, how is it that it didn't occur to him that this was
13 what the sisters were doing in October of 2014 when they were
14 trying to circumvent the board?

15 THE COURT: These are all on your list of bullet
16 points.

17 MR. KRUM: Okay.

18 THE COURT: What I'm trying to find out is if
19 there's anything that's not on the list of bullet points that
20 are on pages 5 and 6 of your supplemental opposition that
21 relate to Mr. Gould. Because when I made my ruling I was
22 including Mr. Gould as someone because I specifically excluded
23 Mr. Adams and the two Ms. Cotters.

24 MR. KRUM: Bear with me. I'm mentally working.

25 THE COURT: I'm watching you. I'm watching him

1 work.

2 MR. KRUM: So I don't think we had the executive
3 committee there, but I just said that.

4 So then, Your Honor, the composition of the board.
5 So Mr. Gould was not a member of the nominating committee.
6 His testimony was that, on a Friday Ellen Cotter called me and
7 asked me if she could come to my office and she and Craig
8 Tompkins came to my office and showed me Judy Coddington's resume
9 and said we were going to have a board meeting on Monday to
10 put Ms. Coddington on the board. And Bill Gould said, this isn't
11 sufficient time, I can't do my job. But he voted for her
12 nonetheless. That, Your Honor, is the same thing that happens
13 over and over and over again with Mr. Gould. That is, in the
14 face of a known duty to act he chooses not to do so. That is
15 intentional misconduct. Your Honor, you've denied the motion
16 with respect to the CEO search. That is Mr. Gould. It is Mr.
17 Gould and Mr. McEachern who are the ones who together with
18 Margaret Cotter aborted the CEO search. Literally the last
19 time they spoke to Korn Ferry was the day Ellen Cotter
20 declared her candidacy. After that what did they do? They
21 told Craig Tompkins to tell Korn Ferry to do no more work.
22 And Mr. Gould, he was the one whose name was on a press
23 release saying, Ellen Cotter was made CEO following a thorough
24 search. She was not made CEO as a result of that search. She
25 was made CEO in spite of that search.

1 THE COURT: Okay. So all of those are issues that
2 I'm aware of considered when I had previously included Mr.
3 Gould in the granting of the summary judgment related to the
4 business judgment rule. The fact that I am denying certain
5 issues related to other summary judgments does not diminish
6 the fact that the directors that I found there was not
7 evidence of a lack of disinterestedness have the protection
8 the statute provides to them.

9 Okay. So let's go back to Mr. Cotter's Motion
10 Number 3. This is related to the coach.

11 MS. LEVIN: Your Honor, this motion should be denied
12 because the hiring of High Point, that's post hoc --

13 THE COURT: It's your motion. You wanted it
14 granted.

15 MS. LEVIN: I'm sorry. You know, the Court -- I'm
16 sorry. The Court should exclude the after-acquired evidence
17 on the -- in the form of any testimony or documents relating
18 to the hiring of High Point, because the breach of fiduciary
19 duty claims, they are -- they concern what the directors did
20 and knew at the time that they decided to fire the plaintiff.
21 So we cited the Smith versus Van Gorkom case, which holds post
22 hoc data is not relevant to the decision.

23 So at the time that they made this decision they did
24 not have nor did they rely on the High Point evidence. So
25 therefore the after-acquired evidence cannot be as a matter of

1 law relevant to their decision to terminate the plaintiff.
2 That would amount to a retroactive assessment of his ability,
3 which are not at issue. And I think that that's the -- you
4 know, the --

5 THE COURT: The problem I have with that is part of
6 what your client's position has been in this case is he is
7 suitable to be acting as the CEO, and if there is information
8 that is relevant to that suitability, that's where I have the
9 problem on this. I certainly understand from a decision-
10 making process that that information was not in the possession
11 of anyone who was making the decisions at the time. But given
12 the affirmative proposition by your client that he is suitable
13 to CEO, I have concerns about granting the motion at this
14 stage.

15 MS. LEVIN: Well -- okay. So -- but with respect to
16 the decision which you can agree that they could not use that
17 evidence to show that after the fact they made the right
18 decision because of the after --

19 THE COURT: No. That's a problem if your client is
20 saying he's suitable and therefore he should be able to be
21 CEO. Because part of what he originally asked for was to make
22 them make him be CEO.

23 MS. LEVIN: All right. And here at issue I believe
24 it's the -- we're seeking to void the termination.

25 THE COURT: I know.

1 MS. LEVIN: So -- but I think that even -- and I
2 think that in that respect if you were inclined to allow it on
3 his suitability, the problem then becomes first of all the
4 hiring of consultant doesn't necessary mean that somebody is
5 unsuitable.

6 THE COURT: Absolutely. It may mean they're trying
7 to get better.

8 MS. LEVIN: Exactly. And I was thinking -- when I
9 read these facts I was thinking about the analogy. If you
10 were a professional runner and you hire a runner coach --

11 THE COURT: Coach.

12 MS. LEVIN: -- doesn't mean that you're not a good
13 runner. You may --

14 THE COURT: You want to be better.

15 MS. LEVIN: Exactly. So that was --

16 THE COURT: I understand.

17 MS. LEVIN: So and the other thing is that, you
18 know, the opposition argues, well, but it looks like in his
19 own assessment he wasn't good for it. And that, of course,
20 again doesn't follow from that. And so then we get into the
21 category of even if there's a remote relevance, Your Honor,
22 then whatever that relevance is would be substantially
23 outweighed by the unfair prejudicial effect that that would
24 cause. Because, again, his assumed thoughts, then the jury
25 could think like, well, you know, he thinks he's not qualified

1 because he hired a coach. So all in all I believe that it's
2 unfairly prejudicial.

3 Just on the point of the unclean hands defense,
4 again they are citing the Fetish, Las Vegas Fetish case. But,
5 again, the unclean hands defense requires egregious misconduct
6 and serious harm caused by it. And they haven't further
7 substantiated that. So with that being said, our position is
8 to exclude it for those reasons.

9 THE COURT: Thank you.

10 MS. LEVIN: Thank you.

11 THE COURT: Mr. Searcy --

12 MR. SEARCY: I'll address that.

13 THE COURT: -- I am inclined to deny the motion.
14 But if the evidence is admitted at trial, to admit it with a
15 limiting instruction that says that it only goes to
16 suitability.

17 MR. SEARCY: And, Your Honor, I think that we're
18 okay with that.

19 THE COURT: Okay.

20 MR. SEARCY: I just want to clarify that we can
21 certainly ask Mr. Cotter about the Alderton documents --

22 THE COURT: You ask him about it, then I'm going to
23 give the limiting instruction, and we'll probably give it five
24 times or six times, and it'll be a written instruction, so
25 it's part of it. And if the plaintiff doesn't want me to give

1 the limiting instruction because they believe that calls to
2 much attention to it, they can, of course, waive that request.

3 MR. SEARCY: Thank you, Your Honor.

4 THE COURT: Okay. So think about whether you really
5 want the limiting instruction, come up with your text for the
6 limiting instruction, and then we'll talk about it when we
7 have our final pretrial conference as to whether you think you
8 really want it.

9 That takes me to the last motion in limine by Mr.
10 Cotter, which relates to the ability of Mr. Ferrario to
11 participate at trial, also known as Motion in Limine Number 2.

12 MR. KRUM: Thank you, Your Honor. I enjoy this very
13 much, showing that perhaps I've spent too many years in the
14 corporate governance jurisprudence. Three points, and it's
15 not complicated. First, as a general rule a nominal defendant
16 is not allowed to introduce evidence and defend the merits of
17 claims against the director defendants.

18 Second, the handful of exceptions to that are
19 exceptions where it's a serious fundamental corporate interest
20 that is challenged by the derivative suit, a reorganization or
21 restructuring, an effort to appoint a receiver. None of those
22 exist here.

23 Third, if you disagree with us on all of that,
24 there's a question of unfair prejudice and waste of time.
25 And, you know, the individual defendants are represented by

1 capable counsel. They don't need a second lawyer carrying
2 their water. And for a jury to have someone who represents
3 the company asking questions that imply conclusions adverse to
4 the plaintiff is, if not unfairly prejudicial, something
5 beyond that.

6 So that's the argument in a nutshell, Your Honor.
7 If you have any questions, I'd be happy to answer them.

8 THE COURT: Nope. Motion's denied.

9 All right. So let's go to your Motion in Limine
10 Number 1 regarding advice of counsel. I forgot we need to hit
11 that one. Ms. Levin.

12 And then we're going to go to the Chief Justice
13 Steel that I'm not going to really hear, because I didn't give
14 you permission to refile.

15 MS. LEVIN: Your Honor is familiar with the share
16 options, so if I talk about the share option, I don't --

17 THE COURT: I am.

18 MS. LEVIN: Okay. Well --

19 THE COURT: And also with the drama related to the
20 production and the creation and all the stuff about the advice
21 of counsel issue.

22 MS. LEVIN: Okay. I'll just --

23 THE COURT: But I also am aware the Nevada Supreme
24 Court has told us on a business judgment issue we cannot reach
25 behind the advice of counsel except to make a determination as

1 to essentially process issues, how the attorney was hired,
2 what the scope of the retention was, and those kind of issues,
3 as opposed to the actual advice.

4 MS. LEVIN: That's true, Your Honor. And so our
5 arguments are really twofold. Number one is that Adams and
6 Kane, who were two of the three directors on the compensation
7 committee, they testified, as the Court found in its October
8 27, 2016, hearing, that they relied solely on the substance of
9 advice of counsel to determine whether the authorization
10 decision to authorize the estate to invoke the option was
11 proper. So, unlike in Wynn or in Comverge, on which the
12 defendants rely, they did not rely on anything else. So if
13 they are asked at trial to explain why they authorized the
14 option, they must rely on that legal advice.

15 So the second point is that the defendants waived
16 the attorney-client privilege by partially disclosing
17 attorney-client privileged information. Now, they're saying
18 -- or RDI says in the opposition that individual directors
19 cannot waive the privilege.

20 THE COURT: That's the Jacobs versus Sands case.

21 MS. LEVIN: Exact, Your Honor. And I agree with
22 that. But, of course, RDI can only act through its officers
23 and directors.

24 THE COURT: That's the Jacobs versus Sands case.

25 MS. LEVIN: And the current officer -- and I think

1 in particular if you look at the Exhibit 4 that we attached
2 to our motion, is that that email was produced by Ellen
3 Cotter, who is a current CEO and is an officer and director,
4 and she --

5 THE COURT: I understand.

6 MS. LEVIN: So, in other words --

7 THE COURT: And then Mr. Ferrario clawed it back.

8 MS. LEVIN: Right. So she produced it, and so
9 there's a Supreme Court case that says, "The power to waive
10 the corporate attorney-client privilege rests with the
11 corporation's management and is usually -- and is normally
12 exercised by its officers and directors." And that's what
13 happened here.

14 So I think especially Exhibit 4, but even Exhibit 2
15 and 3, the 2 and 3 they raise the legal issues. 2 and 3
16 identify the legal issues of whether there was a reason why
17 Ellen Cotter could not exercise the option and whether enough
18 -- whether the trust documents did not pour over -- the share
19 option didn't pour over into the trust. But Exhibit 4
20 specifically seeks legal advice from the company attorney and
21 as to the legal rights of the estate to exercise the option in
22 light of the proxy language. So that is -- under our statute
23 is an attorney-client communication for the purpose of
24 obtaining legal advice. So they partially disclosed that, so
25 we believe there's a waiver issue. And under Wardleigh you

1 cannot use the attorney privilege both as a shield and a
2 sword, which is what they're now doing, is because what
3 they're going to say is, well, we partially disclosed but you
4 cannot find out what it was. But even the very --

5 THE COURT: But that's the Nevada Supreme Court
6 who's made that decision, not the rest of us. They were very
7 clear that we're not allowed to get behind that.

8 MS. LEVIN: Correct. But one thing that the Wynn
9 decision did not decide was the waiver issue. And that was in
10 Footnote 3 of the decision.

11 THE COURT: I made that decision separately after
12 that came back. But that's a case by case, and I haven't made
13 that decision in this case. In fact, my belief is you guys
14 have a writ pending on this issue still. Right?

15 MR. KRUM: I think the writ pending is on a
16 different privilege issue, Your Honor.

17 THE COURT: Okay.

18 MS. HENDRICKS: Your Honor, the writ relating to
19 this issue was filed by RDI, and the Supreme Court actually
20 came back and said the facts were analogous to Wynn and it
21 needed to make a decision, and that was shortly after you did
22 make the decision when we were back before you on it.

23 THE COURT: Yeah. We had a hearing.

24 MS. HENDRICKS: And we had the supplemental
25 briefing.

1 THE COURT: Yep. Okay. So anything else on this
2 one?

3 MS. LEVIN: Only -- the only thing is that the
4 partially disclosed privileged emails themselves show that the
5 board had information that would cause reliance on advice to
6 be improper. So that would --

7 THE COURT: Okay. So your motion's denied. Come up
8 here. I'm going to give you these. These are your I believe
9 documents you actually want sealed. Since I granted your
10 motion, it was on the calendar today, hopefully you can work
11 out with the Clerk's Office so they will actually take the
12 sealed documents and put them so they're part of the record in
13 some way.

14 MS. LEVIN: And I brought them with me, too.

15 THE COURT: Yeah. Good luck. You've got to do it
16 at the counter.

17 MS. LEVIN: Okay. Thank you.

18 THE COURT: Okay. So I am declining to hear again
19 the motion in limine on Chief Justice Steel. I've previously
20 made a ruling on that. I've reviewed your brief, and there's
21 nothing in it that causes me to change my mind.

22 I have already granted your motions to seal and
23 redact. It was on calendar for today.

24 And now we need to set our final pretrial
25 conference. I usually do it the week before.

1 MR. KRUM: The week before is fine, Your Honor.
2 (Pause in the proceedings)
3 THE COURT: The week before is fine?
4 MR. KRUM: The week before is fine, Your Honor.
5 THE COURT: What day are you guys arguing in the
6 Supreme Court?
7 MR. TAYBACK: That's the 3rd.
8 THE COURT: 3rd. So do you want to come in on --
9 MR. TAYBACK: 4th?
10 THE CLERK: [Inaudible].
11 THE COURT: No, I'm not seeing them on January 2,
12 you're seeing them on January 2.
13 How about on January 5 at 3:00 o'clock?
14 MR. TAYBACK: That's good. Thank you.
15 MR. KRUM: Perfect.
16 MR. FERRARIO: Thank you, Judge.
17 THE COURT: That will be your final pretrial
18 conference. At your final pretrial conference we're not going
19 to bring exhibits, because you're already going to deal with
20 that. But you are going to bring any jury instructions,
21 you're going to exchange your draft jury instructions. If you
22 have limiting instructions you think are appropriate, try and
23 have those, as well. And we're also going to deal with any
24 exhibits that you want in a notebook for the jury. The only
25 reason I suggest that is sometimes documents that we show on

1 screens aren't easily able to be seen by a juror. There's
2 contract documents and things you may want. If there are
3 selected items you want to have in a jury notebook, it will be
4 a single jury notebook. It will be not more than 3 inches.
5 So whatever we put in it has to fit in the 3 inches. And so
6 if you have things you think you want included in that, we'll
7 talk about that. And you're going to -- I will make final
8 decisions on voir dire questions at that time. I encourage
9 you to exchange them a week ahead of time.

10 MR. KRUM: Your Honor, with respect to exhibits we
11 have a date this week of Wednesday or Thursday for our exhibit
12 list. I think in view of today's developments it would be a
13 good idea to push that back to next week.

14 THE COURT: You guys need to get working on it.

15 MR. KRUM: No, we're working on it.

16 THE COURT: It takes a lot longer than you think it
17 does.

18 All right. Anything else that I missed?

19 MR. FERRARIO: There may be some utility to that,
20 Mark, in light of the rulings of the Court today, because the
21 complexion of the case has changed.

22 MR. KRUM: Well, that's -- we're working on it. We
23 understand that, Your Honor. So may we have until Wednesday
24 of next week you think, Mark?

25 MR. TAYBACK: Yeah, that's fine.

1 THE COURT: I still need to see representatives from
2 those parties who remain in the case at the calendar call on
3 December 18th. If you are out of town, I do not do call-ins
4 for calendar calls, Mr. Krum, so just make sure Mr. Morris and
5 Ms. Levin know whatever it is they need to say.

6 I am going to be asking you whether given the
7 rulings I made today it has changed the estimate that you
8 provided to me through Ms. Hendricks on December 4th as the
9 amount of time for trial. Because I need to negotiate for
10 space, and knowing the time that I need is important for me in
11 my space negotiations.

12 MR. RHOW: Your Honor, sorry. One point of
13 clarification as to Mr. Gould specifically. He is out of the
14 case entirely?

15 THE COURT: Well, I granted the motion on the
16 business judgment for him. My understanding is that is the
17 only way that you would be involved, because there are no
18 direct breach of contract claims against you. If there were
19 other types of claims against you that were not protected by
20 the business judgment rule, you might not be out. But I
21 didn't see that in the briefing. But I don't know your case
22 as well as you do.

23 MR. RHOW: Assuming that's the case, I just want to
24 make sure that no one's going to sanction me if I don't show
25 up.

1 THE COURT: Do you think you have any remaining
2 claims against Mr. Gould given my ruling today?

3 MR. KRUM: Your Honor, probably not. But I'll go
4 back through it.

5 THE COURT: If you could communicate if you think
6 there are any, and then I'll have to handle that on a
7 supplemental motion practice.

8 MR. RHOW: Understood, Your Honor.

9 THE COURT: Okay. So the people who I anticipate
10 will be here only in the capacity as witnesses would be --
11 okay, I've got to go back to this list -- Kane, McEachern,
12 Gould, Coddling, Wrotniak. That's all of them. So the people
13 who remain parties are Cotter, Cotter, Adams, and then Mr.
14 Cotter.

15 MR. TAYBACK: Yes, Your Honor. I understand that.

16 THE COURT: All right. So see you on the 18th.

17 MR. TAYBACK: Thank you, Your Honor.

18 MR. KRUM: Thank you.

19 MR. EDWARDS: Your Honor --

20 THE COURT: Yes, Jim.

21 MR. EDWARDS: -- on the 2nd is local counsel going
22 to be here for the exhibits? Do you want local counsel here?

23 THE COURT: Counsel does not need to be here. They
24 can send paralegals. So local counsel does not need to come
25 sit through it if they don't want to.

1 MR. EDWARDS: Okay.

2 THE COURT: But it may be helpful if local counsel
3 is going to be intimately involved in the process of doing it
4 for you to have someone here. But I leave that to work out
5 with your people.

6 Anything else?

7 MS. HENDRICKS: Your Honor, on the exhibit list did
8 we get an extra week, then, so we kind of work through these
9 issues?

10 THE COURT: I'm not involved in the exhibit list
11 issue. That's you guys on 2.67. I'm out of that.

12 MR. FERRARIO: Thank you, Your Honor.

13 THE PROCEEDINGS CONCLUDED AT 12:00 NOON

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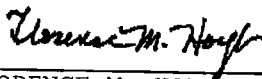
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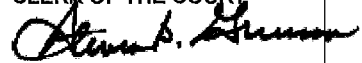
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

MARGARET COTTER, *et al.*,
Defendants.

AND

READING INTERNATIONAL, INC., a Nevada
corporation,

Nominal Defendant.

Case No.: A-15-719860-B
Dept. No.: XI

Case No.: P-14-082942-E
Dept. No.: XI

Related and Coordinated Cases

BUSINESS COURT

**THE INDIVIDUAL DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
MOTION FOR RECONSIDERATION OR
CLARIFICATION OF RULING ON
MOTIONS FOR SUMMARY JUDGMENT
NOS. 1, 2, AND 3**

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: December 28, 2017
Time of Hearing: 9:00 a.m.

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1 instances” involving “new issues of fact or law.” Neither are present here; Plaintiff’s Motion for
2 Reconsideration admittedly reargues what was already in evidence before the Court.

3 Even if the Court were inclined to revisit the merits of its decision (which is both
4 unnecessary and unwarranted), it is plain that its ruling was not “clearly erroneous,” as is
5 required for reversal. Contrary to Plaintiff’s objections of “surprise,” the Individual Defendants’
6 Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence covered all
7 claims, and their separate summary judgment motions—addressing particular issues—covered
8 all decisions that Plaintiff has identified as independent breaches. Of course, as both the Court
9 and Plaintiff’s own expert, Myron T. Steele, have noted, Plaintiff has to establish that RDI’s
10 directors were either interested or not independent *before* he can proceed on the merits of any of
11 his fiduciary duty claims against them.² As the record makes clear and the Court correctly
12 found, Plaintiff has not met—and cannot meet—this burden with respect to Directors Wrotniak,
13 Coddling, McEachern, and Kane. Plaintiff’s Motion for Reconsideration, which attempts to skip
14 to the “entire fairness” of certain transactions, entirely ignores this necessary first step. For the
15 reasons the Court previously found (which Plaintiff’s motion does nothing to disturb), its
16 December 11, 2017 ruling with respect to Directors Wrotniak, Coddling, McEachern, and Kane
17 was correct and should not be reconsidered.

18 ARGUMENT

19 I. PLAINTIFF’S MOTION FOR RECONSIDERATION IS PROCEDURALLY 20 IMPROPER

21 Plaintiff’s Motion for Reconsideration is procedurally defective. The Rules of Practice
22 for the Eighth Judicial District Court state, in relevant part:

23 No motions once heard and disposed of may be renewed in the same cause, nor
24 may the same matters therein embraced be reheard, *unless by leave of the court*
granted upon motion thereof, after notice of such motion to the adverse parties.

25
26 ² The Individual Defendants recognize that Steele’s testimony at trial is limited to what
27 a reasonable director would do, and that he will not be permitted to offer evidence as to the
28 requirements or standards of practice under Delaware law. Still, Plaintiff cannot ignore for
purposes of this motion the opinions proffered by his own witness, as reasonably considered and
applied by this Court.

1 EDCR 2.24(a) (emphasis added). Plaintiff did not comply with this Rule prior to filing his
2 Motion for Reconsideration; rather than filing a motion for leave with the Court and attaching a
3 copy of his proposed Motion for Reconsideration as an exhibit (as contemplated by the Rule),
4 Plaintiff filed his underlying motion directly with the Court. This was improper.

5 The purpose of EDCR 2.24 is to assist the Court in controlling the influx of matters to
6 which it must attend in the normal course of motion practice, such as the time required to
7 properly review the parties' filings or hearing arguments on the merits of the matter before it and
8 issuing an ultimate decision on the merits. These issues of judicial economy inherent in
9 EDCR 2.24(a) are also emphasized in subsection (c) of the Rule, which provides that "[i]f a
10 motion for rehearing is granted, the court may make a final disposition of the cause without re-
11 argument or resubmission or may make other such orders as are deemed appropriate under the
12 circumstances of the particular case." EDCR 2.24(c).

13 Plaintiff's filing of his Motion for Reconsideration without first requesting and then
14 receiving leave of this Court to do so has initially deprived the Court of its duty and ability to
15 make the threshold determination of whether to grant leave in the first instance. Moreover,
16 Plaintiff's filing without leave has required the Individual Defendants' counsel to spend time
17 formally responding to and opposing Plaintiff's Motion for Reconsideration, which they
18 otherwise may not have been required to do if Plaintiff had followed the clear mandate of
19 seeking leave of the Court prior to filing his motion. In light of this clear procedural defect,
20 Plaintiff's Motion for Reconsideration should be stricken.

21 **II. PLAINTIFF FAILS TO MEET THE NEVADA SUPREME COURT'S**
22 **STANDARD FOR RECONSIDERATION**

23 **A. Plaintiff's Motion for Reconsideration Revisits the Same Facts and Same**
24 **Legal Arguments Previously Raised**

25 Even considered on its merits, Plaintiff's Motion for Reconsideration fails to meet the
26 strict standard set by the Nevada Supreme Court for reconsideration of a court's judgment. A
27 motion for reconsideration is not a "do over." See *Merozoite v. Thorpe*, 52 F.3d 252, 255 (9th
28 Cir. 1995) ("Since [Plaintiff's] motion merely reiterated the arguments that he had already
presented to the district court, the motion was properly denied."). Rather, the Nevada Supreme

1 Court has made clear that motions for reconsideration are to be granted “[o]nly in very rare
2 instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling
3 already reached.” *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)
4 (emphasis added) (concluding that, because the “motion for rehearing raised no new issues of
5 law and made reference to no new or additional facts, . . . the motion was superfluous and, in our
6 view, it was an abuse of discretion for the district court to entertain it”). In Nevada, a district
7 court may reconsider a previously-decided issue only if “substantially different evidence is
8 subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Constr. Ass’n of*
9 *S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

10 Here, there is no new issue of fact or law raised in Plaintiff’s Motion for Reconsideration
11 that might generate a contrary ruling. This is not one of those “rare instances” in which
12 reconsideration is appropriate, and to do so would be an abuse of discretion, negating the
13 overriding policy in favor of finality of judgments. Instead, Plaintiff’s motion is nothing more
14 than an attempt to re-argue what was already in evidence before the Court during the summary
15 judgment phase. Plaintiff’s re-hash includes:

- 16 • An extended section focused primarily on Director Edward Kane and the RDI
17 Board’s months-long process in evaluating Plaintiff’s deficient performance as CEO
18 of RDI, which ultimately culminated in Plaintiff’s termination. (*See* Mot. for Recons.
19 at 15-21.) Plaintiff’s attack cites the exact same “evidence” and repeats—almost
20 verbatim—the same arguments that appear in Plaintiff’s Motion for Partial Summary
21 Judgment (pp. 5-8, 16-21), Plaintiff’s Opposition to the Individual Defendants’
22 Motion for Partial Summary Judgment (No. 1) re: Plaintiff’s Termination and
23 Reinstatement Claims (pp. 4-8), and Plaintiff’s Reply in Support of His Motion for
24 Partial Summary Judgment (pp. 3-7).
- 25 • The argument that “the acts and omissions of the individual director defendants must
26 be viewed collectively, not in isolation.” (Mot. for Recons. at 14-15.) In making this
27 legal point, Plaintiff cites the same four cases in exactly the same order as in his
28 Opposition to the Individual Defendants’ Motion for Partial Summary Judgment
(No. 5) re: the Appointment of Ellen Cotter as CEO (pp. 11-12).
- An attack on Director Judy Codding, who—based on an assertion contained in a
declaration prepared by Plaintiff—is alleged to have voted for Ellen Cotter as
permanent CEO based on her purported “view that RDI was a ‘family business’ of
which only a Cotter should be CEO.” (Mot. for Recons. at 22 (citing JJC Decl.
¶ 24).) Plaintiff previously made this same argument citing the same evidence in his
Opposition to the Individual Defendants’ Motion for Partial Summary Judgment
(No. 2) re: Director Independence (p. 7).

- 1 • A section focused on the purportedly “aborted CEO search.” (Mot. for Recons.
2 at 22.) Here, Plaintiff does not even pretend to introduce “substantially different
3 evidence,” as required. Instead, he “respectfully refers the Court to his prior briefs
4 and the evidence described therein and proffered therewith.” (*Id.* (citations omitted).)

5 A party is not entitled to reconsideration simply because “he or she is unhappy with the
6 judgment.” *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001). A motion for
7 reconsideration is not the place for “the plaintiff to ‘reload and shoot again,’” *Butler v. Sentry*
8 *Ins. Mut. Co.*, 640 F. Supp. 806, 812 (N.D. Ill. 1986), and it cannot “be utilized as a vehicle to
9 reargue matters considered and decided in the court’s initial opinion.” *Matter of Ross*, 99 Nev.
10 657, 659, 668 P.2d 1089, 1091 (1983) (denying rehearing). Plaintiff’s arguments are admittedly
11 and uncontrovertibly identical to those raised during motion practice and the various summary
12 judgment hearings before the Court. Nothing new has been added; no intervening precedent has
13 been identified nor any “substantially different” facts adduced. The Court need not proceed any
14 further. Reconsideration is plainly unwarranted as a matter of law. *See Bundorf v. Jewell*, 142
15 F. Supp. 3d 1133, 1137 (D. Nev. 2015) (denying motion for reconsideration because it
16 “primarily rehashes the same arguments that Federal Defendants raised—or could have raised—
17 in the earlier summary judgment briefing”).

18 **B. Plaintiff’s Motion for Reconsideration Is Without Substantive Merit**

19 Even if the Court were inclined to revisit the substance of its ruling granting judgment in
20 favor of Directors Michael Wrotniak, Judy Coddington, Douglas McEachern, and Edward Kane on
21 all claims asserted against them in light of their disinterestedness and independence, it is plain
22 that the Court’s December 11, 2017 ruling was correct a matter of law. Plaintiff’s arguments to
23 the contrary are legally baseless and factually unsupportable.

24 1. The Court’s Decision Was Procedurally Proper and Did Not Overlook
25 Evidence of Any Conduct, Acts, or Omissions

26 Plaintiff first contends that the Court’s ruling as to Directors Wrotniak, Coddington,
27 McEachern, and Kane should be reconsidered because it did not give him “proper notice and
28 adequate time to respond,” since the Individual Defendants “moved for partial summary
29 judgment only on specific *issues*,” not entire “*claims*.” (Mot. for Recons. at 4 (emphasis in

original).) Plaintiff further asserts that the Court's decision was somehow "*sua sponte*," and that the Court failed to consider "additional issues not addressed in the MSJs," such as "materially misleading and erroneous board materials published in public disclosures *and* process failures." (*Id.* at 9-11 (emphasis in original).) None of Plaintiff's assertions withstand scrutiny.

First, Plaintiff's attempted distinction between "claims" and "specific issues" is meritless. Plaintiff's Second Amended Complaint generically pleaded three causes of action against Directors Wrotniak, Coddington, McEachern, and Kane: (1) breach of the fiduciary duty of care; (2) breach of the fiduciary duty of loyalty; and (3) breach of the fiduciary duty of candor. (*See* Second Am. Compl. ("SAC") ¶¶ 173-192.) Due to Plaintiff's vague and obtuse pleading, the Individual Defendants consistently sought clarity from Plaintiff as to what specific RDI Board decisions he claims are actionable breaches as compared to what activities he considers to be mere evidence of entrenchment or misconduct. As a result, at the first summary judgment hearing held on October 7, 2016, the Court directed Plaintiff's counsel to "give me more information" following the completion of discovery as to the specific breaches of fiduciary duty Plaintiff is alleging. (Ex. A to the Decl. of Noah Helpert in Supp. of Ind. Defs.' Suppl. Mots. for Summ. J. (10/7/16 Hr'g Tr.) at 84:16-85:3.)

Plaintiff's counsel finally complied with this directive in opposing the Individual Defendants' Supplemental Motions for Summary Judgment, in which he set forth six "matters" that he claimed were "independently entailing or constituting breaches of fiduciary duty": (1) the threat to terminate Plaintiff "if he did not resolve [the Cotter family] trust disputes"; (2) Plaintiff's actual termination; (3) the authorization of the exercise of the 100,000 share option; (4) the permanent CEO search, which resulted in Ellen Cotter's selection; (5) the decision to hire Margaret Cotter as Executive Vice President, Real Estate Development-New York; and (6) the Board's response to the indications of interest presented by Patton Vision. (*See, e.g.,* Pl.'s Opp'n to Ind. Defs.' Suppl. Mot. for Summ. J. Nos. 1 & 2 at 5-6.) Not surprisingly, the Individual Defendants moved for summary judgment on all six of these purportedly-actionable "breaches." Contrary to Plaintiff's baseless assertions (Mot. for Recons. at 8), there was therefore no disconnect between the "*claims* for breach of fiduciary duty" against

1 the Individual Defendants in the Second Amended Complaint and the “issues” covered in their
2 motions for summary judgment.

3 Second, Plaintiff was also clearly on notice that the Individual Defendants were moving
4 for summary judgment on all claims asserted against Directors Wrotniak, Coddington, McEachern,
5 and Kane. There was no surprise “*sua sponte*” ruling by the Court, nor anything procedurally
6 improper about its decision. Plaintiff conspicuously avoids that (i) the Individual Defendants’
7 Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence covered *all*
8 *claims*, and (ii) Plaintiff admittedly used the *same evidence* to question the disinterestedness and
9 independence of Directors Wrotniak, Coddington, McEachern, and Kane in every transaction or
10 cause of action at issue. (*See, e.g.*, Pl.’s Opp’n to Ind. Defs.’ Mot. for Partial Summ. J. (No. 2)
11 re: Director Independence at 1-10.)

12 Plaintiff has advocated, and the Court has accepted,³ a legal framework governing
13 Plaintiff’s Nevada law claims under which, “with respect to the challenged actions the individual
14 director defendants [can] . . . invok[e] the business judgment rule” if “the majority of those
15 making the challenged decisions were independent generally and independent specifically with
16 respect to the challenged decisions.” (*Id.* at 1.) Plaintiff’s expert, Myron T. Steele, has agreed,
17 emphasizing in his deposition that any decision by “a majority of independent, disinterested
18 directors . . . wouldn’t raise any issues under Delaware law.” (Decl. of Noah Helpert in Supp. of
19 Ind. Defs.’ Opp’n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 140:15-141:12.) As Steele
20 testified, Delaware has a “two-step analysis”; “[i]n the first step, if there are no facts sufficiently
21 pleaded to suggest a lack of independence and interest – in – interestedness, then you get – don’t

22 ³ For the reasons previously set forth in the Individual Defendants’ summary judgment
23 briefing relating to Plaintiff’s termination and reinstatement claims, the Individual Defendants
24 continue to disagree that this “independence-based” framework involving the potential
25 application of Delaware’s “entire fairness” test governs the particular Nevada law fiduciary duty
26 claims asserted by Plaintiff or is a pre-condition to the application of the Nevada business
27 judgment rule presumption. However, the Individual Defendants accept this framework for the
28 purposes of responding to Plaintiff’s Motion for Reconsideration only. The Individual
Defendants further reserve their rights with respect to the Court’s legal ruling as to whether a
genuine issue of material fact exists as a matter of law with the independence and/or
disinterestedness of Directors Guy Adams, Ellen Cotter, and Margaret Cotter, and as well as the
continued viability of any claims against them.

1 go to the next line of inquiry and reach any decision about whether there was any breach of
2 fiduciary duty because [the directors] get the benefit of the business judgment rule.” (*Id.*
3 at 150:6-151:8.) This is why, in his Expert Report, Steele emphasizes that the predicate inquiry
4 is whether “an independent and disinterested majority of directors” at RDI took an action before
5 he opines whether it could potentially constitute a breach of the Individual Defendants’ “duty of
6 loyalty to the Company” on the merits. (Decl. of Noah Helpen in Supp. of Renewed MIL re:
7 Myron Steele, Ex. D (Initial Steele Expert Report) at 3-4.)

8 Thus, while Plaintiff in his Motion for Reconsideration now identifies thirteen “matters”
9 of purported individual misconduct that he claims rebut the business judgment presumption (*see*
10 Mot. for Recons. at 12-13), he is putting the proverbial cart before the horse. The Court
11 correctly recognized this problem at the December 11, 2017 hearing, pointing out to Plaintiff’s
12 counsel that these are really “one of your claims of breach of fiduciary duty,” and that Plaintiff—
13 despite ample opportunity—still was not providing any “evidence of disinterestness as opposed
14 to allegations of [conduct allegedly constituting] breach of fiduciary duty.” (Ex. 3 (12/11/17
15 Hr’g Tr.) to Pl.’s Mot. for Recons. at 36:10-37:3; *see also id.* at 33:2-10, 33:13-17 (noting that, “I
16 looked through this whole pile of about 2 [feet] of paper last night trying to find it, and the only
17 [director] I could find specific allegations of a lack of disinterestedness, besides the two Cotter
18 sisters, was Mr. Adams”).)

19 Before Plaintiff can question the substantive merits of these thirteen RDI Board decisions
20 and proceed to trial on some kind of generalized usurpation and entrenchment theory against the
21 various Individual Defendants,⁴ he must first show that a majority of the directors involved in
22 these decisions were either interested or not independent—Plaintiff cannot simply skip this “first
23 step” in the legal analysis. *See Goldman v. Pogo.com, Inc.*, No. Civ. A. 18532-NC, 2002 WL
24 1358760, at *2 (Del. Ch. June 14, 2002) (“Only upon a showing by a challenger that raises a
25 reasonable doubt as to the independence and/or disinterestedness of a majority of a company’s
26

27 ⁴ Given that two of the directors who he claims to be guilty of usurpation and
28 entrenchment are the controlling stockholders of the Company, it remains unclear to Defendants
who they usurped control from, and who they were attempting to entrench themselves against.

1 directors who approved the challenged transaction will the presumption of director fealty which
2 lies at the core of the business judgment rule be rebutted.”). To do so otherwise, as Plaintiff
3 advocates, would turn Nevada’s strong business judgment rule on its head, forcing defendants to
4 prove fairness on the merits before the business judgment presumption could be applied. *See*
5 *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006); NRS
6 78.138(3), (7). Even Plaintiff’s expert, Myron Steele, has agreed. At his deposition, he
7 conceded that “two independent, objective directors could disagree” on the proper process for a
8 board decision, and admitted that “[t]he mere fact that people have voted in a certain way
9 certainly is not dispositive on th[e] issue of breach of fiduciary duty.” (Decl. of Noah Helpen in
10 Supp. of Ind. Defs.’ Opp’n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 160:14-161:2.)

11 Ultimately, what Plaintiff calls “intentional misconduct” is merely a series of RDI Board
12 decisions, including and post-dating his termination, with which he disagrees. Standing alone,
13 these decisions are not themselves evidence of any breach of fiduciary duty, as the Court and
14 former Justice Steele have noted. To proceed to trial on fiduciary duty claims arising from these
15 transactions against Directors Wrotniak, Coddington, McEachern, and Kane, Plaintiff must, at a
16 minimum, first show that these directors were either interested in, or not independent with
17 respect to, each transaction alleged to be a breach of fiduciary duty. The Court correctly found at
18 the December 11, 2017 hearing that Plaintiff did not meet the required interestedness/non-
19 independence showing with respect to these four Defendants, and Plaintiff’s re-hash of his
20 previous arguments provides no basis to revisit that considered decision. Plaintiff’s claim that
21 the Court “did not adequately consider” purported “intentional misconduct by directors” (Mot.
22 for Recons. at 5) is therefore baseless, and his Motion for Reconsideration should be denied.⁵

23
24 ⁵ Putting aside that Nevada law applies here, the Delaware Supreme Court has noted
25 that “Delaware courts have often decided director independence as a matter of law at the
26 summary judgment stage,” and the Court’s choice to do so on December 11, 2017 certainly was
27 not an outlier. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *In re*
28 *Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) and *In re Gaylord*
Container Corp. S’holders Litig., 753 A.2d 462, 465 (Del. Ch. 2000)); *see also SEPTA v.*
Volgenau, C.A. No. 6354-VCN, 2013 WL 4009193, at *12-21 (Del. Ch. Aug. 5, 2013) (holding,
on summary judgment, that directors on the special committee were disinterested and
independent).

1 2. The Court Correctly Determined That Plaintiff Did Not Raise a Genuine
2 Issue of Material Fact as to the Disinterestedness or Independence of
3 Directors Wrotniak, Coddington, McEachern, and Kane

4 Even if the Court were to revisit its decision with respect to the disinterestedness or
5 independence of Directors Wrotniak, Coddington, McEachern, and Kane, it is clear that the Court's
6 December 11, 2017 ruling was correct as a matter of law, and certainly not "clearly erroneous,"
7 as required by the Nevada Supreme Court for reversal. Plaintiff's Motion for Reconsideration
8 provides no evidence—let alone "substantially different" evidence—to the contrary.

9 None of these four RDI directors were "interested" in *any* of the transactions placed at
10 issue by Plaintiff. In Nevada, "[n]o issue of self-interest exists where directors did not stand on
11 both sides of the transaction or receive any personal financial benefit." *La. Mun. Police Emps.*
12 *Ret. Sys. v. Wynn*, No. 2:12-cv-509 JCM, 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014)
13 (applying Nevada law); *see also* NRS 78.140(1)(a) (defining "interested director"); *Shoen*, 122
14 Nev. at 639, 137 P.3d at 1183 ("to show interestedness" in the context of analyzing futility of
15 demand, the board member must be "materially affected, either to [their] benefit or detriment, by
16 a decision of the board, in a manner not shared by the corporation and the stockholders"). Here,
17 there are no allegations, let alone evidence, that Directors Wrotniak, Coddington, McEachern, or
18 Kane stood on both sides of any challenged transaction or received any personal financial benefit
19 as the result of any decision by the RDI Board put at issue by Plaintiff. (*See* Mot. for Recons.
20 at 12-13 (listing thirteen transactions, none of which involved financial benefits accruing to these
21 four directors).) Accordingly, these directors are disinterested as a matter of law.

22 Instead, the only possible avenue for Plaintiff to challenge the decisions made by
23 Directors Wrotniak, Coddington, McEachern, and Kane is through a lack of independence. This is a
24 difficult task. "[T]here is a presumption that directors are independent," *In re MFW S'holders*
25 *Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), *aff'd sub nom.*, *Kahn v. M & F Worldwide*, 88 A.2d
26 635 (Del. 2014), and "even proof of majority ownership of a company does not strip the directors
27 of the presumptions of independence, and that their acts have been taken in good faith and in the
28 best interests of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984). Plaintiff
"has the burden" to show "particularized facts that create a reasonable doubt to rebut the

1 presumption” that Directors Wrotniak, Coddington, McEachern, and Kane were independent of
2 Ellen and Margaret Cotter. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845
3 A.2d 1040, 1050 (Del. 2004). This requires that he introduce facts showing that these four non-
4 Cotter directors are so “beholden” to Ellen and Margaret Cotter “or so under their influence that
5 their discretion would be sterilized.” *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Shoen*,
6 122 Nev. at 639, 137 P.3d at 1183 (same); *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 219, 252
7 P.3d 681, 698 (2011) (same).⁶ To raise a genuine issue of fact as to independence, Plaintiff
8 needs “particularized” facts showing that each of these directors “would be more willing to risk
9 his or her reputation than risk the relationship with” Ellen or Margaret Cotter. *Teamsters*
10 *Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59 (Del. Ch. 2015).

11 Plaintiff’s case is nothing more than a recitation of what the directors allegedly did,
12 coupled with his assertion that they could not possibly have done what they allegedly did if they
13 were independent, and, ergo, that they were not independent. The “evidence” submitted by
14 Plaintiff in his summary judgment papers and with his Motion for Reconsideration falls far short
15 of this stringent test to show lack of “independence” with respect to Directors Wrotniak,
16 Coddington, McEachern, and Kane.

17 (a) Michael Wrotniak

18 Plaintiff’s Motion for Reconsideration offers no new evidence or argument challenging
19 the independence of Director Michael Wrotniak. As established in the Individual Defendants’
20 prior briefing (*see* Ind. Defs.’ Mot. for Partial Summ. J. (No. 2) re: Director Independence at 21-
21 22; Ind. Defs.’ Reply in Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 8-
22 9), Wrotniak was clearly independent of Margaret and Ellen Cotter as a matter of law. The
23 alleged “close friendship” of which Plaintiff complains is actually between Margaret Cotter and
24 Wrotniak’s wife—not Wrotniak himself. (SAC ¶¶ 131-133.) In fact, the undisputed evidence
25 instead indicates that Margaret Cotter did not have a substantial “ongoing relationship” with

26 ⁶ The Nevada Supreme Court has yet to make clear whether the “beholden” standard for
27 independence applies outside of the demand futility context. Nevada statute evaluates
28 independence solely on whether a director stands on both sides of a transaction. *See* NRS
78.140(1)(a).

1 Wrotniak; she would see him about “once a year” prior to his joining the RDI Board, and their
2 communications were mainly limited to “email” and focused on the topic of “show tickets.”
3 (HD#2 Ex. 6 (5/13/16 M. Cotter Dep.) at 314:10-327:18.)⁷

4 “Allegations of mere personal friendship or a mere outside business relationship, standing
5 alone, are insufficient to raise a reasonable doubt about a director’s independence.” *Beam*, 845
6 A.2d at 1050. Plaintiff’s allegations and evidence vis-à-vis Wrotniak fall well short of the kind
7 of “thick as blood relations” that could possibly undermine Wrotniak’s presumptive
8 independence. *See In re MFW S’holders Litig.*, 67 A.3d at 509 n.37 (no justified concerns
9 regarding independence where the parties “occasionally had dinner over the years, go to some of
10 the same parties and gatherings annually, and call themselves ‘friends’”); *Beam*, 845 A.2d
11 at 1051 (“Allegations that Stewart and the other directors moved in the same social circles,
12 attended the same weddings, developed business relationships before joining the board, and
13 described each other as ‘friends,’ even when coupled with Stewart’s 94% voting power, are
14 insufficient, without more, to rebut the presumption of independence.”); *La. Mun. Police Emps.’*
15 *Ret. Sys.*, 2016 WL 3878228, at *6-7 (applying Nevada law and finding that a 23-year friendship
16 with dominant stockholder, coupled with political contributions, threat against an opponent in an
17 election, and a million dollar charitable contribution did not disturb the presumption of
18 independence).

19 Similarly, the Cotter sisters’ participation in the proposal of Wrotniak as a nominee to the
20 RDI Board is irrelevant as a matter of law, and any argument to the contrary “has consistently
21 been rejected” by courts. *Andreae v. Andreae*, Civ. A. No. 11,905, 1992 Del. Ch. LEXIS 44,
22 at *13-14 (Del. Ch. Mar. 3, 1992) (also noting that “the relevant inquiry is not how the director
23 got his position, but rather how he comports himself in that position”); *In re W. Nat’l Corp.*
24 *S’holders Litig.*, No. 15927, 2000 WL 710192, at *16 (Del. Ch. May 22, 2000) (prior

26 ⁷ In order to minimize the attachment of redundant paper, “HD#2” refers to exhibits
27 attached to the Declaration of Noah Helpert in Support of the Individual Defendants’ Motion for
28 Partial Summary Judgment (No. 2) re: the Issue of Director Independence, while “HD#1” refers
to exhibits attached to the Declaration of Noah Helpert in Support of the Individual Defendants’

1 relationship with, and nomination by, a significant or controlling shareholder “merely
2 establishes” that board member was “known and trusted,” not that director was “beholden”). In
3 light of the actual facts, the Court’s decision finding that Director Wrotniak was disinterested
4 and independent, and granting judgment in his favor on all claims, was not clearly erroneous.

5 (b) Judy Coddington

6 The only “evidence” of Director Judy Coddington’s purported lack of independence offered
7 by Plaintiff in his Motion for Reconsideration comes from his previously-submitted declaration,
8 in which he claims that Coddington once told him around the time of her appointment that “only a
9 Cotter should be CEO” of RDI. (Mot. for Recons. at 22 (citing JJC Decl. ¶ 24).) This argument
10 was already raised and refuted at the summary judgment stage. (*See* Ind. Defs.’ Mot. for Partial
11 Summ. J. (No. 2) re: Director Independence at 20 & nn.4-5.)

12 It is well established that a self-serving affidavit from a party will not defeat a summary
13 judgment motion. *See Clauson v. Lloyd*, 103 Nev. 432, 434-35, 743 P.2d 631, 633 (1987);
14 *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 939 (7th Cir. 1997) (plaintiff’s own
15 uncorroborated testimony is insufficient to defeat a motion for summary judgment); *Dupont v.*
16 *United States*, 663 F. Supp. 2d 961, 966 n.13 (D. Haw. 2009) (“uncorroborated allegations and
17 ‘self-serving testimony’” do not “create a genuine issue of material fact”). Moreover, the
18 purported statement by Coddington identified in Plaintiff’s declaration is hearsay, which cannot be
19 considered on a motion for summary judgment. *See Henry v. Nanticoke Surgical Assocs., P.A.*,
20 931 A.2d 460, 462 (Del. 2007) (“The Court should not consider inadmissible hearsay when
21 deciding a Motion for Summary Judgment.”). Even on the merits, the purported statement from
22 Coddington—that either Ellen Cotter, Margaret Cotter, *or Plaintiff* should be CEO—actually
23 undermines his claim that Coddington is not independent from the Cotter sisters, as she was
24 apparently willing to contemplate his return as permanent CEO of RDI (which is what he seeks
25 in this lawsuit). And, of course, any purported policy consideration held by Coddington that one of
26

27 Motion for Partial Summary Judgment (No. 1) re: Plaintiff’s Termination and Reinstatement
28 Claims.

1 the controlling stockholders of RDI would be best suited to run the Company is, itself, not
2 evidence that she is “beholden” to any of them.

3 As established in the Individual Defendants’ prior briefing (*see* Ind. Defs.’ Mot. for
4 Partial Summ. J. (No. 2) re: Director Independence at 19-20; Ind. Defs.’ Reply in Supp. Mot. for
5 Partial Summ. J. (No. 2) re: Director Independence at 7-8), Coddington was clearly independent of
6 Margaret and Ellen Cotter as a matter of law. Plaintiff himself has admitted that Coddington
7 “might” satisfy a “legal technical definition of independence.” (HD#2 Ex. 7 (5/16/16 J. Cotter,
8 Jr. Dep.) at 70:18-71:6.) It is also undisputed that Coddington has a “limited” relationship with
9 Ellen and Margaret Cotter; before Ellen Cotter asked Coddington to consider becoming a director,
10 she had met Coddington only five or ten times over the course of fifteen years. (*See* Ex. 16 (5/19/16
11 E. Cotter Dep.) to Pl.’s Opp’n to Ind. Defs.’ Mot. for Partial Summ. J. (No. 2) re: Director
12 Independence at 307:19-308:7.)

13 While Coddington does have a friendship with Mary Cotter, the mother of the Cotter
14 siblings who is not a defendant and is not herself a director or significant stockholder of RDI,
15 that relationship is entirely irrelevant to the legal issue of whether Coddington is “beholden” to
16 Ellen and Margaret Cotter, and therefore “unable to consider a business decision on the merits”
17 as it relates to their interests. *La. Mun. Police Emps.’ Ret. Sys.*, 2014 WL 994616, at *7. Indeed,
18 like Coddington, Plaintiff himself has had a “long-standing personal relationship” with his mother
19 but considers himself “independent.” (HD#2 Ex. 7 (5/16/16 J. Cotter, Jr. Dep.) at 71:8-72:15.)
20 Moreover, there exists no non-hearsay evidence establishing what Mary Cotter thinks as to the
21 intra-family fight, whether she has even communicated her feelings to Coddington, and whether
22 Mary Cotter’s view would be in any way material to Coddington’s exercise of her director duties.
23 “Mere insinuation is unfair and improper,” and Plaintiff’s pure speculation does not “support a
24 reasonable inference” that Coddington “could not act independently.” *In re W. Nat’l Corp.*
25 *S’holders Litig.*, 2000 WL 710192, at *16.

26 In addition, like Wrotniak, the fact that Ellen and Margaret Cotter supported Coddington’s
27 nomination to the RDI Board is irrelevant to the independence inquiry. *See White v. Panic*, 793
28 A.2d 356, 366 (Del. Ch. 2000) (“[T]he law is well-settled that [a defendant’s] involvement in

1 selecting [board members] is insufficient to create a reasonable doubt about their
2 independence.”); *Frank v. Elgamal*, C.A. No. 6120-VCN, 2014 WL 957550, at *22 (Del. Ch.
3 Mar. 10, 2014) (“Merely because a director is nominated and elected by a large or controlling
4 shareholder does not mean that [s]he is necessarily beholden to [her] initial sponsor.”). As with
5 Wrotniak, Coddling’s limited relationships with Ellen and Margaret Cotter are hardly the kind
6 that would support a finding that Coddling is “so under their influence that [her] discretion would
7 be sterilized.” *Rales*, 634 A.2d at 936. Accordingly, the Court’s decision finding that Director
8 Coddling was disinterested and independent, and granting judgment in her favor on all claims,
9 was not clearly erroneous.

10 (c) Douglas McEachern

11 Plaintiff’s Motion for Reconsideration offers no new evidence or argument challenging
12 the independence of Director Douglas McEachern. The entirety of Plaintiff’s attack focuses on
13 rehashing his previous objections to certain Board decisions supported by McEachern (*see* Mot.
14 for Recons. at 12-13, 15-23), but—as the Court correctly noted at the December 11, 2017
15 hearing—support for a particular transaction is not itself evidence of a lack of independence. *See*
16 *also Aronson*, 473 A.2d at 817 (“mere directorial approval of a transaction, absent particularized
17 facts . . . otherwise establishing the lack of independence or disinterestedness of a majority of the
18 directors, is insufficient” to support a breach of fiduciary duty claim). Plaintiff again offers
19 absolutely no evidence as to why McEachern’s discretion would be sterilized or why he would
20 be “beholden” in any way to Ellen or Margaret Cotter; he identifies no disqualifying financial
21 connection or personal relationship that would call into question McEachern’s impartial
22 judgment.

23 Instead, the actual evidence is that McEachern made considered decisions. For instance,
24 in determining whether to continue Plaintiff’s employment as CEO, McEachern concluded after
25 months of close scrutiny that Plaintiff lacked the necessary experience and management ability,
26 undercut fellow executives and wasted time, did not interact with staff, acted in an abusive
27 manner to RDI’s employees, had an inability to communicate with people and create trust, and
28 was not moving the Company forward. (HD#1 Ex. 7 (5/6/16 McEachern Dep.) at 49:25-50:7,

1 50:19-52:5, 112:18-114:15, 28:23-286:11, 292:25-293:9, 293:23-294:15.) As McEachern
2 testified, “from August of 2014 until [Plaintiff’s] termination, I cannot tell you one thing that we
3 did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing.”
4 (*Id.* at 292:2-5.) Plaintiff’s mere disagreement with McEachern’s business judgment as an RDI
5 director falls far short of his burden of identifying “admissible evidence” showing “a genuine
6 issue for trial” regarding McEachern’s independence. *Posadas v. City of Reno*, 109 Nev. 448,
7 452, 851 P.2d 438, 442 (1993); *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434,
8 436, 245 P.3d 542, 543 (2010) (“bald allegations without supporting facts” are insufficient).

9 Moreover, as the Individual Defendants have repeatedly emphasized (*see* Ind. Defs.’
10 Mot. for Partial Summ. J. (No. 2) re: Director Independence at 5, 15, 23; Ind. Defs.’ Reply in
11 Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 4), Plaintiff has already
12 **admitted** that Director McEachern is **independent**. When asked at his deposition, “Mr.
13 McEachern, is he independent, in your view?” Plaintiff answered: “Yes. I mean, he’s – I mean,
14 again, he’s independent. He’s got no relationship with Ellen and Margaret or, you know, no
15 business relationship with Ellen and Margaret.” (HD#2 Ex. 7 (5/16/16 Cotter, Jr. Dep.) at 84:21-
16 85:1.) When pressed as to whether, “in your view, Mr. McEachern is independent and has
17 always been independent,” Plaintiff responded “Okay. Yes.” (*Id.* at 85:6-86:4.) Plaintiff, as in
18 prior briefing, never confronts this critical admission in his Motion for Reconsideration. This
19 alone is sufficient to warrant summary judgment in McEachern’s favor, and the Court’s decision
20 to do so was obviously not clearly erroneous.

21 (d) Edward Kane

22 As with Director McEachern, Plaintiff’s Motion for Reconsideration offers no new
23 evidence or argument challenging the independence of Director Edward Kane. Instead, Plaintiff
24 admittedly provides only a repeat of his previous complaints as to the **substance** of Kane’s
25 decisions as an RDI Board member, beginning with Plaintiff’s termination. (*See* Mot. for
26 Recons. at 15 (“As Plaintiff demonstrated in his own summary judgment motion and in his
27 oppositions to Partial MSJ No. 1, and as summarized again below, . . .”).) As with McEachern,
28 Plaintiff’s attempt to challenge the “entire fairness” of Kane’s decisions as an RDI Board

1 member is premature (and ultimately unsupportable). Plaintiff must first establish that Kane was
2 not disinterested or not independent—which he cannot do.

3 Plaintiff's attacks on Kane's independence in his previous filings were without legal
4 merit. Plaintiff has not identified any financial connection or monetary dependence between
5 Kane and the Cotter sisters, nor can he. Moreover, as previously established by the Individual
6 Defendants, Kane also has no "personal relationship" with Ellen or Margaret Cotter sufficient to
7 raise a triable issue of fact as to his independence. (*See* Ind. Defs.' Mot. for Partial Summ. J.
8 (No. 2) re: Director Independence at 16-17; Ind. Defs.' Reply in Supp. of Mot. for Partial Summ.
9 J. (No. 2) re: Director Independence at 5.) As Plaintiff has conceded (*see* Pl.'s Supp. Opp'n to
10 MSJ Nos. 1 & 2 at 8), the friendship of which he complains was actually between Kane and his
11 father, not between Kane and Ellen or Margaret Cotter.

12 Plaintiff has never cited any evidence indicating that Kane's friendship with James J.
13 Cotter, Sr. has resulted in him having a closer relationship with Cotter, Sr.'s daughters than with
14 his son. Indeed, while Ellen and Margaret Cotter have, at times, referred to Director Kane as
15 "Uncle Ed," so has Plaintiff. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 29:4-35:6; HD#2 Ex. 7
16 (5/16/16 Cotter, Jr. Dep.) at 83:6-12.) Plaintiff does not dispute that he has known Kane all of
17 his life and even visited Kane at his home as late as the spring of 2015, just weeks before his
18 termination, to personally implore Kane to help Plaintiff resolve his disputes with his sisters and
19 retain his position as CEO. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 35:10-22; HD#2 Ex. 8 (7/26/16
20 Cotter, Jr. Dep.) at 753:9-754:8.) Even if Kane were Ellen and Margaret Cotter's actual "uncle"
21 (and not Plaintiff's), that is considered a "more remote family relationship" that is "not
22 disqualifying" to a director's independence as a matter of law in Nevada. *In re Amerco Deriv.*
23 *Litig.*, 127 Nev. at 232-33, 252 P.3d at 706 (Pickering, J., concurring in part and dissenting in
24 part); 1 *Principles of Corporate Governance* § 1.26 (1994) (an uncle/nephew relationship does
25 not establish the parties as members of one another's immediate families).

26 In addition, Plaintiff has never explained why Director Kane's "understanding" that
27 James J. Cotter, Sr. intended for Margaret Cotter to control his personal estate would affect his
28 independence as an RDI Board member. (*See* Ind. Defs.' Reply in Supp. of Mot. for Summ. J.

1 (No. 1) re: Plaintiff's Termination and Reinstatement Claims at 5-7.) As the undisputed
2 evidence establishes, it was actually Plaintiff who involved Kane in the trust settlement
3 discussions; Kane supported such a settlement because, as Kane explained to Plaintiff at the
4 time, he—like Plaintiff—believed that a settlement would end all the “ill feelings,” “enhance the
5 company, benefit [Plaintiff] and [his] sisters and allow [the Cotters] to work together going
6 forward.” Further, it would give Plaintiff the time to prove “that [he] do[es] in fact have the
7 leadership skills to run this company.” (Ex. 4 (5/28/16 emails between Kane and Cotter, Jr.) to
8 Pl.'s Opp'n to Ind. Defs.' Mot. for Partial Summ. J. (No. 2) at 32-33.)

9 All evidence shows that Director Kane engaged in any settlement-related discussions on
10 exactly the terms *Plaintiff* requested prior to his termination (*see* Ind. Defs.' Reply in Supp. of
11 Mot. for Summ. J. (No. 1) re: Plaintiff's Termination and Reinstatement Claims at 5-7
12 (collecting evidence)); none of it shows the kind of bias in favor of Ellen and Margaret Cotter
13 (and against Plaintiff) required by law to challenge Kane's independence. *See Beam*, 845 A.2d
14 at 1050. Indeed, while Plaintiff claims that Kane somehow “extorted” him, the actual evidence
15 is that Kane supported a negotiated resolution of the trust dispute because he knew by mid-June
16 that “there were votes there to terminate [Plaintiff]” and that he himself would be “voting against
17 him” if Plaintiff's leadership deficiencies were not alleviated by the kind of further oversight and
18 more harmonious management structure contemplated in the pending settlement deal—
19 including, for example, oversight of Plaintiff's management by an Executive Committee. (*See*
20 HDO Ex. 7 (6/9/16 Kane Dep.) at 596:13-25; HDO Ex. 5 (5/2/16 Kane Dep.) at 193:3-195:2.)⁸

21 Given the clear insufficiency of Plaintiff's challenges, coupled with the fact that
22 Plaintiff—mere weeks before his termination—approved an SEC filing that identified Kane as
23 “independent” (HD#2 Ex. 11 (5/8/15 RDI From 10-K/A, Am. No. 1) at -5644 & -5665), the
24 Court's December 11, 2017 that Plaintiff has not met his burden of showing a genuine issue for
25 trial with respect to Kane's independence was not clearly erroneous.

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27
28 ⁸ “HDO” refers to the Declaration of Noah Helpen filed in support of the Individual
Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment.

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CONCLUSION

For the reasons set forth above, the Individual Defendants respectfully request that the Court deny Plaintiff's Motion for Reconsideration or Clarification of Ruling on Motions for Summary Judgment Nos. 1, 2, and 3.

Dated: December 26, 2017

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EXHIBIT A

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,) A-15-719860-B
GUY ADAMS, EDWARD KANE, DOUGLAS)
McEACHERN, TIMOTHY STOREY, WILLIAM)
GOULD, JUDY CODDING, MICHAEL)
WROTHIAK, and DOES 1 through 100,)
inclusive,)
Defendants,)
and) Case No.
READING INTERNATIONAL, INC.,) P-14-082942-E
a Nevada corporation,)
Nominal Defendant.)

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF MYRON STEELE
Philadelphia, Pennsylvania
Wednesday, October 19, 2016

Reported by:
Susan Marie Migatz, RMR, CRR
JOB No. 2463323

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<p>1 T2 PARTNERS MANAGEMENT, LP, a) 2 Delaware limited partnership,) 3 doing business as KASE CAPITAL) 4 MANAGEMENT, et al.,) 5 Plaintiff,) 6 vs.) 7 MARGARET COTTER, ELLEN COTTER,) 8 GUY ADAMS, EDWARD KANE, DOUGLAS) 9 McEACHERN, WILLIAM GOULD, JUDY) 10 CODDING, MICHAEL WROTHIAK, CRAIG) 11 THOMPSON, and DOES 1 through 100,) 12 inclusive,) 13 Defendants,) 14 and) 15 READING INTERNATIONAL, INC.,) 16 a Nevada corporation,) 17 Nominal Defendant.) 18 _____) 19 20 Videotaped Deposition of MYRON STEELE, 21 taken at Greenberg Traurig, LLP, 2700 One Commerce 22 Square, 2001 Market Street, Philadelphia, 23 Pennsylvania, commencing at 10:25 a.m., before Susan 24 Marie Migatz, a Federally Approved Registered Merit 25 Reporter, Certified Realtime Reporter, Certified LiveNote Reporter, and Notary Public.</p> <p style="text-align: right;">Page 2</p>	<p>1 APPEARANCES: (Continued) 2 3 For Defendants William Gould and Timothy Storey: 4 5 BIRD MARELLA, P.C. 6 BY: EKWAN E. RHOW, ESQUIRE 7 SHOSHANA E. BANNETT, ESQUIRE 8 1875 Century Park East, 23rd Floor 9 Los Angeles, CA 90067 10 310-201-2100 11 erhow@birdmarella.com 12 sbannett@birdmarella.com 13 14 FOR NOMINAL DEFENDANT: (Via Teleconference) 15 16 GREENBERG TRAURIG, LLP 17 BY: MARK E. FERRARIO, ESQUIRE 18 2450 Colorado Avenue, Suite 400E 19 Santa Monica, California 90404 20 702-792-3773 21 ferrariom@gtlaw.com 22 23 ALSO PRESENT: 24 RUSS STRAIN, Videographer 25</p> <p style="text-align: right;">Page 4</p>
<p>1 APPEARANCES: 2 3 For the Plaintiff James Cotter, Jr.: 4 5 LEWIS ROCA ROTHGERBER, LLP 6 BY: MARK G. KRUM, ESQUIRE 7 3993 Howard Hughes Parkway, Suite 600 8 Las Vegas, NV 89169 9 702-949-8217 10 mkrum@lrrlaw.com 11 12 For Defendants Margaret Cotter, Ellen Cotter, 13 Douglas McEachern, Guy Adams, Edward Kane, Judy 14 Coddington, and Michael Wrothiak: 15 16 QUINN EMANUEL URQUHART & SULLIVAN, LLP 17 BY: MARSHALL SEARCY, ESQUIRE 18 865 South Figueroa Street, 10th Floor 19 Los Angeles, CA 90017 20 213-443-3152 21 marshallsearcy@quinnemanuel.com 22 23 24 25</p> <p style="text-align: right;">Page 3</p>	<p>1 INDEX 2 3 MYRON STEELE PAGE 4 By Mr. Searcy 7 5 By Mr. Rhow 146 6 By Mr. Ferrario 171 7 8 9 EXHIBITS 10 NUMBER DESCRIPTION PAGE 11 12 Exhibit 441 Expert report with attached 13 exhibits 18 14 Exhibit 442 E-mail, 8/25/16, to Bole from 15 Krum, STEELE000808 21 16 Exhibit 443 E-mail, 8/25/16, to Bole from 17 Krum, STEELE000809-810 27 18 Exhibit 444 Handwritten notes, STEELE000107- 19 '109 42 20 Exhibit 445 Summary of Rebuttal Opinion 63 21 Exhibit 446 Transcript of Deposition of 22 Margaret Cotter, 5/12/16 68 23 24 25</p> <p style="text-align: right;">Page 5</p>

1 the directors' execution of their duties is unduly influenced,
2 manifesting a direction of corporate conduct in such a way as
3 to comport with the wishes or interests of the person doing
4 the controlling."

5 Now, we know that's a demand case, but that doesn't
6 change the law, it just changes the application of the law.
7 And so the point isn't any more complicated than what it said
8 elsewhere in Shoen, and that is "Directors' discretion must be
9 free from the influence of other interested persons."

10 So Motion Number 2 is -- it's nonsensical, because
11 that has to be assessed based on facts and based on the
12 particular application. You just did it with respect to
13 Number 1. And so it doesn't work that way. And the -- in
14 Rails the court said, of which Shoen is cited with approval,
15 "Directorial interest exists whenever divided loyalties are
16 present." And we have this ongoing set of transactions that
17 entail furthering and protecting the interests of the Cotter
18 sisters. That, Your Honor, is a perfect example of
19 circumstances that show divided loyalties. Thank you.

20 THE COURT: Thank you.

21 Motion for Summary Judgment Number 2 is granted in
22 part. To the extent that you asked me to make a determination
23 as to whether there has been a showing of a lack of
24 disinterestedness there is a lack of disinterestedness for
25 Margaret Cotter, Ellen Cotter, and Guy Adams.

1 With respect to the other directors who were
2 involved in the motion there does not appear to be sufficient
3 evidence presented to the Court to proceed with a claim of
4 lack of disinterestedness.

5 Okay. That takes you to Number 3.

6 MR. TAYBACK: Your Honor, with respect to the Motion
7 for Summary Judgment Number 3, which relates to what's called
8 the patent vision expression of interest --

9 THE COURT: Yeah.

10 MR. TAYBACK: -- there are --

11 THE COURT: The unaccepted offer which may not have
12 been a real offer.

13 MR. TAYBACK: Not may not have been. Was admitted
14 by plaintiff --

15 THE COURT: Eh, you know.

16 MR. TAYBACK: Was admitted by the plaintiff was
17 nonbinding expression of interest that could have been
18 withdrawn or rejected at any point in time. Moreover, when
19 you look -- that in and of itself disposes of the claim,
20 because there are no damages that flow from that. There
21 cannot be. And that Cook case, which is a Delaware case, but
22 the Cook case really makes that clear.

23 THE COURT: I thought I wasn't supposed to look at
24 Delaware law according to you. You know the legislature can't
25 tell the court what it's allowed to look at.

1 MR. TAYBACK: And I did know that.

2 THE COURT: Okay.

3 MR. TAYBACK: I'm encouraging you to look at it.

4 THE COURT: I'm looking at all sorts of things, but
5 I'm trying to interweave it into the legislative intent
6 related to business judgment and the protections that we
7 should give to officers and directors in Nevada.

8 MR. TAYBACK: Yeah. And I think what it is is it's
9 factually analogous. It's factually analogous.

10 THE COURT: Right. I just had to give you a hard
11 time. Anything else you want to tell me?

12 MR. TAYBACK: The only other thing that I would tell
13 you is that when you look at what it is that the board members
14 can look at with respect to the consideration of potential
15 change of control overtures, call it expression of interest or
16 anything else, it's nonexclusive. It says they may consider
17 any of the relevant facts. And here the undisputed evidence
18 is that they did consider a lot of relevant facts, including
19 the views of the plaintiff, the views of the two Cotter
20 sisters, including the presentations of the board. And
21 they're entitled to rely upon that. And the reasonableness of
22 the decision is not something that can be second guessed at
23 this juncture based upon the showing that plaintiff has made.

24 THE COURT: Mr. Krum. Let's skip past a couple of
25 those arguments and focus on a different issue. Other than as

1 evidence of breaches of fiduciary duty, do you have any claim
2 of specific damages to the failure to accept the unsolicited
3 offer?

4 MR. KRUM: Well, first, Your Honor, the notion that
5 it's nonbinding and therefore it cannot result in damages is
6 belied --

7 THE COURT: No. I asked you a very direct question.

8 MR. KRUM: I'm sorry.

9 THE COURT: Do you have damages that you have
10 provided me evidentiary basis for strictly related to the
11 failure of the company or the directors to accept the
12 unsolicited offer?

13 MR. KRUM: Mr. Duarte Solis speaks to that in his
14 expert opinion which was the subject of a motion in limine you
15 denied in October of last year.

16 THE COURT: I know. But I'm asking you a question.
17 Do you have specific evidence of damages related to the
18 decision by the board not to accept the unsolicited offer?

19 MR. KRUM: No. The answer I have is the one I just
20 gave, Your Honor.

21 THE COURT: All right. So that's the only answer
22 you have. Okay. Anything else you want to tell me?

23 MR. KRUM: I just wanted to say again on law,
24 different point, though, intentional misconduct, one of the
25 ways that occurs is where the fiduciary acts with a purpose

1 other than advancing the best interests of the corporation. I
2 think the evidence on this subject, Your Honor, the offer
3 raises a question of fact, a disputed question of material
4 fact as to whether that's what the directors did.

5 Another category of intentional misconduct is where
6 the fiduciary intentionally fails to act in the face of a
7 known duty to act, demonstrating a conscious disregard for his
8 duties. That is a pervasive and recurring phenomenon here,
9 and I submit, Your Honor, with respect to the so-called offer
10 that's what happened. So the point is, as I said before on
11 the offer in particular, Your Honor, it sort of bookends this
12 whole sequence of events, starting with the seizure of
13 control. And you've read the papers, so I'll leave it at
14 that.

15 THE COURT: Anything else?

16 MR. KRUM: No.

17 THE COURT: Okay. Because of the failure of damages
18 related to an unenforceable, unsolicited, nonbinding offer, I
19 am granting the motion.

20 However, that does not preclude the plaintiff from
21 utilizing that factual basis for claims of a breach of
22 fiduciary duty. Okay?

23 MR. TAYBACK: Or for other alleged -- to prove other
24 alleged breaches you're saying it might be admissible as
25 evidence.

1 THE COURT: Well, it may be additional evidence of
2 breach of fiduciary duty. But they don't get to claim any
3 damages from it, since they haven't established damages
4 related to that because of the legal issues related to the
5 nature of the offer.

6 So what is your next motion for summary judgment, if
7 any? I think there were six.

8 MR. SEARCY: Your Honor, I'm addressing Motion for
9 Summary Judgment Number 5. That relates to the CEO search.
10 And --

11 THE COURT: Ready for me to say denied?

12 MR. SEARCY: If you'll let me --

13 THE COURT: You can talk, Mr. Searcy, but we're
14 leaving here in 25 minutes whether you guys are done or not.

15 MR. SEARCY: All right. Well, if you're going to --
16 before you say denied then let me just address a few of the
17 points in it. If you're going to say granted, then I'll
18 certainly sit down.

19 THE COURT: I'm not going to say granted.

20 MR. SEARCY: The point, Your Honor, is that there's
21 no dispute on the material facts here. There was a process
22 that was undertaken by the board here to appoint a CEO. The
23 board appointed a special committee, the special committee
24 hired a search firm, that search firm went out and got
25 information, they interviewed candidates, those candidates

1 were selected by the search firm Korn Ferry, and they were
2 considered along with internal candidates. The board -- or
3 the committee, rather, interviewed Ellen Cotter and decided
4 that she was the best candidate, and the board agreed with
5 that decision. And in the context of the law here you have a
6 majority of disinterested directors who agreed with that
7 decision. There's a presumption that all of this was
8 conducted in good faith. There hasn't been a rebuttal of the
9 presumption here, Your Honor, and, as a result, the motion
10 should be granted.

11 Are there particular issues, though, that I can
12 address for Your Honor?

13 THE COURT: Not that will cause you to be able to
14 get me to change my mind on denied.

15 MR. SEARCY: Okay. Are there any that I can at
16 least make an effort on, Your Honor?

17 THE COURT: Nope.

18 MR. SEARCY: Thank you, Your Honor.

19 THE COURT: All right. So that motion is denied.
20 Can we go to Number 6.

21 MR. SEARCY: Number 6 is mine, as well.

22 THE COURT: This has to do with the special bonus to
23 Mr. Adams.

24 MR. SEARCY: That's correct, Your Honor. There are
25 three main issues here. One has to do with the exercise of

1 options, and in that case there was an executive committee
2 that considered those options. There's no doubt, no dispute
3 that that was an existing plan, that the committee received
4 advice from counsel, and approved of the -- approved of the
5 exercise of the options.

6 THE COURT: Okay. Anything else?

7 MR. SEARCY: In addition to that -- and that's --
8 again, that is an exercise that is presumed to be done in good
9 faith and especially here, where the statute provides that you
10 can obtain information. And that's what the committee did.

11 In addition to that, Your Honor, there's the issue
12 of the payment to Mr. Adams that you just raised. That again
13 was approved by the board, approved by unanimous board who
14 were disinterested in the subject and are entitled to business
15 judgment on that subject.

16 And finally, with respect to Margaret Cotter's
17 appointment it's certainly within the board's discretion to
18 decide that someone who's worked for the company and been
19 affiliated with the company for approximately 20 years or so
20 has the qualifications to take on that job. And as Mr.
21 Tayback said, hiring someone to fill a role is certainly --
22 that's an operational decision that's within the discretion of
23 a board of directors, and certainly they're entitled to be
24 able to exercise the business judgment when it comes to that,
25 especially here. And with all of these decisions, Your Honor,

1 you're talking about a decision made by a majority of
2 disinterested directors, directors that you've found to be
3 disinterested.

4 THE COURT: Some directors I found to be
5 disinterested.

6 MR. SEARCY: Well, for those directors, though, Your
7 Honor, that you found to be disinterested, they constitute a
8 majority of the decision makers here. And --

9 THE COURT: Well, they're protected. Those people
10 are protected.

11 MR. SEARCY: And exercising their business judgment
12 they approved these decisions.

13 THE COURT: Okay. Anything else?

14 MR. SEARCY: Thank you, Your Honor. That's it.

15 THE COURT: Denied.

16 So you had Number 4 I think we didn't get to. Was
17 Number 4 reserved for this time, or had I ruled on it
18 previously?

19 MR. TAYBACK: Your Honor, you --

20 MR. KRUM: You ruled on it previously.

21 THE COURT: Okay. So that takes me to your motions
22 in limine. There were two that I think are important. One is
23 Mr. Gould's motion in limine to exclude irrelevant and
24 speculative evidence.

25 MR. RHOW: Your Honor, can I speak on this one?

1 THE COURT: It's your motion.

2 MR. RHOW: Thank you, Your Honor.

3 MR. FERRARIO: Hey, come on. This is his first
4 time.

5 MR. RHOW: I feel honored to actually --

6 THE COURT: Here's my first question.

7 MR. RHOW: By the way, is it tentative to grant?
8 I'd like to know that first.

9 THE COURT: My first question for you is one that
10 I'm going to ask all the people in motions in limine. Did you
11 have an opportunity to meet and confer with opposing counsel
12 before you filed the motion to see if there were areas of
13 agreement?

14 MR. RHOW: The answer is I don't think we did.

15 THE COURT: You know, we have a rule.

16 MR. SEARCY: I'm going to have to disagree with Mr.
17 Rhow. We actually did meet and confer with Mr. Krum on the
18 phone.

19 MR. RHOW: Oh. I'm sorry.

20 MR. SEARCY: Mr. Rhow wasn't part of the meet and
21 confer, but his associate, Shoshana Bannett, was.

22 THE COURT: Oh. Okay. All right.

23 MR. RHOW: Okay. I had looked at -- I should have
24 looked at Mr. Searcy.

25 THE COURT: Because usually -- usually I get a

1 declaration that tells me, we met and conferred on this
2 date --

3 MR. RHOW: Correct.

4 THE COURT: -- so that I can then gauge whether
5 somebody's being unreasonable or not. So it's your motion.

6 MR. RHOW: Thank you, Your Honor.

7 I think the motion was short and sweet on purpose.
8 During the deposition of Mr. Cotter, Jr., and it lasted days
9 and days and days, and throughout the questioning it was quite
10 clear that he was testifying based on not what he saw, what he
11 heard, what he observed; he was literally saying, here's what
12 I think -- thought at the time, here's what I was thinking Mr.
13 Gould was thinking and others were thinking and so therefore I
14 believe the claim is sufficient because of my subjective
15 belief as to what other directors were thinking. If that's
16 going to be part of this trial, first, this trial's not going
17 to be four weeks, it's going to be eight weeks; but, second,
18 there's nothing in the law, there's nothing based on common
19 sense that tells you that what the subjective beliefs of the
20 plaintiff are none of that is relevant, none of that is
21 relevant under the law, none that is relevant under common
22 sense. So to streamline this case, if he's going to talk
23 about what he saw, what he heard, certainly that's admissible.
24 But if he's going to talk about what he believes, that's
25 subjective and should not be part of this trial.

1 THE COURT: Thank you.

2 Ms. Levin, is this your motion?

3 MS. LEVIN: Yes, Your Honor.

4 As we said in our opposition, we believe this is an
5 improper and premature motion just because Mr. Cotter
6 obviously will be here at trial testifying.

7 THE COURT: So you want me to rule on the questions
8 and answers as they're given. So if somebody asks him, well,
9 did you talk to Mr. Adams about what he was going to do, he
10 can then tell me what he said.

11 MS. LEVIN: Correct, Your Honor.

12 THE COURT: Well, what did you think he meant?
13 That's speculation.

14 MS. LEVIN: Unless, of course, he's got a basis for
15 his belief. And I think that some of the deposition
16 testimony, those responses were invited by the very questions.
17 So to the extent that he has a basis to believe -- you know,
18 to state his belief I think that, again, it should be
19 determined on the question by question.

20 THE COURT: Okay. So the motion is denied. It's
21 premature. It's an issue that has to be handled at trial
22 based upon the foundation that is laid related to the issue.

23 So -- and plus you won't be here. You won't be
24 here; right?

25 MR. RHOW: I'm sorry?

1 THE COURT: You won't be here; right?

2 MR. RHOW: I don't know. I hope not. Is Your Honor
3 saying I should not be here or that my client won't be here
4 then?

5 THE COURT: That's what the business judgment ruling
6 deals with; right? So I granted your client's business
7 judgment rule motion. Well, you know, he may be a witness.

8 MR. KRUM: I'm sorry, Your Honor. Did I miss
9 something?

10 THE COURT: What?

11 MR. KRUM: We haven't had that motion argued yet,
12 Mr. Gould's motion.

13 THE COURT: I included Mr. Gould because you briefed
14 it relate to all of the motions for summary judgment and I
15 asked you questions about all the directors, except Mr. Adams.

16 MR. KRUM: I'm sorry. I didn't understand that,
17 Your Honor. I didn't answer as to Mr. Gould.

18 THE COURT: Do you want to tell me an answer to Mr.
19 Gould?

20 MR. KRUM: I do, because we have a hearing set for
21 the 8th on his motion, which is why misunderstood that.

22 THE COURT: I used it because it was included in
23 your opposition, the supplement to those motions.

24 MR. KRUM: That was confusion that we created, and I
25 apologize. The reason we did that, Your Honor, is that we

1 didn't have an opportunity to prepare a Gould brief, but we
2 didn't want to be accused of doing nothing. And some of the
3 evidence in those motions in our view did relate to Gould, and
4 we therefore put him on there.

5 That said, he filed two pieces of paper, they asked
6 me if we could have the hearing today. I told them no, I
7 wanted to respond. So -- but let me try to answer your
8 question with respect to Mr. Gould. So we start, Your Honor,
9 as we do, with the threat to terminate and the termination.
10 And I respectfully submit --

11 THE COURT: I will tell you that on your Mr. Gould
12 you've got the same list that we've already talked about.
13 What I'm trying to find out is -- and I understand the threat
14 is part of what you've alleged related to Mr. Gould along with
15 the other six or seven bullet points that are on pages 5 and 6
16 of the opposition. Is there something else related to Mr.
17 Gould, something like you have with Mr. Adams that would
18 establish a lack of disinterestedness?

19 MR. KRUM: Let me answer, and then you'll decide.

20 THE COURT: Yeah. That's what I'm trying to pull
21 out of you.

22 MR. KRUM: So, for example, with respect to the
23 termination Mr. Cotter raised the question of Mr. Adams's
24 independence before a vote was taken, and Mr. Gould asked Mr.
25 Adams, well, can you tell us about that. And Mr. Adams got

1 mad and said in words or substance, no. And Mr. Gould said,
2 okay. That, Your Honor, is a perfect example of a failure to
3 act in the face of a known duty to act. We're not talking
4 about someone who is unfamiliar with fiduciary obligations
5 here. Mr. Gould is a corporate lawyer.

6 So we get to the -- we get to the executive
7 committee, same meeting, June 12. Ellen Cotter says, I want
8 to repopulate the executive committee, Mr. Gould, would you
9 like to be on it. His testimony, his deposition testimony was
10 that he declined because he knew that it would take a lot of
11 time. Now, if he knew that it would take a lot of time, Your
12 Honor, how is it that it didn't occur to him that this was
13 what the sisters were doing in October of 2014 when they were
14 trying to circumvent the board?

15 THE COURT: These are all on your list of bullet
16 points.

17 MR. KRUM: Okay.

18 THE COURT: What I'm trying to find out is if
19 there's anything that's not on the list of bullet points that
20 are on pages 5 and 6 of your supplemental opposition that
21 relate to Mr. Gould. Because when I made my ruling I was
22 including Mr. Gould as someone because I specifically excluded
23 Mr. Adams and the two Ms. Cotters.

24 MR. KRUM: Bear with me. I'm mentally working.

25 THE COURT: I'm watching you. I'm watching him

1 work.

2 MR. KRUM: So I don't think we had the executive
3 committee there, but I just said that.

4 So then, Your Honor, the composition of the board.
5 So Mr. Gould was not a member of the nominating committee.
6 His testimony was that, on a Friday Ellen Cotter called me and
7 asked me if she could come to my office and she and Craig
8 Tompkins came to my office and showed me Judy Coddington's resume
9 and said we were going to have a board meeting on Monday to
10 put Ms. Coddington on the board. And Bill Gould said, this isn't
11 sufficient time, I can't do my job. But he voted for her
12 nonetheless. That, Your Honor, is the same thing that happens
13 over and over and over again with Mr. Gould. That is, in the
14 face of a known duty to act he chooses not to do so. That is
15 intentional misconduct. Your Honor, you've denied the motion
16 with respect to the CEO search. That is Mr. Gould. It is Mr.
17 Gould and Mr. McEachern who are the ones who together with
18 Margaret Cotter aborted the CEO search. Literally the last
19 time they spoke to Korn Ferry was the day Ellen Cotter
20 declared her candidacy. After the what did they do? They
21 told Craig Tompkins to tell Korn Ferry to do no more work.
22 And Mr. Gould, he was the one whose name was on a press
23 release saying, Ellen Cotter was made CEO following a thorough
24 search. She was not made CEO as a result of that search. She
25 was made CEO in spite of that search.

1 THE COURT: Okay. So all of those are issues that
2 I'm aware of considered when I had previously included Mr.
3 Gould in the granting of the summary judgment related to the
4 business judgment rule. The fact that I am denying certain
5 issues related to other summary judgments does not diminish
6 the fact that the directors that I found there was not
7 evidence of a lack of disinterestedness have the protection
8 the statute provides to them.

9 Okay. So let's go back to Mr. Cotter's Motion
10 Number 3. This is related to the coach.

11 MS. LEVIN: Your Honor, this motion should be denied
12 because the hiring of High Point, that's post hoc --

13 THE COURT: It's your motion. You wanted it
14 granted.

15 MS. LEVIN: I'm sorry. You know, the Court -- I'm
16 sorry. The Court should exclude the after-acquired evidence
17 on the -- in the form of any testimony or documents relating
18 to the hiring of High Point, because the breach of fiduciary
19 duty claims, they are -- they concern what the directors did
20 and knew at the time that they decided to fire the plaintiff.
21 So we cited the Smith versus Van Gorkom case, which holds post
22 hoc data is not relevant to the decision.

23 So at the time that they made this decision they did
24 not have nor did they rely on the High Point evidence. So
25 therefore the after-acquired evidence cannot be as a matter of

1 law relevant to their decision to terminate the plaintiff.
2 That would amount to a retroactive assessment of his ability,
3 which are not at issue. And I think that that's the -- you
4 know, the --

5 THE COURT: The problem I have with that is part of
6 what your client's position has been in this case is he is
7 suitable to be acting as the CEO, and if there is information
8 that is relevant to that suitability, that's where I have the
9 problem on this. I certainly understand from a decision-
10 making process that that information was not in the possession
11 of anyone who was making the decisions at the time. But given
12 the affirmative proposition by your client that he is suitable
13 to CEO, I have concerns about granting the motion at this
14 stage.

15 MS. LEVIN: Well -- okay. So -- but with respect to
16 the decision which you can agree that they could not use that
17 evidence to show that after the fact they made the right
18 decision because of the after --

19 THE COURT: No. That's a problem if your client is
20 saying he's suitable and therefore he should be able to be
21 CEO. Because part of what he originally asked for was to make
22 them make him be CEO.

23 MS. LEVIN: All right. And here at issue I believe
24 it's the -- we're seeking to void the termination.

25 THE COURT: I know.

1 MS. LEVIN: So -- but I think that even -- and I
2 think that in that respect if you were inclined to allow it on
3 his suitability, the problem then becomes first of all the
4 hiring of consultant doesn't necessary mean that somebody is
5 unsuitable.

6 THE COURT: Absolutely. It may mean they're trying
7 to get better.

8 MS. LEVIN: Exactly. And I was thinking -- when I
9 read these facts I was thinking about the analogy. If you
10 were a professional runner and you hire a runner coach --

11 THE COURT: Coach.

12 MS. LEVIN: -- doesn't mean that you're not a good
13 runner. You may --

14 THE COURT: You want to be better.

15 MS. LEVIN: Exactly. So that was --

16 THE COURT: I understand.

17 MS. LEVIN: So and the other thing is that, you
18 know, the opposition argues, well, but it looks like in his
19 own assessment he wasn't good for it. And that, of course,
20 again doesn't follow from that. And so then we get into the
21 category of even if there's a remote relevance, Your Honor,
22 then whatever that relevance is would be substantially
23 outweighed by the unfair prejudicial effect that that would
24 cause. Because, again, his assumed thoughts, then the jury
25 could think like, well, you know, he thinks he's not qualified

1 because he hired a coach. So all in all I believe that it's
2 unfairly prejudicial.

3 Just on the point of the unclean hands defense,
4 again they are citing the Fetish, Las Vegas Fetish case. But,
5 again, the unclean hands defense requires egregious misconduct
6 and serious harm caused by it. And they haven't further
7 substantiated that. So with that being said, our position is
8 to exclude it for those reasons.

9 THE COURT: Thank you.

10 MS. LEVIN: Thank you.

11 THE COURT: Mr. Searcy --

12 MR. SEARCY: I'll address that.

13 THE COURT: -- I am inclined to deny the motion.
14 But if the evidence is admitted at trial, to admit it with a
15 limiting instruction that says that it only goes to
16 suitability.

17 MR. SEARCY: And, Your Honor, I think that we're
18 okay with that.

19 THE COURT: Okay.

20 MR. SEARCY: I just want to clarify that we can
21 certainly ask Mr. Cotter about the Alderton documents --

22 THE COURT: You ask him about it, then I'm going to
23 give the limiting instruction, and we'll probably give it five
24 times or six times, and it'll be a written instruction, so
25 it's part of it. And if the plaintiff doesn't want me to give

1 the limiting instruction because they believe that calls to
2 much attention to it, they can, of course, waive that request.

3 MR. SEARCY: Thank you, Your Honor.

4 THE COURT: Okay. So think about whether you really
5 want the limiting instruction, come up with your text for the
6 limiting instruction, and then we'll talk about it when we
7 have our final pretrial conference as to whether you think you
8 really want it.

9 That takes me to the last motion in limine by Mr.
10 Cotter, which relates to the ability of Mr. Ferrario to
11 participate at trial, also known as Motion in Limine Number 2.

12 MR. KRUM: Thank you, Your Honor. I enjoy this very
13 much, showing that perhaps I've spent too many years in the
14 corporate governance jurisprudence. Three points, and it's
15 not complicated. First, as a general rule a nominal defendant
16 is not allowed to introduce evidence and defend the merits of
17 claims against the director defendants.

18 Second, the handful of exceptions to that are
19 exceptions where it's a serious fundamental corporate interest
20 that is challenged by the derivative suit, a reorganization or
21 restructuring, an effort to appoint a receiver. None of those
22 exist here.

23 Third, if you disagree with us on all of that,
24 there's a question of unfair prejudice and waste of time.
25 And, you know, the individual defendants are represented by

1 capable counsel. They don't need a second lawyer carrying
2 their water. And for a jury to have someone who represents
3 the company asking questions that imply conclusions adverse to
4 the plaintiff is, if not unfairly prejudicial, something
5 beyond that.

6 So that's the argument in a nutshell, Your Honor.
7 If you have any questions, I'd be happy to answer them.

8 THE COURT: Nope. Motion's denied.

9 All right. So let's go to your Motion in Limine
10 Number 1 regarding advice of counsel. I forgot we need to hit
11 that one. Ms. Levin.

12 And then we're going to go to the Chief Justice
13 Steel that I'm not going to really hear, because I didn't give
14 you permission to refile.

15 MS. LEVIN: Your Honor is familiar with the share
16 options, so if I talk about the share option, I don't --

17 THE COURT: I am.

18 MS. LEVIN: Okay. Well --

19 THE COURT: And also with the drama related to the
20 production and the creation and all the stuff about the advice
21 of counsel issue.

22 MS. LEVIN: Okay. I'll just --

23 THE COURT: But I also am aware the Nevada Supreme
24 Court has told us on a business judgment issue we cannot reach
25 behind the advice of counsel except to make a determination as

1 to essentially process issues, how the attorney was hired,
2 what the scope of the retention was, and those kind of issues,
3 as opposed to the actual advice.

4 MS. LEVIN: That's true, Your Honor. And so our
5 arguments are really twofold. Number one is that Adams and
6 Kane, who were two of the three directors on the compensation
7 committee, they testified, as the Court found in its October
8 27, 2016, hearing, that they relied solely on the substance of
9 advice of counsel to determine whether the authorization
10 decision to authorize the estate to invoke the option was
11 proper. So, unlike in Wynn or in Comverge, on which the
12 defendants rely, they did not rely on anything else. So if
13 they are asked at trial to explain why they authorized the
14 option, they must rely on that legal advice.

15 So the second point is that the defendants waived
16 the attorney-client privilege by partially disclosing
17 attorney-client privileged information. Now, they're saying
18 -- or RDI says in the opposition that individual directors
19 cannot waive the privilege.

20 THE COURT: That's the Jacobs versus Sands case.

21 MS. LEVIN: Exact, Your Honor. And I agree with
22 that. But, of course, RDI can only act through its officers
23 and directors.

24 THE COURT: That's the Jacobs versus Sands case.

25 MS. LEVIN: And the current officer -- and I think

1 in particular if you look at the Exhibit 4 that we attached
2 to our motion, is that that email was produced by Ellen
3 Cotter, who is a current CEO and is an officer and director,
4 and she --

5 THE COURT: I understand.

6 MS. LEVIN: So, in other words --

7 THE COURT: And then Mr. Ferrario clawed it back.

8 MS. LEVIN: Right. So she produced it, and so
9 there's a Supreme Court case that says, "The power to waive
10 the corporate attorney-client privilege rests with the
11 corporation's management and is usually -- and is normally
12 exercised by its officers and directors." And that's what
13 happened here.

14 So I think especially Exhibit 4, but even Exhibit 2
15 and 3, the 2 and 3 they raise the legal issues. 2 and 3
16 identify the legal issues of whether there was a reason why
17 Ellen Cotter could not exercise the option and whether enough
18 -- whether the trust documents did not pour over -- the share
19 option didn't pour over into the trust. But Exhibit 4
20 specifically seeks legal advice from the company attorney and
21 as to the legal rights of the estate to exercise the option in
22 light of the proxy language. So that is -- under our statute
23 is an attorney-client communication for the purpose of
24 obtaining legal advice. So they partially disclosed that, so
25 we believe there's a waiver issue. And under Wardleigh you

1 cannot use the attorney privilege both as a shield and a
2 sword, which is what they're now doing, is because what
3 they're going to say is, well, we partially disclosed but you
4 cannot find out what it was. But even the very --

5 THE COURT: But that's the Nevada Supreme Court
6 who's made that decision, not the rest of us. They were very
7 clear that we're not allowed to get behind that.

8 MS. LEVIN: Correct. But one thing that the Wynn
9 decision did not decide was the waiver issue. And that was in
10 Footnote 3 of the decision.

11 THE COURT: I made that decision separately after
12 that came back. But that's a case by case, and I haven't made
13 that decision in this case. In fact, my belief is you guys
14 have a writ pending on this issue still. Right?

15 MR. KRUM: I think the writ pending is on a
16 different privilege issue, Your Honor.

17 THE COURT: Okay.

18 MS. HENDRICKS: Your Honor, the writ relating to
19 this issue was filed by RDI, and the Supreme Court actually
20 came back and said the facts were analogous to Wynn and it
21 needed to make a decision, and that was shortly after you did
22 make the decision when we were back before you on it.

23 THE COURT: Yeah. We had a hearing.

24 MS. HENDRICKS: And we had the supplemental
25 briefing.

1 THE COURT: Yep. Okay. So anything else on this
2 one?

3 MS. LEVIN: Only -- the only thing is that the
4 partially disclosed privileged emails themselves show that the
5 board had information that would cause reliance on advice to
6 be improper. So that would --

7 THE COURT: Okay. So your motion's denied. Come up
8 here. I'm going to give you these. These are your I believe
9 documents you actually want sealed. Since I granted your
10 motion, it was on the calendar today, hopefully you can work
11 out with the Clerk's Office so they will actually take the
12 sealed documents and put them so they're part of the record in
13 some way.

14 MS. LEVIN: And I brought them with me, too.

15 THE COURT: Yeah. Good luck. You've got to do it
16 at the counter.

17 MS. LEVIN: Okay. Thank you.

18 THE COURT: Okay. So I am declining to hear again
19 the motion in limine on Chief Justice Steel. I've previously
20 made a ruling on that. I've reviewed your brief, and there's
21 nothing in it that causes me to change my mind.

22 I have already granted your motions to seal and
23 redact. It was on calendar for today.

24 And now we need to set our final pretrial
25 conference. I usually do it the week before.

1 MR. KRUM: The week before is fine, Your Honor.

2 (Pause in the proceedings)

3 THE COURT: The week before is fine?

4 MR. KRUM: The week before is fine, Your Honor.

5 THE COURT: What day are you guys arguing in the
6 Supreme Court?

7 MR. TAYBACK: That's the 3rd.

8 THE COURT: 3rd. So do you want to come in on --

9 MR. TAYBACK: 4th?

10 THE CLERK: [Inaudible].

11 THE COURT: No, I'm not seeing them on January 2,
12 you're seeing them on January 2.

13 How about on January 5 at 3:00 o'clock?

14 MR. TAYBACK: That's good. Thank you.

15 MR. KRUM: Perfect.

16 MR. FERRARIO: Thank you, Judge.

17 THE COURT: That will be your final pretrial
18 conference. At your final pretrial conference we're not going
19 to bring exhibits, because you're already going to deal with
20 that. But you are going to bring any jury instructions,
21 you're going to exchange your draft jury instructions. If you
22 have limiting instructions you think are appropriate, try and
23 have those, as well. And we're also going to deal with any
24 exhibits that you want in a notebook for the jury. The only
25 reason I suggest that is sometimes documents that we show on

1 screens aren't easily able to be seen by a juror. There's
2 contract documents and things you may want. If there are
3 selected items you want to have in a jury notebook, it will be
4 a single jury notebook. It will be not more than 3 inches.
5 So whatever we put in it has to fit in the 3 inches. And so
6 if you have things you think you want included in that, we'll
7 talk about that. And you're going to -- I will make final
8 decisions on voir dire questions at that time. I encourage
9 you to exchange them a week ahead of time.

10 MR. KRUM: Your Honor, with respect to exhibits we
11 have a date this week of Wednesday or Thursday for our exhibit
12 list. I think in view of today's developments it would be a
13 good idea to push that back to next week.

14 THE COURT: You guys need to get working on it.

15 MR. KRUM: No, we're working on it.

16 THE COURT: It takes a lot longer than you think it
17 does.

18 All right. Anything else that I missed?

19 MR. FERRARIO: There may be some utility to that,
20 Mark, in light of the rulings of the Court today, because the
21 complexion of the case has changed.

22 MR. KRUM: Well, that's -- we're working on it. We
23 understand that, Your Honor. So may we have until Wednesday
24 of next week you think, Mark?

25 MR. TAYBACK: Yeah, that's fine.

1 THE COURT: I still need to see representatives from
2 those parties who remain in the case at the calendar call on
3 December 18th. If you are out of town, I do not do call-ins
4 for calendar calls, Mr. Krum, so just make sure Mr. Morris and
5 Ms. Levin know whatever it is they need to say.

6 I am going to be asking you whether given the
7 rulings I made today it has changed the estimate that you
8 provided to me through Ms. Hendricks on December 4th as the
9 amount of time for trial. Because I need to negotiate for
10 space, and knowing the time that I need is important for me in
11 my space negotiations.

12 MR. RHOW: Your Honor, sorry. One point of
13 clarification as to Mr. Gould specifically. He is out of the
14 case entirely?

15 THE COURT: Well, I granted the motion on the
16 business judgment for him. My understanding is that is the
17 only way that you would be involved, because there are no
18 direct breach of contract claims against you. If there were
19 other types of claims against you that were not protected by
20 the business judgment rule, you might not be out. But I
21 didn't see that in the briefing. But I don't know your case
22 as well as you do.

23 MR. RHOW: Assuming that's the case, I just want to
24 make sure that no one's going to sanction me if I don't show
25 up.

1 THE COURT: Do you think you have any remaining
2 claims against Mr. Gould given my ruling today?

3 MR. KRUM: Your Honor, probably not. But I'll go
4 back through it.

5 THE COURT: If you could communicate if you think
6 there are any, and then I'll have to handle that on a
7 supplemental motion practice.

8 MR. RHOW: Understood, Your Honor.

9 THE COURT: Okay. So the people who I anticipate
10 will be here only in the capacity as witnesses would be --
11 okay, I've got to go back to this list -- Kane, McEachern,
12 Gould, Coddington, Wrotniak. That's all of them. So the people
13 who remain parties are Cotter, Cotter, Adams, and then Mr.
14 Cotter.

15 MR. TAYBACK: Yes, Your Honor. I understand that.

16 THE COURT: All right. So see you on the 18th.

17 MR. TAYBACK: Thank you, Your Honor.

18 MR. KRUM: Thank you.

19 MR. EDWARDS: Your Honor --

20 THE COURT: Yes, Jim.

21 MR. EDWARDS: -- on the 2nd is local counsel going
22 to be here for the exhibits? Do you want local counsel here?

23 THE COURT: Counsel does not need to be here. They
24 can send paralegals. So local counsel does not need to come
25 sit through it if they don't want to.

1 MR. EDWARDS: Okay.

2 THE COURT: But it may be helpful if local counsel
3 is going to be intimately involved in the process of doing it
4 for you to have someone here. But I leave that to work out
5 with your people.

6 Anything else?

7 MS. HENDRICKS: Your Honor, on the exhibit list did
8 we get an extra week, then, so we kind of work through these
9 issues?

10 THE COURT: I'm not involved in the exhibit list
11 issue. That's you guys on 2.67. I'm out of that.

12 MR. FERRARIO: Thank you, Your Honor.

13 THE PROCEEDINGS CONCLUDED AT 12:00 NOON

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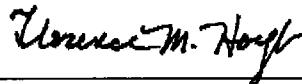
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FLORENCE M. HOYT, TRANSCRIBER

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CLARK COUNTY, NEVADA**

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International, Inc.,

Plaintiff,

v.

**MARGARET COTTER, ELLEN
COTTER, GUY ADAMS,
EDWARD KANE, DOUGLAS
McEACHERN, WILLIAM
GOULD, JUDY CODDING,
MICHAEL WROTONIAK,**

Defendants.

And

**READING INTERNATIONAL,
INC.,** a Nevada corporation,
Nominal Defendant.

) Case No. A-15-719860-B

) Dept. No. XI

)

) Coordinated with:

)

) Case No. P-14-0824-42-E

) Dept. No. XI

)

) Jointly Administered

)

**MOTION FOR
RECONSIDERATION OR
CLARIFICATION OF RULING
ON MOTIONS FOR SUMMARY
JUDGMENT NOS 1, 2, AND 3
AND GOULD'S SUMMARY
JUDGMENT MOTION**

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**AND
APPLICATION FOR ORDER
SHORTENING TIME**


Electronically Filed
12/19/2017 10:02 AM
Steven D. Grierson
CLERK OF THE COURT



MORRIS LAW GROUP
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1 Plaintiff James J. Cotter, Jr. ("Plaintiff") hereby moves the Court
2 under EDCR 2.24(b) to reconsider and/or clarify the Court's ruling on the
3 individual defendants' motions for partial summary judgments Nos. 1 and 2
4 ("Partial MSJ Nos. 1 and 2") and William Gould's motion for summary
5 judgment ("Gould MSJ"). Plaintiff further moves the Court under EDCR
6 2.26 for an Order shortening time to notice and hear this Motion.

7 MORRIS LAW GROUP

8
9 By: 
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DECLARATION OF AKKE LEVIN
IN SUPPORT OF APPLICATION FOR
ORDER SHORTENING TIME

I, Akke Levin, declare:

1. I am an attorney with Morris Law Group, counsel for Plaintiff James J. Cotter, Jr. I have personal knowledge of the facts stated in this declaration except as to those stated on information and belief, which facts I have investigated and believe to be true. I would be competent to testify to them if called upon to do so.

2. On December 11, 2017, the Court heard oral argument on the defendants' motions for summary judgment and some of the parties' motions *in limine*. The Court granted Partial MSJ No. 1 regarding Plaintiff's termination and reinstatement; Partial MSJ No. 2 regarding director independence; and Partial MSJ No. 3 regarding the unsolicited Patton Vision offer as to five of the eight defendants. The Court also granted defendant William Gould's MSJ on all claims. The Court further ruled in favor of Edward Kane, Douglas McEachern, Judy Coddington, and Michael Wrotniak on all four of Plaintiff's breach of fiduciary duty claims asserted against them.

3. During the December 11 hearing, the Court set January 8, 2018 as the trial start date.

4. Good cause exists under EDCR 2.26 to shorten the time for notice and hearing of this Motion for Reconsideration and Clarification because trial is less than fourteen business days away, and the issues raised by this Motion have substantial impact on trial preparation and the scope of issues and claims remaining for trial. Plaintiff's counsel is available any day of the week of December 18, 2017.

5. This Motion is being served by the court's E-Service System to all counsel of record.


6. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct


Akke Levin, Bar No. 9102

ORDER SHORTENING TIME

On application of Akke Levin, counsel for plaintiff James J. Cotter, Jr., and good cause appearing,

IT IS HEREBY ORDERED that the time for notice and hearing of the Motion for Reconsideration and Clarification shall be, and it hereby is, shortened and shall be heard on shortened time on the ~~8~~¹² day of December, 2017, at the hour of 9⁰⁰ a.m. . Chm 10A.


Judge Elizabeth Goff Gonzalez
District Court Judge, Dept. 11 CR

DATED: _____

I. INTRODUCTION

The defendants, except Gould, moved for partial summary judgment only on specific *issues*. The Court, however, without giving plaintiff proper notice and adequate time to respond, elected to treat the motions as directed to the *claims* made against the defendants and granted three of the five pending motions as to defendants Kane, McEachern, Coddington, and Wrotniak on all claims and dismissed them from the case. The Court also dismissed defendant Gould although his separately-filed motion for summary judgment had not been fully briefed and was scheduled for hearing next month, on January 8, 2018. Granting summary

1 judgment on all claims against these defendants under these circumstances
2 was error and should be reconsidered by the Court.'

3 The Court also erred in granting summary judgment for these
4 defendants under the business judgment rule because the Court did not
5 adequately consider that intentional misconduct by directors rebuts the
6 presumption that they acted in good faith and are entitled to immunity for
7 their misconduct by the rule. Moreover, in assessing the dismissed
8 directors' conduct for summary judgment purposes, the Court apparently
9 overlooked the law that says the acts and omissions of individual directors
10 must be viewed *collectively*, not separately, to determine, for example,
11 whether their conduct and motives show independence of actions in the
12 *interest* of their corporation, as distinct from their own interests or that of
13 control shareholders.

14 As these observations suggest and the following law and
15 evidence support, the Court erred in dismissing the five subject directors
16 without allowing the jury to hear the evidence on disputed material facts
17 and render a verdict on whether the dismissed directors were acting in
18 RDI's interest or to protect and further the interests of the controlling
19 shareholders, as alleged in detail in the Second Amended Complaint
20 ("SAC") and set out again in the Joint Pretrial Memo.

21 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

22 **A. Plaintiff's Complaint and Claims/Causes of Action**

23 The SAC pleads four claims: (1) breach(es) of the duty of care; (2)
24 breach(es) of the duty of loyalty; (3) breach(es) of the duty of candor; and (4)
25 aiding and abetting breaches of fiduciary duty. SAC at 47–54. The Claims
26

27
28 The Court denied summary judgment for defendants Ellen Cotter ("EC"
hereafter), Margaret Cotter ("MC" hereafter), and Guy Adams ("Adams"
hereafter).

1 1-3 are against each of the individual director defendants; the fourth claim is
2 against EC and MC. *See id.*

3 Plaintiff's duty of care claim(s) are based on acts and omissions
4 set out in the SAC, some of which were *not* the subject of a motion for partial
5 summary judgment. Examples of such acts and omissions include: (i) the
6 one time "special nominating committee" of McEachern, Kane and Adams
7 forcing director Storey to "retire" and adding unqualified persons loyal to
8 EC and/or MC to the RDI Board; and (ii) knowingly disseminating
9 erroneous and materially misleading statements in RDI public disclosures
10 (SEC filings and press releases). The acts and omissions on which fiduciary
11 duty claims of care and loyalty are based also include one as to which MSJ
12 No. 4 was denied in relevant part—misuse of the executive committee. *See*
13 December 21, 2016 Order Regarding Defendants' Motions For Partial
14 Summary Judgment Nos. 1-6..." (the "MSJ Order"), Ex. 1 at 3:15-19 (granting
15 MSJ No. 4 "[a]s to formation and revitalization (activation) of the Executive
16 Committee," but denying it "as to utilization of the committee").

17 Plaintiff's duty of loyalty claims also were based in part on
18 matters which were *not* the subject of the motions for partial summary
19 judgment, including breaches of the duty of loyalty arising from the misuse
20 by EC and MC of their position as controlling shareholders *and* breaches of
21 the duty of loyalty by the other director defendants in acquiescing to the
22 wishes of EC and MC and actively assisting them in protecting and
23 pursuing their personal interests rather than acting solely in the interests of
24 the Company. These breaches are evidenced by other matters pleaded in
25 the SAC and summarized in section II. B. below, some of which were *not* the
26 subject of a partial summary judgment motion, such as the threat to
27 terminate Plaintiff if he did not settle trust disputes unrelated to his sisters
28 on terms satisfactory to them *and* the threat to terminate Plaintiff's family's

1 health insurance if he did not resign as a director, among others. The breach
2 of the duty of loyalty claims also are based on the misuse of the executive
3 committee, as to which a prior motion for summary judgment (Partial MSJ
4 No. 4) was denied in relevant part.

5 **B. The Partial Summary Judgment Motions**

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

11 The Court on October 27, 2016 denied Partial MSJ No. 1, finding
12 that "there are genuine issues of material fact and issues related to interested
13 directors participating in the process." *See* Oct. 27, 2016 Hearing Tr., Ex. 2 at
14 117:9–12. The Court granted in part and denied in part Partial MSJ No. 4
15 regarding the executive committee of the RDI Board. The Court ruled:

16 The motion related to the executive committee is granted in part.
17 As the formation and revitalization of the committee the Motion
18 is granted. *As to the utilization of the committee it's denied.*

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

20 Other Partial MSJs regarding particular matters—director
21 independence (No. 2), the offer (No. 3), the CEO search (No. 5) and other
22 matters including the exercise of the 100,000 share option and the
23 employment and compensation of MC (No. 6), were denied on rule 56 (f)
24 grounds. *See* December 21, 2016 Order, Ex. 1.

25 All of those motions were reset for hearing and heard on
26 December 11, 2017. As Plaintiff understands the Court's oral rulings, the
27 Court granted Partial MSJ No. 1 regarding termination as to defendants
28 Kane, McEachern, Gould, Wrotniak, and Coddington on the grounds that
Plaintiff had failed to raise a disputed issue of material fact regarding their

1 disinterestedness or independence. December 11, 2017 Hearing Tr., Ex. 3, at
2 41:4-20. The Court granted Partial MSJ No. 2 regarding director
3 independence on the same grounds as to the same five defendants. *Id.* at
4 44:20-45:4. The Court granted Partial MSJ No. 3 regarding the unsolicited
5 offer on separate grounds. *Id.* at 48:17-22. The Court denied Partial MSJ No.
6 5 regarding the CEO search and denied Partial MSJ No. 6 regarding the
7 option exercise, compensation package and related conduct. *Id.* at 49:11-
8 52:15.

9 Although the director defendants who filed Partial MSJ Nos. 1-6
10 did not seek summary judgment with respect to any of the *claims* for breach
11 of fiduciary duty against them in the SAC, the Court indicated that only EC,
12 MC and Adams remain defendants in the case. *Id.* at 73:9-14. As to director
13 defendant Gould, his separate summary judgment motion had been noticed
14 for hearing on January 8, 2018. *See* Request for Hearing on Gould MSJ, on
15 file at 3. Nevertheless, on December 11, 2017 the Court ruled that Gould
16 was entitled to summary judgment on the same grounds as the director
17 defendants other than EC, MC and Adams. December 11, 2017 Hearing Tr.
18 at 41:4-20; 44:20-45:4; 73:9-14.

19 III. ARGUMENT

20 A. Reconsideration and clarification of the Court's rulings are 21 warranted.

22 The Court has authority under EDCR 2.24(b) to reconsider prior
23 rulings, and inherent authority to "reconsider, rescind, or modify an
24 interlocutory order for [sufficient] cause" *City of L.A., Harbor Div. v.*
25 *Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001). Courts may grant
26 reconsideration based on new evidence or if the decision is clearly
27 erroneous. *Masonry & Tile Contractors Ass 'n of S. Nev. v. Jolley, Urga & Wirth,*
28 *Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). As discussed below, the
Court should reconsider and clarify its rulings on Partial MSJ Nos. 1, 2, and

1 3 and the Gould MSJ, because in ruling in favor of defendants Coddling,
2 Kane, Gould, Wrotniak, and McEachern on all four claims for breaches of
3 fiduciary duty, the Court overlooked that: (1) Partial MSJ Nos. 1, 2, and 3
4 did not seek complete relief on all four claims for breaches of fiduciary duty
5 and briefing on Gould's MSJ was incomplete; and (2) Plaintiff's fiduciary
6 duty claims are supported by other conduct not addressed by these Partial
7 MSJs that is sufficient to rebut application of the business judgment rule.

8 **B. The Court erred in granting summary judgment on all claims**
9 **against five defendants.**

10 When reviewing a motion for summary judgment, "the evidence,
11 and any reasonable inferences drawn from it, must be viewed in a light most
12 favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729,
13 121 P.3d 1026, 1029 (2005). Although a district court has the inherent power
14 under Nev. R. Civ. P. 56 to *sua sponte* grant summary judgment on claims
15 that are not a part of a motion for summary judgment, before doing so the
16 Court must give the non-moving party 10 days notice and the opportunity
17 to defend himself. *Renown Reg'l Med. Ctr. v. Second Jud. Dist. Ct.*, 130 Nev.
18 ___, 335 P.3d 199, 202 (2014) ("*Renown*"); *Soebbing v. Carpet Barn*, 109
19 Nev. 78, 83-84, 847 P.2d 731, 735 (1993)(holding that the defending party
20 must be given the full 10 days notice under Nev. R. Civ. P. 56(c) and an
21 opportunity to defend itself before a court may grant summary judgment
22 *sua sponte*).

23 *Renown* is instructive, because its procedural history is similar to
24 this case. There, the defendant hospital moved for summary judgment on
25 three specific issues: policy coverage, third-party beneficiary status of the
26 plaintiff, and *Renown's* compliance with certain statutes. *Renown*, 335 P.2d
27 at 201. "The full merits of Wiley's claims for breach of the provider
28 agreement and intentional interference with his Cigna policy were not at
issue in the summary judgment proceedings." *Id.* The district court initially

1 denied the motion, holding there were issues of fact. *Id.* Thereafter,
2 Renown renewed its motion for summary judgment on the same three
3 issues and Wiley filed summary judgment motion but only on the statute
4 violation issue. *Id.* After a hearing on the summary judgment motions, the
5 district court denied Renown's motion and granted Wiley's motion. But in
6 granting that motion, the court decided not only the three issues raised by
7 Renown; it also found "in favor of Wiley on his breach of contract and
8 intentional interference with contract claims, *even though the full merits of*
9 *these claims were not specifically argued in the cross-motions for summary*
10 *judgment or at the hearing.*" *Id.* (emphasis added). "The district court stayed
11 the remainder of the case so that Renown could seek writ relief in this
12 court," which it did. *Id.* The Nevada Supreme Court granted the writ
13 petition with respect to that portion of the order because the "claims for
14 breach of contract and intentional interference with contract . . . were
15 nowhere mentioned in the six summary judgment briefs." *Id.* at 202.

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

18 Here, the individual defendants (other than Gould) moved for
19 partial summary judgment on distinct issues only—*i.e.*, Plaintiff's
20 termination and reinstatement (Partial MSJ No. 1); director independence
21 (No. 2); the unsolicited Patton Vision offer (No. 3); the executive committee
22 (No. 4); the appointment of EC as CEO (No.5); and option exercise and other
23 issues (No. 6). *See, e.g.*, Partial MSJ No. 1 at 2 (Defendants seek summary
24 judgment "as to the First, Second, Third, and Fourth Causes of Action in
25 Plaintiffs Second Amended Complaint, *to the extent that they assert claims*
26 *based on Plaintiffs [sic] June 12, 2015 termination . . .*") (emphasis added).

27 Unlike defendant Gould, the individual defendants did not
28 move for summary judgment on all four claims for breach of fiduciary duty,
which involve additional issues not addressed in the MSJs—*e.g.*, materially

1 misleading and erroneous board materials published in public disclosures
2 and process failures. See Pretrial Memo at 5–9. Moreover, the Court *denied*
3 Partial MSJ Nos. 5 and 6, which involve conduct by dismissed defendants.
4 For example, Partial MSJ No. 5 relates to the appointment of Ellen Cotter as
5 CEO, which is a decision in which defendants Gould and McEachern
6 participated.

7 **2. The Court's ruling deprived Plaintiff of Notice and an**
8 **Opportunity to be heard.**

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

17 Here, because the individual defendants other than Gould did
18 not seek summary judgment across the board on all claims against all five
19 defendants, and the Court's ruling went beyond the issues raised in Partial
20 MSJ Nos. 1, 2, and 3 and dismissed all claims against five defendants,
21 Plaintiff should have received ten days' notice and been given an
22 opportunity to be heard. Nev. R. Civ. P. 56(c); *Renown*, 335 P.3d at 202.
23 Plaintiff was entitled to the same notice on the Gould MSJ, because briefing
24 was still open on that MSJ on December 11. See Request for Hearing on
25 Gould MSJ at 3 (setting hearing on the MSJ for January 8).

26 **C. The Court overlooked the conduct, acts and omissions stated**
27 **in the SAC and Pretrial Memorandum.**

28 During the October 27, 2016 hearing, the Court asked counsel to
apprise the Court of the topics that would be the subject of special

1 interrogatories, which Plaintiff's counsel understood to mean matters
2 Plaintiff would claim also gave rise to or constitute breaches of fiduciary
3 duty *alone*, not just a breach of duty when considered together with other
4 complained of conduct. Oct. 27, 2016 Hearing Tr., Ex. 2 at 60:23–61:8. That
5 is what Plaintiff did on pages 5 to 6 of his supplemental opposition that was
6 discussed with the Court at the December 11, 2017 hearing.

7 But those matters were not the entirety of the bases for the
8 claims of breaches of fiduciary duty, as the SAC reflects on its face, (which
9 the Court observed during the October 27, 2016 hearing (*id.* at 58:19–25)), as
10 Plaintiff explained in the Joint Pretrial Memorandum, and as the list below,
11 included for the convenience of the Court, reflects. Likewise, the evidence
12 proffered with Plaintiff's oppositions to Partial MSJ Nos. 1–6 (and Gould's
13 MSJ) was of course focused on, *but not confined to*, the matters listed on pages
14 5 to 6 of the supplemental opposition that was discussed with Court at the
15 December 11, 2017 hearing.

16 The matters which evidence fiduciary breaches by the individual
17 director defendants include the following:

- 18 1. The threat by Adams, Kane and McEachern to terminate
19 Plaintiff as President and CEO of RDI if he did not resolve trust
20 disputes with his sisters on terms acceptable to them (which
included giving them control of RDI);
- 21 2. The vote by Adams, Kane and McEachern to terminate
22 Plaintiff because he failed to acquiesce to the threat;
- 23 3. EC's threat to terminate health insurance for JJC and his
24 family if JJC did not resign as a director, which Gould
25 acknowledged was an erroneous position, but to which he
acquiesced, resulting in erroneous SEC filings by RDI, among
other things;
- 26 4. Use of the executive committee of Kane, Adams, EC and
27 MC to limit the participation of Plaintiff and Storey as directors,
to which Gould acquiesced;
- 28 5. Manipulating board materials, including creating
inaccurate minutes, to which Gould acquiesced;

6. Kane and Adams as compensation committee members authorizing exercise of the 100,000 share option to assist EC and MC in their efforts to retain control of RDI, over the stated reservations of Storey;

7. The involuntary "retirement" of director Storey by the one-time "special nominating committee" of McEachern, Adams and Kane, at the direction of EC and MC, because Storey failed to exhibit the required subservience to EC and MC as controlling shareholders;

8. Board stacking/adding Coddington and Wrotniak by the one-time "special nominating committee" of McEachern, Adams and Kane, to which Gould acquiesced while acknowledging that he had insufficient time to fulfill his fiduciary responsibilities;

9. The CEO search committee of MC, McEachern and Gould aborting the CEO search and selecting EC even though she did not possess the required experience and qualifications for the position, which the Board acknowledged;

10. Hiring MC as EVP RED NY and paying a \$200,000 pre-employment bonus "recommended" by EC, even though all directors had acknowledged that she had no real estate development experience and was not qualified for the position;

11. Paying \$50,000 to Adams because EC "recommended" it;

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

13. Materially misleading and inaccurate statements and omissions in public disclosures, including SEC filings and press releases

SAC ¶¶ 9, 13, 72, 101(a)-(i), 109-119, 135(a)-(k), 136(a)-(i), 147 (all).

D. Plaintiff Proffered Evidence of Fiduciary Breaches and Intentional Misconduct More Than Sufficient to Raise Disputed Issues of Material Fact.

The business judgment rule presumes that directors in making business decisions acted in good faith, on an informed basis and with a view to the interests of the corporation. NRS 78.138(3). Courts therefore give deference to directors' decisions reached by proper *process*, and do not evaluate the reasonableness of the subject decision itself, as distinct from the process by which it was made. *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del.

1 1997). Thus, the business judgment rule presumption "is a rule of evidence
2 that places the initial burden of proof on the plaintiff challenging the board's
3 decision." *Cinerama v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995). To
4 rebut this presumption, the plaintiff bears "the burden of providing
5 evidence that the Board of Directors, in reaching its challenged decision,
6 breached any one of its... fiduciary duties [of] good faith, loyalty or due
7 care." *Id.* at 1164.

8 In particular, NRS 78.138(7) requires the plaintiff to: (a) rebut the
9 presumption under NRS 78.138(3) that directors are presumed to act in good
10 faith, on an informed basis and with a view to the interests of the
11 corporation; (b) show that the director's act or failure to act constituted a
12 breach of fiduciary duty; and (c) show that such breach involved intentional
13 misconduct, fraud or a knowing violation of law.

14 "Intentional misconduct" is one of three ways in which a
15 fiduciary can fail to act in good faith. *In re Walt Disney Co. Derivative Litig.*,
16 906 A.2d 27, 67 (Del. 2006). The first occurs "where the fiduciary
17 intentionally acts with a purpose other than that of advancing the best
18 interests of the corporation." *Id.* The second occurs "where the fiduciary acts
19 with the intent to violate applicable positive law." *Id.* The third occurs
20 "where the fiduciary intentionally fails to act in the face of a known duty to
21 act, demonstrating a conscious disregard for his duties." *Id.*

22 Additionally, as a matter of law and, in cases such as this, logic
23 as well, the acts and omissions of the individual director defendants must be
24 viewed collectively, not in isolation. *See, e.g., In re Ebix, Inc. Stockholder Litig.*,
25 2016 Del. Ch. LEXIS 5 at *66-67 n.137, 2016 WL 208402 (Del. Ch. Jan. 15,
26 2016) (rejecting director defendants' contention that bylaw amendments
27 should be viewed individually rather than collectively); *Carmody v. Toll*
28 *Brothers., Inc.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (finding that particularized

1 allegations that directors acted for entrenchment purposes sufficient to
2 excuse demand); *Chrysogelos v. London*, 1992 WL 58516, at *8 (Del. Ch. 1992)
3 ("None of these circumstances, if considered individually and in isolation
4 from the rest, would be sufficient to create a reasonable doubt as to the
5 propriety of the director's motives. However, when viewed as a whole, they
6 do create such a reasonable doubt . . ."); *Cal. Pub. Employees' Ret. Sys. v.*
7 *Coulter*, 2002 Del. Ch. LEXIS 144 at *29-30, 2002 WL 31888343 (Del. Ch. Dec.
8 18, 2002) (concluding that allegations which individually would be
9 insufficient to show a lack of disinterestedness or independence when taken
10 together, were sufficient to do so).¹

11 Plaintiff respectfully submits that the evidence proffered with
12 his various oppositions to the various motions, including the evidence
13 highlighted below, is more than sufficient to raise disputed issues of
14 material fact and rebut the presumptions that the RDI directors in taking the
15 actions raised in this case and described above acted in good faith, on an
16 informed basis and with a view to the interest of the corporation.

17 **1. Examples of Evidence Sufficient to Rebut the Business**
18 **Judgment Rule Presumptions.**

19 **a) The (a) Attempted Extortion (by threatening**
20 **termination) and (b) the Termination Because**
21 **Plaintiff Refused to Be Extorted.**

22 As Plaintiff demonstrated in his own summary judgment motion
23 and in his oppositions to Partial MSJ No. 1, and as summarized again below,
24 Kane, McEachern, and Adams attempted to extort plaintiff by telling him
25 that they would vote to terminate him as President and CEO of RDI if he did
26 not resolve personal disputes with his sisters concerning trust and estate

27 ¹ Plaintiff understood the Court to recognize and agree that, even if
28 individual matters or activities did not in and of themselves constitute
breaches of fiduciary duty, that "taken with other activities [they may]
evidence... a breach of fiduciary duty." See Oct. 27, 2016 Hearing Tr., Ex. 2 at
57:9-11.

1 matters (including control of RDI), unrelated to his performance as an officer
2 and director of the corporation. Once Kane, McEachern and Adams had
3 threatened JJC with termination, Kane used his position as a RDI director to
4 pressure Plaintiff to acquiesce to that extortion.

5 When Kane, McEachern (who personally solicited plaintiff to
6 resign rather than be terminated, Oct. 13, 2016 Decl. of JJC, ¶ 14) and Adams
7 failed to extort him, they acted on their threat and terminated plaintiff. They
8 did so because, as Adams memorialized contemporaneously, they had
9 picked the sisters' side in their *family dispute* with plaintiff, as opposed to
10 acting in the interest of RDI. Remarkably, Kane admitted to plaintiff just
11 before he terminated Plaintiff, **"there is no one more qualified to be the**
12 **CEO of this company than you."** Appendix ("App.") Ex. 2
13 (JCOTTER009286) (emphasis added). In making this statement, Kane not
14 only admitted that he, Adams, and McEachern were not acting in the
15 interests of RDI, but also admitted that they were acting *in derogation of*
16 RDI's interests. (The details of these events are summarized below from
17 Plaintiff's motion for summary judgment and opposition to Partial MSJ No.
18 1, and the citations are to the Appendices of evidence Plaintiff submitted
19 previously therewith).

20 On May 19, 2015, EC distributed an agenda for a RDI board of
21 directors meeting two days later, May 21, 2015. App. Ex. 6 (EC Dep. Ex.
22 339). The first agenda item was "Status of President and CEO." *Id.* This
23 subject had not been previously addressed at an RDI Board of Directors
24 meeting. Indeed, a draft agenda a few days earlier made no mention of the
25 subject. App. Ex. 7 (EC Dep. Ex. 338). Storey wrote in a May 20, 2015 email
26 to Director Gould that "I am only assuming the matter before us is a
27 resolution to immediately remove the CEO—that isn't clear from the
28 agenda, or any direct comment made to me by any party." App. Ex. 8

1 (TS0000073). But before May 19, 2015, each of Adams, Kane and McEachern
2 communicated to EC their agreement to vote as RDI directors to terminate
3 plaintiff as President and CEO of RDI. App. Ex. 1 (EC 6/16/16 Dep. Tr.
4 175:17-176:8); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 96:5-91:4, 98:21-100:8,
5 100:14-101:11); App. Ex. 9 (Adams 4/28/16 Dep. Tr. at 98:7-17; 98:18-99:22);
6 App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 378:15-370:5); *see also* App. Ex. 6 (TS
7 8/31/16 Dep. Tr. at 66:22-67:20) and App. Ex. 26 (Dep. Ex 131).

8 During their planning that predated the supposed May 21
9 meeting, Kane sent an email to Adams on May 18, 2016, in which he (Kane)
10 agreed to second the motion for plaintiff's termination:

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

16 App. Ex. 19 (Dep. Ex. 81 at GA00005500).

17 Also prior to May 21, 2015, Kane and Adams discussed other
18 motions related to plaintiff's termination, such as the appointment of an
19 interim CEO. App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 366:5-367:6); *see also*
20 App. Ex. 20 (Adams Dep. Ex. 82 at GA00005502-03). In a May 19, 2015 email
21 to Kane, Adams confirmed they had chosen sides in a family dispute:

22 Ed,

23 I am sorry, as I know your relationship with the family started
24 long before they were born. I also know—and now see for
25 myself—why SR placed such a high value on you and your
26 counsel. More than anyone else on the board, you worked
27 behind the scenes attempting to bridge every problem with the
28 kids. Lastly, I know that more than anyone else, you have been
at SR's side at every turn as he built his empire. I think you and I
share a [sic] *obligation to the family* based upon our
commitment to our friend.... Unfortunately, it seems that we
have no choice but to choose a side.

1 App. Ex. 21 (Adams Dep. Ex. 85 at GA00005544–45 (emphasis added); *see*
2 *also* App. Ex. 6 (TS 8/3/16 Dep. Tr. at 65:12–66:20). Where is the "interest" of
3 RDI in this admission? NRS 78.138(1).

4 In the face of a pre-arranged agreement among Adams, Kane
5 and McEachern to vote to terminate plaintiff, Gould warned that they all
6 could "face possible claims for breach of fiduciary duty if the Board takes
7 action without following a *process . . .*" App. Ex. 318 (Gould Dep. Ex. 318).
8 (Emphasis added). Storey used the term "kangaroo court," and observed as
9 to the non-Cotter directors that, "as directors *we can't just do what a*
10 *shareholder* [meaning EC and MC] *asks.*" App. Ex. 22 (Kane Dep. Ex. 116)
11 (emphasis added). Kane rejected their request to meet separately from the
12 Cotters, stating that "the die is cast." App. Ex. 23 (EK Dep. Ex. 117 at
13 TS000069).

14 The supposed May 21, 2015 special meeting was convened and
15 concluded with no termination vote having been taken. Sept. 23, 2016 JJC
16 Declaration In Support of Plaintiff's Motion ("JJC Decl.") ¶ 11.

17 On or about Wednesday, May 27, 2015, a lawyer representing
18 MC and EC in the California Trust Action sent an attorney representing
19 Plaintiff in that action a document outlining terms on which EC and MC
20 would resolve their disputes with him. *Id.* ¶ 12; App. Ex. 4 (MC 6/15/16
21 Dep. Tr. at 154:19–156:19); App. Ex. 32 (Dep. Ex. 322). Not coincidentally, EC
22 on May 27, 2015 emailed RDI directors stating "that the board meeting held
23 last Thursday [May 21] was adjourned, to reconvene this Friday, May 29,
24 2015. The board meeting will begin at 11:00 a.m. at our Los Angeles office."
25 JJC Decl. ¶ 13; App. Ex. 1 (MC 6/16/16 Dep. Tr. at 185:13–186:9); App. Ex. 35
26 (Dep. Ex. 340).

27 Once the termination threat had been made, Kane continued
28 misusing his position of trust and power as a director at RDI to pressure

1 Plaintiff to give in to the threat of his sisters and resolve his disputes with
2 them by acceding to their demands. For example, on May 28 Kane wrote
3 Plaintiff: "Ellen is going to present you with a global plan to end the
4 litigation and move the Company forward. If you agree to it, you, Ellen and
5 Margaret will work in a collaborative manner and you will retain your title."
6 App. Ex. 4 (Dep. Ex. 118 at EK 00000396 (emphasis added)). Kane further
7 warned, "If it is a take-it-or-leave-it, then I STRONGLY ADVISE YOU TO
8 TAKE IT, even though I have not seen or heard the particulars." *Id.*
9 (emphasis added).

10 The supposed special board meeting on May 29 commenced and
11 Adams made a motion to terminate Plaintiff as President and CEO. In
12 response, Plaintiff questioned Adams' independence and/or
13 disinterestedness. JJC Decl. ¶ 15. Adams refused to speak to the subject,
14 and neither Gould nor any other RDI director received or required an
15 explanation from Adams. *Id.* The supposed special meeting was adjourned
16 until 6:00 p.m. that evening. Plaintiff was then told by Kane, McEachern
17 and Adams that he needed to resolve his disputes with his sisters by then or
18 they would to terminate him. *Id.* That threat was memorialized by director
19 Storey, whose contemporaneous handwritten notes state:

20 **long board discussion**

21 **ended with basically a command from "majority" – Jim go**
22 **settle something with sisters in next hour or you will be**
23 **terminated.**

24 App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 110:6–12); App. Ex. 15 (Storey Dep.
25 Ex. 17) (emphasis added).

26 The Board reconvened telephonically around 6:00 p.m. and Ellen
27 Cotter reported that she and Margaret Cotter had reached an agreement in
28 principle with plaintiff to resolve their disputes. Ellen Cotter concluded
that, while no definitive agreement had been reached, she would have one

1 of their lawyers provide documentation to counsel for plaintiff. No
2 termination vote was taken. JJC Decl. ¶ 16; Motion App. Ex. 3 (MC 5/13/16
3 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 15 (Dep. Ex. 17) and Ex. 1 (Kane
4 5/2/16 Dep. Tr. at 191:6–24). On Wednesday, June 3, 2015, counsel for EC
5 and MC transmitted a new document to counsel for JJC. JJC Decl. ¶ 17;
6 App. Ex. 3 (MC 5/13/16 Dep. Tr. at 377:7–24); App. Ex. 28 (Dep. Ex. 167).

7 A few days later, on June 7 and 8, 2015, Kane *admitted* that the
8 termination threat was in furtherance of the *interests of EC and MC, not RDI*.
9 In a June 8 email to Plaintiff, Kane stated that "there is no one more qualified
10 to be the CEO of this company than you." App. Ex. 2 (JCOTTER009286)
11 (emphasis added). A day earlier, Kane said "I want you to be CEO and run
12 the company for the next 30 years or more." *Id.* Kane thus confirmed that
13 when he, Adams, and McEachern threatened to terminate Plaintiff and
14 thereafter did so, they not only were not acting in the interests of RDI, but
15 that they were acting against of RDI's interests, *in breach of their fiduciary*
16 *duties*.

17 On June 8, 2015, Plaintiff advised EC and MC that he could not
18 accept their so-called settlement document. MC responded that she would
19 advise the RDI board of directors. JJC Decl. ¶ 18; App. Ex. 3 (MC 5/13/16
20 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 3 (MC 5/12/16 Dep. Tr. at
21 271:22–279:7); App. Ex. 27 (Dep. Ex. 156). On Wednesday afternoon, June 10,
22 2015, EC transmitted an email to all RDI board members stating, among
23 other things, that "we would like to reconvene the Meeting that was
24 adjourned on Friday, May 29th, at approximately 6:15 p.m. (Los Angeles
25 time.) We would like to reconvene this Meeting telephonically Friday, June
26 12 at 11:00 a.m. (Los Angeles time) . . ." JJC Decl. ¶ 19.

27 When the termination vote was rescheduled for the next day,
28 Kane resumed pressuring Plaintiff stating on June 11, 2015: "I do believe

1 that if you give up what you consider 'control' for now to work
2 cooperatively with your sisters," Kane admonished, "you will find that you
3 will have a lot more commonality than you think." App. Ex. 5 (Kane Dep.
4 Ex. 306 at EK 00001613). **"Otherwise," Kane threatened, "you will be sorry**
5 **for the rest of your life, they and your mother will be hurt and your**
6 **children will lose a golden opportunity."** *Id.* Tellingly, Kane also wrote:

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

10 App. Ex. 5 (Kane Dep. Ex. 306) (emphasis in original).

11 On Friday, June 12, 2015, a supposed RDI board of directors
12 special meeting was convened. Adams, Kane and McEachern voted to
13 terminate JJC (as did MC and EC). App. Ex. 10 (Kane 5/2/16 Dep. Tr. at
14 191:25–192:12, 193:–194:10); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 139:22–
15 140:11); *see also* App. Ex. 6 (TS 8/3/16 Dep. Tr. at 75:4–76:16 and 81:22–82:6).
16 Kane in deposition admitted that JJC was fired because he did not acquiesce
17 to the termination threat made by Kane, Adams and McEachern:

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

25 * * *

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

28 Kane: He rejected it, yes.

Q.: And he got himself terminated, right?

Kane: Yes.

App. Ex. 1 (Kane 5/2/16 Dep. Tr. at 194–195 (objection omitted)).

b) The Aborted CEO Search

Rather than recite the record evidence regarding the CEO search again, Plaintiff respectfully refers the Court to his prior briefs and the evidence described therein and proffered therewith. *See* October 13, 2016 Oppositions to Partial MSJ No. 5 and Gould's MSJ and December 1, 2017 Supplemental Opposition to Partial MSJ Nos. 2 and 5. By way of summary, that evidence shows that the CEO search committee, comprised of MC, McEachern and Gould (after EC declared her candidacy and withdrew), effectively terminated the search on the same day EC declared her candidacy. That was the last day the committee had a substantive communication with Korn Ferry, the outside professional search firm employed and paid by RDI to lead the CEO search. Shortly thereafter, Korn Ferry was told to stand down, to not provide the agreed and paid for proprietary assessment of final qualified candidates and, in effect, to not interfere with the decision of MC, McEachern and Gould to ignore the fact that EC did not possess the experience and qualifications that they had agreed were the sine qua non to be selected as RDI's new CEO. The CEO search committee then presented (surprise!) EC as their choice, and did not present the full Board with the final three candidates as the previously set *process* prescribed. The Board dutifully agreed, and EC was made CEO. For Judy Coddington, a close family friend who had been a Board member for only two months, that was the result she previously had determined to bring about, because it was her view that RDI was a "family business" of which only a Cotter should be CEO. JJC Decl. ¶ 24.

c) The Matters Which Were the Subject of MSJ No. 6

Because the Court is familiar with the matters raised in Partial MSJ No. 6 and denied that motion, Plaintiff will not recite the record evidence bearing upon those matters. However, Plaintiff respectfully reminds the Court that it was director defendant Kane who, together with

1 Adams, authorized the exercise of the 100,000 share option, and did so
2 notwithstanding the fact that (1) questions he deemed needed to be
3 answered before doing so were not answered, and (2) the responses
4 provided were identified as insufficient by director Storey. Together with
5 the context of that conduct—to enable EC and MC to retain control of RDI—
6 Plaintiff respectfully submits that these facts alone preclude dismissal of this
7 action as against Kane.

8 **d) Gould's Recurring Intentional Misconduct.**

9 Rather than attempt to recite the record evidence contained in
10 Plaintiff's oppositions to the various motions addressing matters to which
11 Gould was a party, Plaintiff respectfully refers to Court to the motions.
12 However, for ease of reference and the convenience of the Court, Plaintiff
13 provides the following inventory of facts that he contends show that
14 director-defendant Gould engaged in intentional misconduct, meaning that
15 he intentionally failed of to act in the face of a known duty to act,
16 demonstrating a conscious disregard of his duties to RDI, and/or that he
17 intentionally acted with a purpose other than advancing the best interests of
18 RDI. The inventory of misconduct includes the following:

- 19 • Gould failed to take steps to prevent or to terminate the
20 efforts by Kane, Adams and McEachern to extort plaintiff.
- 21 • Gould failed to follow through and require Adams to
22 produce, and the Board assess, information regarding his
23 financial dependence on EC and MC, as a result of which Gould
24 allowed Adams to cast the decisive vote to terminate Plaintiff.
- 25 • Gould failed to require the Board to decide whether the
26 position taken by EC, that Plaintiff was required to resign as a
27 director upon termination as an executive, notwithstanding the
28 fact that Gould knew the position was erroneous, thereby
acquiescing to conduct that was erroneous if not improper.
- Gould acquiesced to the use of an executive committee he
knew at the time it was put in place would be used to limit the
participation of Plaintiff and Storey as directors.

1 • Gould acquiesced to stacking the RDI board with
2 unqualified loyalists to the Cotter sisters, even acknowledging at
3 the time that he did not have sufficient opportunity to make an
4 informed decision about whether to disagree or acquiesce.

5 • Gould as one of three members of the executive committee
6 allowed EC to manipulate the process and then took affirmative
7 steps to abort the CEO selection process, in order to bend to the
8 wishes of EC to be CEO.

9 • Gould admitted at the time and subsequently that MC
10 lacked real estate development experience, making her
11 unqualified to be the senior executive vice president of RDI
12 responsible for development of its valuable New York City real
13 estate, but he nevertheless acquiesced to her being given that
14 position and paid as if she were qualified.

15 • Gould acquiesced to EC's recommendation that Adams be
16 given \$50,000, without having any RDI basis for doing so.

17 • Gould took his cue from EC and Craig Tompkins and
18 directed the discussion at the 1 hour and 25 minutes telephonic
19 board meeting regarding the Patton Vision offer to the subject of
20 whether the controlling shareholders would approve, thereby
21 pre-empting and preventing any genuine consideration of how
22 RDI should assess and respond to that offer.

23 • Gould repeatedly acquiesced to RDI issuing and not
24 correcting erroneous SEC filings, including a June 15, 2015 Form
25 8-K that asserted the erroneous statement that Plaintiff was
26 required to resign as a director upon termination as a senior
27 executive, as well as a materially misleading if not erroneous
28 Form 8-K in January 2016 regarding the selection of CEO, which
included a statement from Gould implying that the selection of
EC was the result of a "thorough search process," when in fact
the process had been aborted and selection was not the result of
the proper process.

The motion papers are devoid of any explanation, much less
justification, for the conduct of Kane, McEachern and Adams in threatening
Plaintiff with termination in order to force him to settle trust disputes with
his sisters on terms that suited them, as distinguished from terms suitable to
RDI. The evidence regarding the aborted CEO search, for which MC, Gould
and McEachern are responsible, likewise raises disputed issues of material
fact that preclude dismissal of this action against any of them. Finally by

1 way of example, when viewed collectively and in context, as it must be,
2 Gould's recurring abdication of his fiduciary responsibilities evidences
3 disputed issues of material fact that require denial of Gould's separate
4 motion.

5 **IV. CONCLUSION**

6 For the reasons stated above, the Court should clarify,
7 reconsider, and vacate its rulings on Partial MSJ Nos. 1 and 2, and on
8 Gould's MSJ.

9 MORRIS LAW GROUP

10
11 By: 

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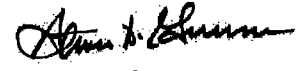
CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that I am an employee of MORRIS LAW GROUP and that on the date below, I cause the following document(s) to be served via the Court's Odyssey E-Filing System: **MOTION FOR RECONSIDERATION OR CLARIFICATION OF RULING ON MOTIONS FOR SUMMARY JUDGMENT NOS 1, 2, AND 3 AND GOULD'S SUMMARY JUDGMENT MOTION AND APPLICATION FOR ORDER SHORTENING TIME** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this _____ day of December, 2017.

By: _____

Exhibit 1


CLERK OF THE COURT

1 **ORDR**
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3 Lewis Roca Rothgerber Christie LLP
4 3993 Howard Hughes Pkwy, Suite 600
5 Las Vegas, NV 89169-5996
6 Tel: 702-949-8200
7 Fax: 702-949-8398
8 E-mail: mkrum@lrcc.com

9 *Attorneys for Plaintiff*
10 *James J. Cotter, Jr.*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

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

16 **Plaintiff,**

17 **vs.**

18 MARGARET COTTER, ELLEN COTTER,
19 GUY ADAMS, EDWARD KANE, DOUGLAS
20 McEACHERN, TIMOTHY STOREY,
21 WILLIAM GOULD, and DOES 1 through 100,
22 inclusive,

23 **Defendants.**

24 **and**

25 **READING INTERNATIONAL, INC., a**
26 **Nevada corporation,**

27 **Nominal Defendant.**

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

31 **Plaintiffs,**

32 **vs.**

33 MARGARET COTTER, ELLEN COTTER,
34 GUY ADAMS, EDWARD KANE, DOUGLAS
35 McEACHERN, WILLIAM GOULD, JUDY
36 CODDING, MICHAEL WROTHIAK, CRAIG
37 TOMPKINS, and DOES 1 through 100,
38 inclusive,

39 **Defendants.**

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

Case No. P-14-082942-E
Dept. No. XI

Case No. A-16-735305-B
Dept. No. XI

Jointly Administered

Business Court

**[PROPOSED] ORDER REGARDING
DEFENDANTS' MOTIONS FOR PARTIAL
SUMMARY JUDGMENT NOS. 1-6 AND
MOTION *IN LIMINE* TO EXCLUDE
EXPERT TESTIMONY**

Date of Hearing: October 27, 2016
Time of Hearing: 8:30 a.m.

3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Lewis Roca
ROTHGERBER CHRISTIE

100040057_2

1 and

2 READING INTERNATIONAL, INC., a
3 Nevada corporation,

4 Nominal Defendant.

5 THESE MATTERS HAVING COME BEFORE the Court on October 27, 2016, Mark G.
6 Krum appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); H. Stanley Johnson, Christopher
7 Tayback, and Marshall M. Searcy appearing for defendants Margaret Cotter, Ellen Cotter, Douglas
8 McEachern, Guy Adams, Edward Kane, Judy Coddington and Michael Wrotniak; Mark E. Ferrario
9 and Kara Hendricks appearing for Reading International, Inc.; and Ekwun Rhew, Shoshana E.
10 Bennett appearing for William Gould, on the following motions:

- 11 • Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's
12 Termination and Reinstatement Claims;
- 13 • Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The
14 Issue of Director Independence;
- 15 • Individual Defendants' Motion for Partial Summary Judgment (No. 3) On
16 Plaintiff's Claims Related to the Purported Unsolicited Offer;
- 17 • Individual Defendants' Motion for Partial Summary Judgment (No. 4) On
18 Plaintiff's Claims Related to the Executive Committee;
- 19 • Individual Defendants' Motion for Partial Summary Judgment (No. 5) On
20 Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO;
- 21 • Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re:
22 Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of
23 Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter,
24 and the Additional Compensation to Margaret Cotter and Guy Adams; and
- 25 • Defendants' Motion *In Limine* to Exclude Expert Testimony of Myron Steele,
26 Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty;
- 27
- 28

1 IT IS HEREBY ORDERED THAT the Motion for Partial Summary Judgment No. 1 is
2 DENIED. There are genuine issues of material fact as to the issues related to interested directors
3 participating in the process.

4 IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to
5 Motion for Partial Summary Judgment No. 2, and supplemental briefing will be discussed once
6 the relevant discovery is complete. The independence issue needs to be evaluated on a transaction
7 or action-by-action basis, because the independence related to each needs to be separately
8 evaluated; even though facts overlap, the Court cannot evaluate this in a vacuum. Motion for
9 Partial Summary Judgment No. 2 is CONTINUED pending Plaintiff's submission of a
10 supplemental opposition.

11 IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to
12 Motion for Partial Summary Judgment No. 3, because depositions have not been completed and
13 the relevant documents have not been produced. Motion for Partial Summary Judgment No. 3 is
14 CONTINUED pending Plaintiff's submission of a supplemental opposition.

15 IT IS FURTHER ORDERED THAT Motion for Partial Summary Judgment No. 4 is
16 GRANTED IN PART. As to the formation and revitalization (activation) of the Executive
17 Committee, the motion is GRANTED; as to utilization of the committee, the motion is DENIED.
18 Formation and revitalization includes a decision by the company to make use of their previously
19 dormant Executive Committee and put people on that Executive Committee.

20 IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for
21 Partial Summary Judgment No. 5. Motion for Partial Summary Judgment No. 5 is CONTINUED
22 pending Plaintiff's submission of a supplemental opposition.

23 IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for
24 Partial Summary Judgment No. 6. Motion for Partial Summary Judgment No. 6 is CONTINUED
25 pending Plaintiff's submission of a supplemental opposition.


26 IT IS FURTHER ORDERED THAT the Motion *in Limine* to Exclude Expert Testimony of
27 Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty is GRANTED
28 IN PART. With respect to Chief Justice Steele, he may testify only for the limited purpose of

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Lewis Roca
ROTHGERBER CHRISTIE

1 identifying what appropriate corporate governance activities would have been, including activities
2 where directors are interested, including how to evaluate if directors are interested. As to Dr.
3 Finnerty, the Motion *In Limine* was WITHDRAWN. As to the other experts, the motion is
4 DENIED.

5 DATED this 20 day of December, 2016.

6 
7 DISTRICT COURT JUDGE

8 Submitted by:

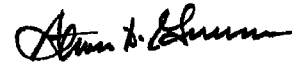
9 LEWIS ROCA ROTHGERBER CHRISTIE LLP

10 By: /s/ Mark G. Krum

11 MARK G. KRUM (SBN 10913)
12 3993 Howard Hughes Pkwy., Ste. 600
13 Las Vegas, NV 89169
14 Attorneys for Plaintiff

Exhibit 2

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CLERK OF THE COURT

TRAN

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:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

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

PA3375

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

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

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

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

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

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

19 THE COURT: Uh-huh.

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

24 THE COURT: Yes.

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

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

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

8 MR. TAYBACK: That's correct.

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

11 MR. TAYBACK: That's absolutely correct.

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

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

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

23 MR. TAYBACK: If I'm --

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

1 MR. TAYBACK: I did, too.

2 THE COURT: Okay.

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

22 THE COURT: Okay. Anything else?

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

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

1 them.

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

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

22 MR. KRUM: Yes.

23 THE COURT: What are you going to ask them?

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

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

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

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

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

17 THE COURT: I know.

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

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

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

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

9 THE COURT: Thank you.

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

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

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

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

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

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

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

7 THE COURT: Okay. Are you done?

8 MR. FERRARIO: Yes.

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

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

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

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

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

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

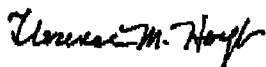
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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Las Vegas, Nevada 89146


FLORENCE M. HOYT, TRANSCRIBER

10/31/16

DATE

Exhibit 3

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR.	.	CASE NO. A-15-719860-B
Plaintiff	.	A-16-735305-B
vs.	.	P-14-082942-E
MARGARET COTTER, et al.	.	DEPT. NO. XI
Defendants	.	Transcript of
.....	.	Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

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.
STEVE L. MORRIS, ESQ.
AKKE LEVIN, ESQ.

FOR THE DEFENDANTS:

H. STANLEY JOHNSON, ESQ.
MARSHALL M. SEARCY, ESQ.
CHRISTOPHER TAYBACK, ESQ.
JAMES L. EDWARDS, ESQ.
MARK E. FERRARIO, ESQ.
KARA B. HENDRICKS, ESQ.
EKWAN RHOW, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

2 (Court was called to order)

3 MR. FERRARIO: Ms. Hendricks has something to take
4 up with you.

5 MS. HENDRICKS: I just have a question.

6 THE COURT: On what?

7 MS. HENDRICKS: On how many drives we each need.

8 THE COURT: Wait. That's not me. Wait. Don't go
9 there yet.

10 MS. HENDRICKS: Okay.

11 THE COURT: Who are you looking for?

12 MR. MORRIS: I'm so unaccustomed to being on the
13 plaintiff's side.

14 (Pause in the proceedings)

15 THE COURT: All right. So moving on. Good morning.
16 We were talking about the pro bono awards at the 8:00 o'clock
17 session this morning, and Mr. Ferrario didn't get one this
18 year, so I was giving him a hard time because nobody from his
19 firm did a lot of work. But apparently they did. It just
20 didn't get reported because it was done with a different
21 agency.

22 Right, Ms. Hendricks?

23 MS. HENDRICKS: Yes. We're getting that fixed right
24 now.

25 THE COURT: Okay. So before we start on your

1 motions I need to hit some practical problems. As those
2 lawyers who practice here in the Eighth all the time know, as
3 the chief judge I do not have a courtroom. That occurred
4 because when the Complex Litigation Center was investigated
5 for purposes of conducting the CityCenter trial we determined
6 that it had a structural issue and some electrical issues. As
7 a result, we did not renew the lease --

8 When was that, Mr. Ferrario?

9 MR. FERRARIO: It was 2013.

10 THE COURT: In 2013 we did not renew the lease, and
11 since that time we have been down one courtroom. The person
12 who gets screwed is the chief judge. So since 2013 we have
13 had the chief judge be a floater. Unfortunately for you guys,
14 I'm the first judge who kept my docket, because Business Court
15 cases have a lot of history and it's not one of those things
16 you can get rid of and assume somebody else is going to be
17 able to be familiar with it fairly quickly.

18 So the down side for all of you is that I don't have
19 a courtroom. Which is why sometimes we borrow Judge
20 Togliatti's courtroom when you guys see me, sometimes in this
21 courtroom. And you've been in the two Family Court courtrooms
22 a couple of times here. I also have judges who lend me their
23 courtrooms on a regular basis on the third floor, and
24 sometimes I have courtrooms in other places in the building I
25 borrow.

1 Recently I learned that I am going to be able on
2 behalf of the court to acquire the seventeenth floor that used
3 to be occupied by the Supreme Court and to build a new Complex
4 Litigation Center, because since 2013 every time we have a
5 complex trial we build out a courtroom, it costs a quarter of
6 a million dollars, and then when we're done with it we take it
7 back down to put it back in regular shape. And so finally the
8 County has realized that's probably not an effective use of
9 the funds, and so we're going to build out the seventeenth
10 floor as a complex litigation, jury, and criminal caseload
11 accommodated. Unfortunately, that's a construction project,
12 and it is in process. And when I say in process it means
13 they're still in the bid evaluation process and it has to now
14 go to something called long-term planning at County
15 management, which means that some day there'll be a courtroom
16 there. In the meantime --

17 MR. MORRIS: So our trial will start when the
18 construction is complete on 17?

19 THE COURT: No, no. You're going to start. I just
20 don't know where we're going to be, Mr. Morris. This is the
21 reason for the speech, because Mr. Ferrario says nobody
22 believes me that I don't have a courtroom. I don't have a
23 courtroom. So I will have a courtroom when I end being chief
24 judge. I'll go back to being a regular judge and I'll have a
25 courtroom, and then the new chief won't have a courtroom

1 unless we finish building out the seventeenth floor by then.

2 So right now the reason I'm telling you that is it
3 impacts your trial. The trial I am currently in is a bench
4 trial, so it's not a jury trial and we have moved from
5 courtroom to courtroom during our 10 days we've been in
6 proceedings so far. So we've not been in the same courtroom
7 every day. But that's sort of the life of being in this
8 department at the moment. That's the history.

9 Now let's go to the electronic exhibit part of our
10 problem. Brandi is the head of the Clerk's Office, Mike is
11 the head of IT, so they are the two people who are here to
12 make sure that they are able to interact with you -- and then
13 I'll let them leave while I hear your motions -- about the
14 electronic exhibit protocol. Because when we use the
15 electronic exhibit protocol there's two ways that we have to
16 deal with it, from an IT standpoint and from the Clerk's
17 Office standpoint. So instead of us hauling all the paper
18 volumes from courtroom to courtroom, depending on where we're
19 going to be, the clerk won't have to do that. They will have
20 the drives, as Ms. Hendricks mentioned earlier, for that
21 purpose so that Dulce will then -- after IT has cleared the
22 drives Dulce will then work with the drives, and then we
23 usually keep one that is called golden that we don't mess
24 with, and we have one that's a working drive. But I'll let
25 Mike explain that and Brandi explain it, because not all of

1 you have been through the electronic exhibit protocol in the
2 past.

3 Mike, you're up.

4 MR. DOAN: So this is a jury trial, so a high level.
5 We expect three drives, a working copy, a golden copy, and
6 then a blank for the jury that everything that gets accepted
7 or submitted in a group will be over on that drive.

8 Depending on the number of drives is just based on
9 the space. So if your teams, whoever's putting these drives
10 together -- we have problems if you get a million exhibits on
11 one drive or even 600,000 on one drive. Not so much even the
12 space, it's just navigating through those files. And so as
13 long as your team can navigate and view the files, that's okay
14 for us. We don't have like a set number. We just ask that
15 the drives be twice as big as the amount of the exhibits,
16 because in theory everything could get accepted, and therefore
17 everything would be stamped and there'd be duplicate on the
18 drive.

19 THE COURT: And when it's stamped there's a program
20 that goes through and it puts a stamp on each page of the
21 electronic exhibit that says it's admitted so that we have
22 your original proposed copy and then your admitted copy. The
23 one drawback for lawyers is if you decide you want to admit a
24 partial version of an exhibit, we cannot do that with
25 electronic exhibits. We need you to submit a replacement

1 electronic exhibit that includes only the pages that you are
2 offering. That will then have an exhibit marker placed upon
3 it. But I can't with the electronic exhibits admit pages 6
4 through 10 of the 25-page document.

5 So, Mike, what did I miss?

6 MR. DOAN: That's it.

7 THE COURT: Okay, Brandi. You're up.

8 MS. WENDELL: Have you already given them the
9 ranges? Do we have --

10 THE COURT: No, we have not done ranges yet.

11 MS. WENDELL: Okay. The protocol is pretty basic.
12 Your paralegals or your IT people that are going to be working
13 on those might have questions. Usually -- a lot of times on
14 all the other trials Litigation Services was used. They're
15 very familiar with this program. I'm not advocating for them
16 or anything, but if anybody's contracted with them, they're
17 pretty familiar with how to do it. It's really important that
18 you pay attention to the naming convention. Make sure there
19 are no letters in it. It has to be strictly numbers and then
20 .pdf. The last time there was a question about whether .tifs
21 worked, and Mike was able to verify that .tifs are -- we're
22 able to use those. But color photos can be done as long as
23 there's a little border up at the top for the stamping program
24 to mark all of the information.

25 Another thing that we have found useful, it's not in

1 the protocol, but at least a couple weeks before the trial
2 starts we do like a dry run, because your exhibit list, the
3 templates that Dulce went ahead and emailed to you, you cannot
4 change that, the formatting. It's critical because Mike's
5 team will do a validation, and it validates the exhibit
6 numbers to what is on the drive, each exhibit. And it'll
7 identify if there's something that's missed or skipped that's
8 on the list but it's not actually on the drive. And a lot of
9 times there's been some formatting problems when people try to
10 get creative. So, you know, just a little advice that we
11 found from trial and error that that is an important piece.

12 What else?

13 MR. DOAN: That's the biggest thing, is if you can
14 get with us -- and we'll make ourselves available as soon as
15 you're available to do like an initial run before you start
16 all printing and doing all these other things just so
17 everything can be tested for format so there's not a lot of
18 time wasted.

19 MS. WENDELL: The clerk must have -- the exhibit
20 list must be printed out.

21 THE COURT: Not in 2 font, Ms. Hendricks.

22 MS. HENDRICKS: [Inaudible] that was not our
23 office's fault, Your Honor.

24 MS. WENDELL: That should be in a binder so that the
25 clerk as you're actually offering and admitting the evidence

1 during the trial, she'll be working on that. Later that day
2 she'll be doing the electronic stuff or we'll have a second
3 clerk that'll be helping her. Antoinette is court clerk
4 supervisor, and so she's here to make sure that, you know, if
5 we have any questions that have to be answered.

6 A lot of times -- oh. Last trial somebody asked if
7 because the exhibit list itself was going to be like 14 of
8 those big binders, they asked if they could print on the front
9 and the back. That was in Judge Kishner's big trial. We let
10 them do it, and -- but the trial settled, so it wasn't an
11 issue.

12 THE COURT: It's not a good idea.

13 MS. WENDELL: It's not ideal, so --

14 THE COURT: Please don't do a front and back.

15 MS. WENDELL: Anybody have any idea how many
16 exhibits you're looking at?

17 THE COURT: We're going to start with them and do
18 our ranges first. But we're not quite there yet.

19 So if anybody has questions or your staffs have
20 questions, would you like contact information to reach out to
21 either Antoinette, Brandi, or Mike?

22 MR. TAYBACK: Yes.

23 MS. HENDRICKS: That would be great, Your Honor.

24 THE COURT: So tell them or give them business
25 cards.

1 MS. WENDELL: Okay.

2 MR. FERRARIO: If you all have cards, then that'd be
3 easiest.

4 THE COURT: They're County employees. Does that
5 mean they get cards?

6 MR. DOAN: Yeah.

7 THE COURT: Oh. Look at that.

8 MR. DOAN: You know, and it's best to have one point
9 of contact so then we don't get confused.

10 MS. WENDELL: I'm putting my cards away now.

11 THE COURT: Who do you guys want to be the person
12 that calls? Do they want to call Antoinette, they want to
13 call you, want call Mike?

14 MS. WENDELL: Well, Antoinette is -- she's not
15 Dulce's direct supervisor, but I can be the point of contact,
16 and then I can go ahead and let you guys know. My email
17 address and my phone number are both on here. If you could
18 pass some of these out, that'd be great. And then I'll
19 probably hand you off depending on the questions that come up.
20 Most of them are going to be technical questions, but I'll try
21 to help if I can.

22 THE COURT: All right. So do you have any more
23 questions for the Clerk's Office, the IT folks, in the
24 electronic exhibit protocol? You will notice because of what
25 happened in CityCenter in paragraph 6 it now says the exhibit

1 list will be font size 12, Times New Roman. So we're very
2 specific on what size, because the clerk's actually have to
3 work with the paper copy. And so although you can blow up the
4 Xcel spreadsheet and see it when it's 2 font, they can't. So
5 we have to have it in a larger font.

6 Any more questions?

7 Okay. Mr. Krum, how many exhibits do you think
8 you're going to have so I can set the exhibit ranges?

9 MR. KRUM: The answer is it's in the hundreds, not
10 in the thousands. So if --

11 THE COURT: So if I give you 1 to 9999, you will be
12 okay?

13 MR. KRUM: Yes.

14 THE COURT: All right. Who wants to have 10000 as
15 their start? Mr. Searcy, how many have you got?

16 MR. SEARCY: I think our approximation is basically
17 the same. It's in the hundreds, not the thousands. So if we
18 had 10000 to --

19 THE COURT: 1999 [sic]?

20 MR. SEARCY: Yeah, that would be perfect.

21 THE COURT: I have to give you lots of extras,
22 because if you're going to do partial exhibits, we need that
23 space to be able to add those. So if you've got subparts of
24 one exhibit, I need an exhibit number for each one of those.
25 So I'm giving you more than you need.

1 Mr. Ferrario, how many do you need?

2 MR. FERRARIO: Your Honor, Your Honor, I would
3 suspect our -- any exhibits we would introduce independent of
4 what Mr. Krum and the other defendants would be nominal. So
5 you can give us a very short range.

6 THE COURT: 20000 to 2499 [sic].

7 THE COURT: Who else wants exhibit lists that's not
8 one of those three? Anybody else need --

9 MR. TAYBACK: Counsel for Mr. Gould is sitting
10 behind me.

11 THE COURT: So Mr. Gould's counsel, you want about
12 the same range Mr. Ferrario has, 25000 to 30000?

13 MR. RHOW: That's fine, Your Honor. Just for
14 protocol --

15 THE COURT: Hold on. They've got to get your name,
16 because otherwise I'm going to get really -- I'm going to
17 screw up.

18 MR. FERRARIO: Can you let Ekwan speak today? He's
19 been here all -- he hasn't even got to argue one time, Your
20 Honor.

21 THE COURT: All right, Mr. --

22 MR. RHOW: I'm actually in this case. Ekwan Rhow,
23 Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. RHOW: We can have a separate range for sure,

1 but is there any problem with incorporating Mr. Gould's
2 exhibits into the exhibits for Mr. Searcy that he presents?

3 THE COURT: There is absolutely no problem with your
4 exhibits being within their exhibit range, but I need to give
5 you a separate range for your own in case you all don't reach
6 an agreement.

7 MR. RHOW: I see.

8 THE COURT: So my exhibit ranges based on what I've
9 heard today is 1 to 9999 for the plaintiffs, 10000 to 1999
10 [sic] for the Quinn Emanuel folks and their associated, which
11 includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic]
12 for Mr. Ferrario and his team. And, Mr. Krum, we gave you
13 25000 to 2999 [sic] for Mr. Gould.

14 Do we anticipate there is anyone else who's going to
15 need more numbers? Anybody else who's going to show up
16 randomly in the case?

17 All right. Any other stuff I need to do on your
18 part?

19 MS. WENDELL: No. Based on that, that's very good
20 news. The goal will be for all counsel to prepare your
21 exhibits and then everybody put them one drive. The only
22 reason why we do different drives is because if there's like
23 10,000 exhibits on one, like Mike said, so if there's any way
24 possible -- and you all have to use the same exhibit list
25 template. Now, if that's a problem to do that, then if your

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 WROTONIAK,

Real Parties in Interest.

Electronically Filed
Jan 02 2018 03:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

CASE NO.:

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

**PETITIONER'S APPENDIX TO
PETITION FOR WRIT OF
MANDAMUS**

VOLUME XIV (PA3236-3486)

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**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

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PROHIBITION OR ALTERNATIVELY, MANDAMUS**

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PROHIBITION OR ALTERNATIVELY, MANDAMUS**

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2017-12-08	Joint Pre-Trial Memorandum	XIV	PA3236-3267
2017-12-11	Transcript from Hearing on [Motions for Summary Judgment], Motions In Limine and Pre-Trial Conference, December 11, 2017	XIV	PA3268-3342
2017-12-19	Motion for Reconsideration or Clarification of Ruling on Motions for Summary Judgments Nos. 1, 2 and 3 and Gould's Summary Judgment Motion and Application for Order Shortening Time	XIV	PA3343-3459
2017-12-26	The Individual Defendants' Opposition To Plaintiff's Motion For Reconsideration Or Clarification Of Ruling On Motions For Summary Judgment Nos. 1, 2, and 3	XIV, XV	PA3460-3531
2017-12-27	Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's Motion for Summary Judgment	XV	PA3532-3536
2017-12-27	Declaration of Shoshana E. Bannett in Support of Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's Motion for Summary Judgment	XV	PA3537-3614
2017-12-28	Order Regarding Defendants' Motions for Partial summary Judgment and Plaintiff's and Defendants' Motions in Limine	XV	PA3615-3621
2017-12-28	Motion [to] Stay and Application for Order Shortening Time	XV	PA3622-3630

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

Date	Description	Vol. #	Page Nos.
2017-12-28	Transcript of Hearing on Motion for Reconsideration and for Stay	XV	PA3631-3655
2017-12-28	Court Exhibit 1-Reading Int'l, Inc. Board of Directors Meeting Agenda	XV	PA3656 (ACCEPTED UNDER SEAL)
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
2017-12-29	Mot. for Rule 54(b) Certification and Application for Order Shortening Time	XV	PA3668-3685

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

ALPHABETICAL INDEX

Date	Description	Vol. #	Page Nos.
2016-10-26	1st Amended Order Setting Civil Jury Trial, Pre-Trial Conference, and Calendar Call	XIII	PA3083-3087
2016-03-14	Answer to First Amended Complaint (filed by Ellen Cotter, Margaret Cotter, Douglas McEachern, Guy Adams, and Edward Kane)	I	PA51-72
2017-12-28	Court Exhibit 1-Reading Int'l, Inc. Board of Directors Meeting Agenda	XV	PA3656 (ACCEPTED UNDER SEAL)
2017-12-27	Declaration of Shoshana E. Bannett in Support of Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's Motion for Summary Judgment	XV	PA3537-3614
2016-09-23	Defendant William Gould's Motion for Summary Judgment	I, II, III, IV	PA176-1000
2017-12-04	Defendant William Gould's Supplemental Reply In Support of Motion for Summary Judgment	XIII	PA3219-3235
2017-11-09	Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddington, Michael Wrotniak's Supplement to Motion for Partial Summary Judgment Nos. 1, 2, 3, 5 and 6	XIII	PA3088-3138 (FILED UNDER SEAL)

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

Date	Description	Vol. #	Page Nos.
2017-11-28	Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddling, Michael Wrotniak's Answer To Plaintiff's Second Amended Complaint	XIII	PA3159-3188
2015-10-22	First Amended Verified Complaint	I	PA1-50
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff's Claims Related to the Executive Committee	IX	PA2041-2146
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 5) On Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO	IX, X	PA2147-2317
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
2016-09-23	Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's Termination and Reinstatement Claims	V, VI, VII	PA1001-1673
2016-09-23	Individual Defendants' Motion for Summary Judgment (No. 2) Re: The Issue of Director Independence	VIII	PA1674-1946

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

Date	Description	Vol. #	Page Nos.
2016-09-23	Individual Defendants' Motion for Summary Judgment (No. 3) On Plaintiff's Claims Related to the Purported Unsolicited Offer	VIII, IX	PA1947-2040
2017-12-08	Joint Pre-Trial Memorandum	XIV	PA3236-3267
2016-04-05	Judy Coddling and Michael Wrotniak's Answer to First Amended Complaint	I	PA95-118
2017-12-29	Mot. for Rule 54(b) Certification and Application for Order Shortening Time	XV	PA3668-3685
2017-12-28	Motion [to] Stay and Application for Order Shortening Time	XV	PA3622-3630
2017-12-19	Motion for Reconsideration or Clarification of Ruling on Motions for Summary Judgments Nos. 1, 2 and 3 and Gould's Summary Judgment Motion and Application for Order Shortening Time	XIV	PA3343-3459
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
2017-12-27	Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's Motion for Summary Judgment	XV	PA3532-3536
2016-12-21	Order Regarding Defendants' Motion for Partial Summary Judgment Nos. 1-6 and Motion in Limine to Exclude Expert Testimony	XIII	PA3072-3075

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

Date	Description	Vol. #	Page Nos.
2017-12-28	Order Regarding Defendants' Motions for Partial summary Judgment and Plaintiff's and Defendants' Motions in Limine	XV	PA3615-3621
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
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
2016-09-02	Second Amended Verified Complaint	I	PA119-175
2017-12-01	Supplemental Opposition to Motion for Summary Judgment Nos. 1 and 2 and Gould Motion for Summary Judgment	XIII	PA3205-3218

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
PROHIBITION OR ALTERNATIVELY, MANDAMUS**

Date	Description	Vol. #	Page Nos.
2017-12-26	The Individual Defendants' Opposition To Plaintiff's Motion For Reconsideration Or Clarification Of Ruling On Motions For Summary Judgment Nos. 1, 2, and 3	XIV, XV	PA3460-3531
2017-12-11	Transcript from Hearing on [Motions for Summary Judgment], Motions In Limine and Pre-Trial Conference, December 11, 2017	XIV	PA3268-3342
2016-10-27	Transcript from Hearing on Motions, October 27, 2016	XII, XIII	PA2891-3045
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
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, XIV (PA3236-3486)** was served by the following method(s):

☒ United States Postal Service:

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Attorneys for Nominal Defendant
Reading International, Inc.

Dated: January 2, 2018

**Courtesy Copy Hand
Delivered**

To:

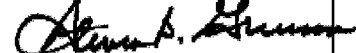
Judge Elizabeth Gonzalez
Eighth Judicial District
Court of Clark County,
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By: /s/ PATRICIA FERRUGIA

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Attorneys for Plaintiff

James J. Cotter, Jr.

(See signature page for additional counsel.)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES J. COTTER, JR.,
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,

Defendants.

And

READING INTERNATIONAL,
INC., a Nevada corporation,

Nominal Defendant.

) Case No. A-15-719860-B

) Dept. No. XI

) Coordinated with:

) Case No. P-14-0824-42-E

) Dept. No. XI

) Jointly Administered

) **JOINT PRETRIAL**

) **MEMORANDUM**

) **DATE: 12/11/2017**

) **TIME: 10:30 a.m.**

The parties, through their respective counsel of record, hereby submit the following joint pre-trial memorandum in accordance with this Court's 1st Amended Order Setting Civil Jury Trial, Pre-trial Conference and Calendar Call dated September 29, 2017 and Local Rule 2.67 after counsel for all parties¹ conferred regarding the same on November 15, 2017 and November 20, 2017.

I. MATTER REFERENCED IN OCTOBER 4, 2017 ORDER, PARAGRAPH D

A. Motions in Limine (December 11, 2017)

1. Plaintiff James J. Cotter Jr.'s Motion In Limine No. 1 Regarding Advice of Counsel
2. Plaintiff James J. Cotter Jr.'s Motion In Limine No. 2 Regarding the Submission of Merits-Related Evidence By Nominal Defendant Reading International, Inc.
3. Plaintiff James Cotter Jr.'s Motion In Limine No. 3 Regarding After Acquired Evidence
4. Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddington, Michael Wrotniak's Motion In Limine to Exclude Evidence that is More Prejudicial Than Probative
5. Renewed Motion In Limine to Exclude Expert Testimony of Myron Steele Based on Supplemental Authority
6. Defendant William Gould's Motion In Limine Exclude Irrelevant Speculative Evidence

¹ Counsel participating in the pretrial conference included: Mark Krum and Steve Morris on behalf of Plaintiff; Marshall Searcy and Noah Helpert on behalf of Defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Coddington and Michael Wrotniak; Shoshana Bannett on behalf of William Gould; and Kara Hendricks on behalf of Reading International, Inc.

1
2 **B. Motions for Summary Judgment (December 11, 2017)**

3 1. Defendants Margaret Cotter, Ellen Cotter, Guy Adams,
4 Edward Kane, Douglas McEachern, William Gould, Judy
5 Coddington, Michael Wrotniak's Supplement to Motions for
6 Partial Summary Judgment Nos. 1, 2, 3, 5 and 6

7 2. See also Section II. J.

8 **II. OTHER PRETRIAL MATTER**

9 **A. Statement of Facts**

10 **Plaintiff's Statement:**

11 In view of the significant prior proceedings in this case,
12 including motions to dismiss and summary judgment motions, as well as
13 the detail in the pending Second Amended Complaint (the particular
14 allegations of which have been or will be admitted or denied in the
15 individual defendants' respective answers), and the Court's resulting
16 familiarity with this case, the parties respectfully provide the following
17 abbreviated, summary statement of facts of the case:

18 Plaintiff James J. Cotter, Jr. ("Mr. Cotter" or "Plaintiff") was and is
19 a substantial shareholder and a director of nominal defendant Reading
20 International, Inc. ("RDI" or the "Company"), as well as a former President
21 and Chief Executive Officer ("CEO"). Defendants Ellen Cotter and Margaret
22 Cotter were and are members of the RDI board of directors (the "Board")
23 and at all times relevant hereto have purported to be and/or been the
24 controlling shareholder(s) of RDI. Each of the remaining individual
25 defendants was at relevant times and is a member of the RDI Board, as well
26 of certain Board committees.

27 The facts of this case include and concern acts and omissions of
28 individual director defendants which the Plaintiff claims give rise to entail
breaches of fiduciary duties individually and/or together with other acts

1 and omissions, including with respect to the following matters: the threat to
2 terminate Mr. Cotter as President and CEO of RDI, the termination of
3 Mr. Cotter as President and CEO of RDI, the demand that he resign from the
4 Board, RDI Board governance matters, RDI SEC filings and press releases,
5 the search for a permanent CEO that resulted in Ellen Cotter becoming
6 permanent CEO, the hiring and compensation of Margaret Cotter as EVP
7 RED NY, the payment of certain monies to certain of the individual
8 defendants and the actions and or lack of actions by each of the individual
9 defendants in response to offers or expressions of interest by Patton Vision
10 and others to purchase all of the outstanding stock of RDI.

11 **Director Defendants' Statement:**

12 On June 12, 2015, the Board of Directors of Reading
13 International, Inc. ("RDI") voted to terminate Plaintiff James J. Cotter, Jr. as
14 President and CEO of RDI. Plaintiff claims that this decision was a breach of
15 fiduciary duty. Plaintiff also claims various other breaches of fiduciary
16 duty, including with respect to the search for a new President and CEO of
17 RDI, the hiring of Margaret Cotter as an Executive Vice President for Real
18 Estate -- NYC, the exercise of an option held by the Estate of James J. Cotter,
19 Sr. to purchase 100,000 shares of RDI Class B voting stock, and the response
20 to a third party's indication of interest in purchasing all outstanding shares
21 of RDI. The Director Defendants contend that they acted in the best
22 interests of RDI stockholders at all times and fulfilled their fiduciary duties
23 to the Company.

24 One of the Director Defendants, William Gould is separately
25 represented. On the central claim that initiated this case—Plaintiff's
26 termination—Mr. Gould voted *against* terminating Plaintiff. Although
27 Mr. Gould is separately represented, there is substantial overlap in his
28 witness list and his responses to other portions of this pre-trial

1 memorandum with that of the other director defendants and individual
2 defendants have therefore chosen to present a combined defense position in
3 the pre-trial memorandum.

4 **RDI's Statement:**

5 RDI joins in the Director Defendants' Statement above.

6 **B. List of Claims**

7 Plaintiffs' list of claims for relief is as follows:

8 **A. Breaches of the Duty of Care (SAC 1-179) (First Cause)**

- 9
- 10 1. **Process in connection with termination, including aborting**
11 **ombudsman and lack of process/process failures (SAC 3, 35,**
12 **36, 43, 50 – 57, 61 – 94) (EC, MC, GA, EK, DM, WG)**
13 **(equitable relief)²**
- 14 2. **Breach(es) of the duty of care and abdication of fiduciary**
15 **responsibilities by some or all acts and omissions in SAC**
16 **(SAC - all), including paragraph A. 1. above and the**
17 **following:**
- 18 • Use of executive committee (SAC 8, 99) (EC, MC, Kane,
19 Adams/WG, JC, MW)
 - 20 • Process/process failures from aborted CEO search selecting
21 EC (SAC 6, 14, 137 – 147, 152) (Search Committee: MC, DM,
22 WG) (Board: All)
 - 23 • Erroneous and/or materially misleading statements in board
24 materials such as agendas and minutes, and in public
25 disclosures including SEC filings and press releases (SAC 9,
26 13, 72, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (all)

27

28 ² Arabic numbered bold typeface paragraphs indicate matters which
Plaintiff contends give rise to and/or constitute breaches of fiduciary duty
independently, as well as together with other matter.

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- Process/process failures in connection with nomination and retention of directors, including adding Coddington and/or Wrotniak (SAC 11, 12, 121-134) (EC, MC, DM, GA, EK, WG)
- Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149 – 151, 166) and paying the \$200,000 pre-employment bonus (committees - members) (Board - all)
- \$50,000 to Adams (SAC 153, 166) (Committees – members) (Board – all but GA)
- Process/process failures in response to Patton Vision offer(s) (SAC 16, 154-162) (all)

3. Damages/injury (SAC 163 – 168)

- a. injury to RDI's reputation and goodwill (164)
- b. impairment of shareholder rights due to SEC filings (165)

B. Breaches of the Duty of Loyalty (SAC 1 – 172, 180-186) (Second Cause)

- 1. Threat to terminate (SAC 2, 35, 36, 64-71, 78 – 82, 84, 87, 88, 91) (GA, EK, DM, EC, MC)
- 2. Termination (SAC 3, 35, 36, 43, 50 – 57, 64 – 94) (GA, EK, DM, EC, MC) (equitable relief also sought)
- 3. Authorizing exercise of the 100,000 share option (SAC 10, 102 – 108) (GA, EK) (equitable relief also sought)
- 4. Aborted CEO search selecting EC (SAC 6, 14, 137 – 147, 152) (Search Committee: MC, DM, WG) (Board: all)
- 5. Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149 – 151, 166) and paying \$200,000 pre-employment bonus (Committee members) (Board: all)
- 6. Process/process failures in response to Patton Vision offer(s) (SAC 16, 154-162) (all)
- 7. Breach of the duty of loyalty (all) and misuse of their

position as controlling shareholders (EC, MC) by some or all such acts and omissions in the SAC, including those in paragraphs B. 1. – 7. above and the following:

- Threat to terminate insurance if JJC, Jr. does not resign as a director (SAC 4, 38) (EC, WG)
- use of executive committee (SAC 8, 99) (EC, MC, Kane, Adams, WG)
- manipulating board materials (SAC 9, 72, 100) (EC)
- involuntary retirement of Storey (SAC 12, 127-130) (EC, MC, DM, GA, EK)
- Board stacking/adding Coddington and Wrotniak (SAC 11, 121-134) (nominating committee) (Board - all others)
- \$50,000 to Adams (SAC 153, 166) (EC) (all)
- SEC filings (SAC 13, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (all)

8. **Damages/injury (SAC 163 – 168)**

- a. diminution in value of RDI (163)
- b. injury to reputation and goodwill (164)
- c. impairment of shareholder rights due to SEC filings (165)
- d. other monetary damages (166)
 - i. \$200,000 and job to MC
 - ii. \$50,000 to Adams
 - iii. duplicate cost of paying consultants to perform MC's position's responsibilities
 - iv. class A nonvoting stock accepted *in lieu* of cash consideration for exercise of 100,000 share option

C. Breaches of the Duty of Candor (SAC 1 – 172, 187 – 192) (Third Cause)

1. SEC filings and press releases (SAC 13, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (EC - all) (WG - Form 8-Ks and press releases about termination and CEO) (each as to disclosures regarding themselves (e.g., proxies))
2. Damages/injury (SAC 163 – 168)
 - a. diminution in value of RDI (163)
 - b. impairment of shareholder rights due to SEC filings (165)
 - c. injury to reputation and goodwill (168)

D. Aiding and Abetting Breaches of Fiduciary Duty (SAC 193 – 200) (Fourth Cause)

1. Threat to terminate (SAC 2, 35, 36, 64-71, 78 – 82, 84, 87, 88, 91) (EC, MC)
2. Termination (SAC 3, 35, 36, 43, 50 – 57, 64 – 94) (Threat to terminate (SAC 2, 35, 36, 78 – 82, 87, 88, 91) (EC, MC)
3. Authorizing exercise of the 100,000 share option (SAC 10, 102 – 108) (EC)
4. Involuntary retirement of Storey (SAC 12, 127-130) (EC, MC)
5. Board stacking/adding Coddington and Wrotniak (SAC 11, 121-134) (EC, MC)
6. Aborted CEO search selecting EC (SAC 6, 14, 137 – 147, 152) (EC)
7. Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149 – 151, 166) and paying \$200,000 pre-employment bonus (EC, MC)
8. Patton Vision offer(s) (SAC 16, 154-162) (EC, MC)

9. Damages/injury (SAC 163 – 168)
 - a. diminution in value of RDI (163)
 - b. injury to reputation and goodwill (164)
 - c. impairment of shareholder rights due to SEC filings (165)
 - d. other monetary damages (166)
 - i. \$200,000 and job to MC
 - ii. \$50,000 to Adams
 - iii. duplicate cost of paying consultants to perform MC's position's responsibilities
 - iv. class A nonvoting stock accepted *in lieu* of cash consideration for exercise of 100,000 share option

C. List of Affirmative Defenses

Plaintiff has not abandoned any purported claims identified in the Second Amended Complaint. Director Defendants therefore cannot abandon any affirmative defenses asserted in its Answer to the Second Amended Complaint. Depending on which particular claims for relief Plaintiff actually pursues at trial, Director Defendants may raise the following affirmative defenses:

- Failure to State a Cause of Action;
- Statute of Limitations and Repose;
- Laches;
- Unclean Hands;
- Spoliation;
- Illegal Conduct and Fraud;
- Waiver, Estoppel, and Acquiescence;
- Ratification and Consent;

- No Unlawful Activity;
- No Reliance;
- Failure to Plead Fraud with Particularity;
- Uncertain and Ambiguous Claims;
- Privilege and Justification;
- Good Faith and Lack of Fault;
- No Entitlement to Injunctive Relief;
- Damages too Speculative;
- No Entitlement to Punitive Damages;
- Failure to Mitigate;
- Comparative Fault;
- Business Judgment Rule;
- Equitable Estoppel;
- Election of Remedies;
- N.R.S. 78.138;
- Failure to Make Appropriate Demand;
- Conflict of Interest and Unsuitability to Serve as a Derivative Representative.

RDI

- Failure To State A Claim
- Failure To Make Demand
- Corporate Governance
- Irreparable Harm To Company
- Unclean Hands
- Spoliation
- Waiver, Estoppel, And Acquiescence
- Ratification And Consent
- No Unlawful Activity

- Privilege And Justification
- Good Faith And Lack Of Fault
- No Entitlement To Injunctive Relief
- Damages Too Speculative
- Mitigation Of Damages
- Comparative Fault
- Equitable Estoppel
- Nevada Revised Statute 78.138
- Conflict Of Interest And Unsuitability To Serve As Representative

D. Claims or Defenses to be Abandoned

None. However, Plaintiff will not seek equitable relief with respect to historical or past actions relating to the executive committee, to corporate governance of RDI such as misleading or inaccurate meeting agendas and/or minutes, to the addition or removal of persons to and/or from the RDI board of directors and to SEC filings and press releases. Plaintiff will seek equitable relief with respect to the vote to terminate James J. Cotter Jr. as President and CEO and reserves the right to do so with respect to authorization of the exercise of the so-called 100,000 share option.

E. List of Exhibits

The Court has given the parties to and including December 13, 2017 to provide exhibit list(s).

F. Agreements to Limit or Exclude Evidence

None presently.

1 **G. Witness List**

2 **1. Nonexpert Witnesses**

3 For Plaintiff:

- 4 1. James Cotter, Jr. (*plaintiff expects to present this witness*)
5 c/o Mark Krum
6 Yurko, Salvesen & Remz. P.C.
7 One Washington Mall, 11th Floor
8 Boston, MA 02108
9 617.723.6900
- 10 2. Person Most Knowledgeable, Reading International, Inc. (*plaintiff*
11 *may call this witness if the need arises*)
12 c/o Mark E. Ferrario, Esq.
13 Leslie S. Godfrey, Esq.
14 Greenberg Traurig LLP
15 3773 Howard Hughes Parkway, Suite 400 North
16 Las Vegas, Nevada 89169
17 702-792-3773
- 18 3. Margaret Cotter (*plaintiff expects to present this witness*)
19 c/o Stan Johnson
20 COHEN | JOHNSON | PARKER | EDWARDS
21 375 E. Warm Springs Road, Ste. 104
22 Las Vegas, NV 89119
23 702-823-3500
- 24 4. Ellen Cotter (*plaintiff expects to present this witness*)
25 c/o Stan Johnson
26 COHEN | JOHNSON | PARKER | EDWARDS
27 375 E. Warm Springs Road, Ste. 104
28 Las Vegas, Nevada 89119
 702-823-3500
5. Douglas McEachern (*plaintiff expects to present this witness*)
 c/o Stan Johnson
 Cohen-Johnson, LLC
 255 East Warm Springs Road, Suite 100
 Las Vegas, Nevada 89119
 702-823-3500

- 1 6. Guy Adams (*plaintiff expects to present this witness*)
2 c/o Stan Johnson
3 Cohen-Johnson, LLC
4 255 East Warm Springs Road, Suite 100
5 Las Vegas, Nevada 89119
6 702-823-3500
- 7 7. Edward Kane (*plaintiff expects to present this witness*)
8 c/o Stan Johnson
9 Cohen-Johnson, LLC
10 255 East Warm Springs Road, Suite 100
11 Las Vegas, Nevada 89119
12 702-823-3500
- 13 8. William Gould (*plaintiff expects to present this witness*)
14 Donald A. Lattin, Esq.
15 Carolyn K. Renner, Esq.
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17 4785 Caughlin Parkway
18 Reno, Nevada 89519
19 775-827-2000
- 20 9. Timothy Storey (*plaintiff expects to present this witness*)
21 Donald A. Lattin, Esq.
22 Carolyn K. Renner, Esq.
23 MAUPIN, COX & LeGOY
24 4785 Caughlin Parkway
25 Reno, Nevada 89519
26 775-827-2000
- 27 10. John Hunter (*plaintiff may call this witness if the need arises*)
28 Milken Institute, Chief Financial Officer
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11. Antoinette Jefferies (*plaintiff may call this witness if the need arises*)
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- 1 12. Eric Barr (*plaintiff may call this witness if the need arises*)
2 9 Park Street, Brighton, VIC 3186
3 Southern Melbourne, Australia
4 011-61-488-096-616
5 ebarr@optushome.com.au
- 6 13. Al Villasenor (*plaintiff may call this witness if the need arises*)
7 116 – 19th Street
8 Manhattan Beach, California 90266
9 Home- 310-546-5193
10 Mobile- 310-897-0407
- 11 14. Lois Marie Kwasigroch (*plaintiff may call this witness if the need*
12 *arises*)
13 20100 Wells Drive
14 Woodland Hills, California 91364
15 (805) 447-6265
- 16 15. Harry P. Susman (*plaintiff may call this witness if the need arises*)
17 Susman Godfrey, LLP
18 1000 Louisiana, Suite 5100
19 Houston, Texas 77002
20 713-653-7875 (w)
21 hsusman@susmangodfrey.com
- 22 16. Fehmi Karahan (*plaintiff may call this witness if the need arises*)
23 The Karahan Companies
24 7200 Bishop Road, Suite 250
25 Plano, Texas 75024
26 214-473-9700 (w)
27 fehmi@karahaninc.com
- 28 17. Judy Coddling (*plaintiff expects to present this witness*)
2266 Canyon Back Road
Los Angeles, California 90049
18. Michael J. Wrotniak (*plaintiff expects to present this witness*)
Aminco Resources USA
World Headquarters
81 Main Street Suite 110

White Plains, NY 10601
914 949 4400
M.Wrotniak@Aminco.biz

19. Gil Borok (*plaintiff may call this witness if the need arises*)
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Encino, California 91436
Mobile- 818-0528-3689
Email- gborok@me.com

20. Robert Wagner (*plaintiff may call this witness if the need arises*)
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1900 Avenue of the Stars Suite 2600
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310-226-2672 (w)
Robert.wagner@kornferry.com

21. John M. Genovese (*plaintiff may call this witness if the need arises*)
7584 Coastal View Drive
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Mobile: 310-245-1760
Email- jngenovese@yahoo.com

22. William D. Ellis (*plaintiff expects to present this witness and/or
present the witness's testimony by means of a deposition*)
c/o Mark E. Ferrario, Esq.
Leslie S. Godfrey, Esq.
Greenberg Traurig LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
702-792-3773

23. Craig Tompkins (*plaintiff may call this witness if the need arises*)
c/o Mark E. Ferrario, Esq.
Leslie S. Godfrey, Esq.
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- 1 24. Gary McLaughlin (*plaintiff may call this witness if the need arises*)
2 Akin Gump
3 2029 Century Park East, Suite 2400
4 Los Angeles, CA 90067
5 310-728-3358
- 6 25. C.N. Franklin Reddick, III (*plaintiff may call this witness if the*
7 *need arises*)
8 Akin Gump
9 2029 Century Park East, Suite 2400
10 Los Angeles, CA 90067
11 310-728-3358
- 12 26. Robert Mayes (*plaintiff expects to present this witness and/or*
13 *present the witness's testimony by means of a deposition*)
14 Korn Ferry
15 c/o Samantha Goodman
16 1900 Avenue of the Stars, Suite 2600
17 Los Angeles, CA 90067
18 310.556.8557
- 19 27. Andrew Shapiro (*plaintiff expects to present this witness and/or*
20 *present the witness's testimony by means of a deposition*)
21 c/o Jahan Raissi
22 Shartsis Freise LLP
23 One Maritime Plaza, 18th Floor
24 San Francisco, CA 94111
25 415.421.6500
- 26 28. Jonathan Glaser (*plaintiff expects to present this witness and/or*
27 *present the witness's testimony by means of a deposition*)
28 c/o Alexander Robertson, IV
Robertson & Associates, LLP
32121 Lindero Canyon Road, Suite 200
Westlake Village, CA 91361
818.851.3850

- 1 29. Whitney Tilson (*plaintiff expects to present this witness's*
2 *testimony*
3 *by means of a deposition*)
4 c/o Alexander Robertson, IV
5 Robertson & Associates, LLP
6 32121 Lindero Canyon Road, Suite 200
7 Westlake Village, CA 91361
8 818.851.3850
- 9 30. Andrez Matycynski (*plaintiff may call this witness if the need*
10 *arises*)
11 c/o Greenberg Traurig, LLP
12 3773 Howard Hughes Pkwy., Ste. 400N
13 Las Vegas, NV 89169
- 14 31. Dev Ghose (*plaintiff may call this witness if the need arises*)
15 c/o Greenberg Traurig, LLP
16 3773 Howard Hughes Pkwy., Ste. 400N
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- 18 For the Director Defendants:
- 19 1. Ellen Cotter (*the director defendants expect to present this witness*)
20 c/o COHEN | JOHNSON | PARKER | EDWARDS
21 375 E. Warm Springs Road, Ste. 104
22 Las Vegas, NV 89119
23 702-823-3500
24 And
25 Quinn Emanuel Urquhart & Sullivan, LLP
26 865 S. Figueroa St., 10th Floor
27 Los Angeles, 90017
28 213-443-3000
- 2 2. Margaret Cotter (*the director defendants expect to present this*
3 *witness*)
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And
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3. James Cotter, Jr. (*the director defendants expect to present this witness*)
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4. Guy Adams (*the director defendants expect to present this witness*)
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5. Edward Kane (*the director defendants expect to present this witness*)
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- 1 6. Douglas McEachern (*the director defendants expect to present this*
2 *witness*)
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7 And
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13 7. Michael Wrotniak (*the director defendants expect to present this*
14 *witness*)
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19 And
20 Quinn Emanuel Urquhart & Sullivan, LLP
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22 Los Angeles, 90017
23 213-443-3000
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25 8. Judy Coddling (*the director defendants expect to present this*
26 *witness*)
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And
Quinn Emanuel Urquhart & Sullivan, LLP
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And
c/o Bird, Marella, Boxer, Wolpert,
Nessim, Drooks, Lincenberg & Rhow
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Los Angeles, CA 90067
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10. Timothy Storey (*the director defendants expect to present this witness*)
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775-827-2000

And
c/o Bird, Marella, Boxer, Wolpert,
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12. Bob Smerling (*the director defendants expect to present this witness*)
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13. Terri Moore (*the director defendants expect to present this witness*)
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- 1 14. Andrzej Matyczynski (*the director defendants expect to present this*
2 *witness*)
3 c/o Greenberg Traurig, LLP
4 3773 Howard Hughes Pkwy., Ste. 400N
5 Las Vegas, NV 89169
6 702-792-3773
- 7 15. Linda Pham (*the director defendants expect to present this witness*)
8 c/o Greenberg Traurig, LLP
9 3773 Howard Hughes Pkwy., Ste. 400N
10 Las Vegas, NV 89169
11 702-792-3773
- 12 16. Debbie Watson (*the director defendants expect to present this*
13 *witness*)
14 c/o Greenberg Traurig, LLP
15 3773 Howard Hughes Pkwy., Ste. 400N
16 Las Vegas, NV 89169
17 702-792-3773
- 18 17. Laura Batista (*the director defendants expect to present this witness*)
19 c/o Greenberg Traurig, LLP
20 3773 Howard Hughes Pkwy., Ste. 400N
21 Las Vegas, NV 89169
22 702-792-3773
- 23 18. David Roth (*the director defendants expect to present this witness*)
24 Cecelia Packing Corp.
25 24780 E South Ave.
26 Orange Cove, CA 93646
27 559-626-5000
- 28 19. Michael Buckley (*the director defendants may call this witness if the*
need arises)
Edifice Real Estate Partners
545 8th Ave.
New York, NY 10018
347-826-4569

1 20. Derek Alderton (*the director defendants expect to present this*
2 *witness*)

3 Highpoint Associates
4 100 N Sepulveda Blvd.
5 El Segundo, CA 90245
6 310-616-0100

7 21. Mary Cotter (*the director defendants expect to present this witness*)

8 2818 Dumfries Road
9 Los Angeles, CA 90064
10 310-559-0581

11 22. Jill Van (*the director defendants expect to present this witness*)

12 Grant Thornton
13 515 S. Flower St., 7th Floor
14 Los Angeles, CA 90071
15 213-627-1717

16 23. Whitney Tilson (*the director defendants may call this witness if the*
17 *need arises*)

18 c/o Alexander Robertson, IV
19 Robertson & Associates, LLP
20 32121 Lindero Canyon Road, Suite 200
21 Westlake Village, CA 91361
22 818-851-3850

23 24. Jon Glaser (*the director defendants may call this witness if the need*
24 *arises*)

25 c/o Alexander Robertson, IV
26 Robertson & Associates, LLP
27 32121 Lindero Canyon Road, Suite 200
28 Westlake Village, CA 91361
818-851-3850

For Reading International, Ind.:

RDI does not intend to call witnesses, but reserves all rights to
question witnesses identified by Plaintiff and/or the other defendants in this
matter.

2. Expert Witnesses and Summaries of Opinions

For Plaintiff:

1. Former Chief Justice Myron Steele will offer opinion testimony relating to matters of corporate governance, including regarding proper exercise of directors' fiduciary duties. Among other things, he will offer opinion testimony regarding appropriate corporate governance practices and activities where a board of directors is faced with circumstances in which directors lack or may lack independence and/or disinterestedness, including the appropriate practices and activities to address such circumstances, and to evaluate the success of such practices and activities, including with respect to the following matters (i) the process used to terminate James J. Cotter, Jr. as President and Chief Executive Officer of Reading International, Inc. ("RDI"), (ii) the use of the Executive Committee of RDI's Board of Directors, (iii) the appointment of EC and MC to their respective current positions and the revised compensation and bonuses that they and Adams were given and (iv) the rejection of the Offer.³ Former Chief Justice Steele also will offer opinion

³ As stated in the Steele Report, it is Justice Steele's understanding that Nevada courts look to Delaware case law when there is no Nevada statutory or case law on point for an issue of corporate law. See, e.g. *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) ("Because the Nevada Supreme Court frequently looks to the Delaware Supreme Court and the Delaware Courts of Chancery as persuasive authorities on questions of corporation law, this Court often looks to those sources to predict how the Nevada Supreme Court would decide the question."); *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1346 (D. Nev. 1997) ("Where, as here, there is no Nevada statutory or case law on point or an issue of corporate law, this Court finds persuasive authority in Delaware case law."); *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 727 n.10 (Nev. 2003) ("Because the Legislature relied upon the Model Act and the Model Act relies heavily on New York

testimony to rebut opinions offered by defendants' experts Michael Klausner and Alfred Osborne.

2. Richard Spitz will offer opinion testimony relating to executive and CEO searches and RDI's supposed CEO search. It is anticipated that he will offer opinion testimony that the execution of the (supposed) executive search process undertaken at RDI in 2015 to find a CEO was not conducted properly and that the search failed, including because the selection of Ellen Cotter as CEO was not the product of completing the search process undertaken and was not a result of the search activities conducted. Mr. Spitz also will offer opinion testimony to rebut opinions offered by defendants' expert Alfred Osborne.
3. Albert Nagy will offer opinion testimony in rebuttal to defendants' expert Alfred Osbourne. Among other things, it is anticipated that he will offer opinion testimony that Margaret Cotter's compensation from RDI is not within a reasonable range for a person with her experience and qualifications.
4. Tiago Duarte-Silva will offer opinion testimony about money damages Plaintiff seeks by this action. It is anticipated that his opinion testimony will include opinions that (i) Reading's earnings have declined and underperformed since Ellen Cotter became Reading's CEO, (ii) Reading's value has declined and

and Delaware case law, we look to the Model Act and the law of those states in interpreting the Nevada statutes.").

Justice Steele is aware that the defendants in this action have filed a motion in limine because the Steele Report stated that the opinions therein were based on what a court that applied Delaware law would find. That phraseology was intended simply to refer to Justice Steele's years of experience in Delaware's well-versed body of law. The Delaware law on which Justice Steele relies neither supplants nor modifies the plain meaning of Nevada law, but only is used to inform Nevada law.

1 underperformed since Ellen Cotter became Reading's CEO, and
2 (iii) failing to respond favorably to an acquisition offer impeded
3 an increase in Reading's market value. Mr. Duarte-Silva also will
4 offer opinion testimony to rebut opinions offered by defendants'
5 expert Richard Roll.

- 6 5. Dr. John Finnerty will offer opinion testimony to rebut opinions
7 offered by defendants' expert Richard Roll. It is anticipated that
8 his opinion testimony will include opinions that Dr. Roll's
9 conclusions that (1) "the news regarding James Cotter, Jr.'s
10 termination did not have an adverse effect on the price of RDI
11 stock;" (2) "the risk adjusted performance of RDI Stock since the
12 termination of James Cotter, Jr. through June 30, 2016 does not
13 support Plaintiff's contention that RDI Stock has
14 underperformed and/or suffered irreparable harm;" and (3) "the
15 risk adjusted performance of RDI Stock since the termination of
16 James Cotter, Jr. through June 30, 2016, is not distinguishable
17 from the performance of RDI Stock while he was CEO" are
18 incorrect.

19 For the Director Defendants:

- 20 1. Michael Klausner – Mr. Klausner will offer opinion testimony
21 regarding the Board of Directors' proper exercise of their duties
22 and obligations in connection with their decision to terminate
23 James Cotter, Jr. as President and CEO and their decision not to
24 pursue the third-party indication of interest, including as a
25 rebuttal to Plaintiffs' expert Justice Myron Steele.
26 2. Jon Foster – Mr. Foster will offer opinion testimony regarding
27 the Board of Directors' decision-making and analysis in
28 connection with their consideration of the third-party indication

1 of interest, as a rebuttal to the expected testimony of Plaintiffs'
2 expert Tiago Duarte-Silva.

- 3 3. Richard Roll – Dr. Roll will offer opinion testimony about the
4 claimed money damages being sought by Plaintiff in this action
5 based on fluctuations or changes in RDI's stock price, including
6 as a rebuttal to Plaintiffs' purported damages experts.
7
8 4. Bruce Strombom – Mr. Strombom will offer opinion testimony to
9 rebut the purported damages analysis set forth by Plaintiffs'
10 exert Tiago Duarte-Silva.
11
12 5. Alfred Osborne – Dr. Osborne will offer opinion testimony on
13 matters relating to corporate governance and assess Williams
14 Gould's role, responsibilities and conduct in certain corporate
15 governance processes at RDI. He will also offer opinion
16 testimony to rebut opinions offered by Plaintiffs' experts Justice
17 Myron Steele and Mr. Richard Spitz regarding purported
18 breaches of fiduciary duty by members of the Board of Directors.
19 For Reading international, Inc.:
20 RDI joins in the expert designations of the Director Defendants.

21 **H. Issues of Law**

22 **Plaintiff's Position:**

23 Plaintiff's position is that any such issues will be raised with the
24 Court in the context of jury instructions.

25 **Director Defendants' Position:**

26 As described in detail in the Director Defendants' pending
27 Motions for Partial Summary Adjudication, the Director Defendants believe
28 that for each purported breach of fiduciary described in the Second
Amended Complaint, each of them (1) were subject to the protections and

1 presumptions afforded by Nevada's business judgment rule, (2) properly
2 exercised their fiduciary obligations, (3) did not engage in any "intentional
3 misconduct, fraud or a knowing violation of law" required by N.R.S. 78.138
4 to impose individual liability on corporate directors, and, although not
5 relevant under Nevada law, (4) were independent for each relevant decision
6 made by the Board in which they participated. Moreover, as previously
7 argued in the context of the Director Defendants' Motion for Partial
8 Summary Judgment No. 1 and Opposition to Plaintiff's Motion for Partial
9 Summary Judgment, Plaintiff lacks standing to bring this derivative action
10 or to derivatively assert certain claims that are wholly-personal to him, such
11 as his termination claim. Similarly, the equitable relief that Plaintiff seeks—
12 *i.e.*, reinstatement as President and CEO of RDI—is not available as a matter
13 of law.

14 **RDI's Position:**

15 RDI's business decisions challenged by Plaintiff were the result
16 of valid business judgment. Additionally, RDI joins in the position of the
17 Director Defendants.

18 **I. Previous Orders on Motions in Limine**

19 a. Defendants' Motion In Limine to Exclude Expert
20 Testimony of Myron Steele, Tiago Duarte-Silva, Richard
21 Spitz, Albert Nagy, and John Finnerty

22 i. Granted in Part. With respect to Chief Justice
23 Steele, he may testify only for the limited purpose
24 of identifying what appropriate corporate
25 governance activities would have been, including
26 activities where directors are interested, including
27 how to evaluate if directors are interested.

28 Withdrawn as to Dr. Finnerty. Denied as to all

other experts. See December 21, 2016 Order Regarding Defendants' Motions for Partial Summary Judgment Nos. 1-6 and Motion In Limine to Exclude Expert Testimony ("December 21, 2016 Order"), attached as Ex. ____.

J. Previous Orders on Motions for Partial Summary Judgement

- a. Individual Defendants' Motion for Summary Judgment (No. 1.) Re: Plaintiff's Termination and Reinstatement Claims
 - i. Denied. See December 21, 2016 Order.
- b. Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence
 - i. Continued. See December 21, 2016 Order.
- c. Individual Defendants' Motion for Partial Summary Judgment (No. 3) On Plaintiff's Claims Related to the Purported Unsolicited Offer
 - i. Continued. See December 21, 2016 Order.
- d. Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff's Claims Related to the Executive Committee
 - i. Granted in Part. Granted as to the formation and revitalization (activation) of the Executive Committee; Denied as to the utilization of the committee. See December 21, 2016 Order.
- e. Individual Defendant's Motion for Partial Summary Judgment (No. 5) On Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO

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i. Continued. See December 21, 2016 Order.

f. 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 of Margaret Cotter and Guy Adams

i. Continued. See December 21, 2016 Order.

g. Plaintiff James J. Cotter, Jr.'s Motion for Partial Summary Judgment.

i. Denied. See October 3, 2016 Order Denying James J. Cotter Jr.'s Motion for Partial Summary Judgment and Granting RDI's Countermotion for Summary Judgment.

h. Defendant William Gould's Motion for Summary Judgment

i. Continued.

K. Estimated Length of Trial

The parties estimate 15 to 19 days; 80-100 trial hours.

L. Other Issues

Plaintiff's Statement:

Plaintiff is unable to locate an answer from defendant Gould to the Second Amended Complaint, which the individual defendants should have answered long ago.

Director Defendants' Statement:

Plaintiff's list of claims above neither complies with the rules for pre-trial disclosures nor provides *any* clarity about what claims Plaintiff

1 actually intends to prove at trial or what damages (money or equitable) he
2 seeks. Eighth District Rule of Practice 2.67(b)(2) requires Plaintiff to provide
3 "[a] list of all claims for relief designated by reference to each claim or
4 paragraph of a pleading and a description of the claimant's theory of
5 recovery with each category of damage requested." The Director
6 Defendants intend to address at trial any purported breaches of fiduciary
7 duty—and will show that Plaintiff's claims are baseless—but must be told
8 which specific actions are at issue in order to properly prepare their defense.

9 Plaintiff states that he will pursue claims for breaches of
10 fiduciary duty potentially based on each and every allegation in the Second
11 Amended Complaint by, for example, stating his intent to pursue
12 "[b]reach(es) of the duty of care and abdication of fiduciary responsibilities
13 by some or all acts and omissions in SAC." This provides no more
14 information than if Plaintiff had never made his pre-trial disclosures—he
15 may or may not pursue a claim based on any act or omission mentioned or
16 alluded to anywhere in the Second Amended Complaint. Plaintiff's witness
17 list similarly fails to shed any light on the claims Plaintiff intends to
18 pursue—his list strays so far afield that Plaintiff has stated his intent to call
19 Defendant Guy Adams' ex-wife (Lois Marie Kwasigroch) at trial.

20 Plaintiff also fails to disclose the actual monetary damages or
21 equitable relief he intends to seek at trial. For example, Plaintiff states that
22 his damages resulting from Defendants' alleged breaches of the duty of care
23 are "injury to RDI's reputation and goodwill" and "impairment of
24 shareholder rights due to SEC filings." If these are supposed money
25 damages, Plaintiff does not state his claim for damages, or even explain
26 what shareholder rights are purportedly impacted. With the exception of
27 the equitable relief he seeks in connection with his termination from RDI
28 (*i.e.*, being reinstated as President and CEO), Plaintiff does not link any

1 particular claim to any particular category or amount of damages. For
2 example, Defendants have no idea what relief Plaintiff is seeking in
3 connection with the "involuntary retirement of Storey" or "process/process
4 failures in connection with nomination and retention of directors, including
5 Coddington and/or Wrotniak." Plaintiff's list of claims/damages is
6 indecipherable and nonsensical; Plaintiff has attempted to reserve the right
7 at trial to pursue any claim he wants and seek whatever damages he wants.
8 Defendants cannot prepare for trial based on these inadequate disclosures,
9 which amount to nothing but gamesmanship and are highly prejudicial.

10 **RDI's Position:**

11 RDI contends the equitable relief sought would result in
12 significant disruption of RDI management and the pursuit of its long term
13 business strategy. Additionally, RDI joins in the statement of the Director
14 Defendants regarding Plaintiff's purported damages.

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JAMES COTTER, JR.	.	CASE NO. A-15-719860-B
	.	A-16-735305-B
Plaintiff	.	P-14-082942-E
	.	
vs.	.	
	.	DEPT. NO. XI
MARGARET COTTER, et al.	.	
	.	Transcript of
Defendants	.	Proceedings
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BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
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APPEARANCES:

FOR THE PLAINTIFF:

MARK G. KRUM, ESQ.
STEVE L. MORRIS, ESQ.
AKKE LEVIN, ESQ.

FOR THE DEFENDANTS:

H. STANLEY JOHNSON, ESQ.
MARSHALL M. SEARCY, ESQ.
CHRISTOPHER TAYBACK, ESQ.
JAMES L. EDWARDS, ESQ.
MARK E. FERRARIO, ESQ.
KARA B. HENDRICKS, ESQ.
EKWAN RHOW, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

2 (Court was called to order)

3 MR. FERRARIO: Ms. Hendricks has something to take
4 up with you.

5 MS. HENDRICKS: I just have a question.

6 THE COURT: On what?

7 MS. HENDRICKS: On how many drives we each need.

8 THE COURT: Wait. That's not me. Wait. Don't go
9 there yet.

10 MS. HENDRICKS: Okay.

11 THE COURT: Who are you looking for?

12 MR. MORRIS: I'm so unaccustomed to being on the
13 plaintiff's side.

14 (Pause in the proceedings)

15 THE COURT: All right. So moving on. Good morning.
16 We were talking about the pro bono awards at the 8:00 o'clock
17 session this morning, and Mr. Ferrario didn't get one this
18 year, so I was giving him a hard time because nobody from his
19 firm did a lot of work. But apparently they did. It just
20 didn't get reported because it was done with a different
21 agency.

22 Right, Ms. Hendricks?

23 MS. HENDRICKS: Yes. We're getting that fixed right
24 now.

25 THE COURT: Okay. So before we start on your

1 motions I need to hit some practical problems. As those
2 lawyers who practice here in the Eighth all the time know, as
3 the chief judge I do not have a courtroom. That occurred
4 because when the Complex Litigation Center was investigated
5 for purposes of conducting the CityCenter trial we determined
6 that it had a structural issue and some electrical issues. As
7 a result, we did not renew the lease --

8 When was that, Mr. Ferrario?

9 MR. FERRARIO: It was 2013.

10 THE COURT: In 2013 we did not renew the lease, and
11 since that time we have been down one courtroom. The person
12 who gets screwed is the chief judge. So since 2013 we have
13 had the chief judge be a floater. Unfortunately for you guys,
14 I'm the first judge who kept my docket, because Business Court
15 cases have a lot of history and it's not one of those things
16 you can get rid of and assume somebody else is going to be
17 able to be familiar with it fairly quickly.

18 So the down side for all of you is that I don't have
19 a courtroom. Which is why sometimes we borrow Judge
20 Togliatti's courtroom when you guys see me, sometimes in this
21 courtroom. And you've been in the two Family Court courtrooms
22 a couple of times here. I also have judges who lend me their
23 courtrooms on a regular basis on the third floor, and
24 sometimes I have courtrooms in other places in the building I
25 borrow.

1 Recently I learned that I am going to be able on
2 behalf of the court to acquire the seventeenth floor that used
3 to be occupied by the Supreme Court and to build a new Complex
4 Litigation Center, because since 2013 every time we have a
5 complex trial we build out a courtroom, it costs a quarter of
6 a million dollars, and then when we're done with it we take it
7 back down to put it back in regular shape. And so finally the
8 County has realized that's probably not an effective use of
9 the funds, and so we're going to build out the seventeenth
10 floor as a complex litigation, jury, and criminal caseload
11 accommodated. Unfortunately, that's a construction project,
12 and it is in process. And when I say in process it means
13 they're still in the bid evaluation process and it has to now
14 go to something called long-term planning at County
15 management, which means that some day there'll be a courtroom
16 there. In the meantime --

17 MR. MORRIS: So our trial will start when the
18 construction is complete on 17?

19 THE COURT: No, no. You're going to start. I just
20 don't know where we're going to be, Mr. Morris. This is the
21 reason for the speech, because Mr. Ferrario says nobody
22 believes me that I don't have a courtroom. I don't have a
23 courtroom. So I will have a courtroom when I end being chief
24 judge. I'll go back to being a regular judge and I'll have a
25 courtroom, and then the new chief won't have a courtroom

1 unless we finish building out the seventeenth floor by then.

2 So right now the reason I'm telling you that is it
3 impacts your trial. The trial I am currently in is a bench
4 trial, so it's not a jury trial and we have moved from
5 courtroom to courtroom during our 10 days we've been in
6 proceedings so far. So we've not been in the same courtroom
7 every day. But that's sort of the life of being in this
8 department at the moment. That's the history.

9 Now let's go to the electronic exhibit part of our
10 problem. Brandi is the head of the Clerk's Office, Mike is
11 the head of IT, so they are the two people who are here to
12 make sure that they are able to interact with you -- and then
13 I'll let them leave while I hear your motions -- about the
14 electronic exhibit protocol. Because when we use the
15 electronic exhibit protocol there's two ways that we have to
16 deal with it, from an IT standpoint and from the Clerk's
17 Office standpoint. So instead of us hauling all the paper
18 volumes from courtroom to courtroom, depending on where we're
19 going to be, the clerk won't have to do that. They will have
20 the drives, as Ms. Hendricks mentioned earlier, for that
21 purpose so that Dulce will then -- after IT has cleared the
22 drives Dulce will then work with the drives, and then we
23 usually keep one that is called golden that we don't mess
24 with, and we have one that's a working drive. But I'll let
25 Mike explain that and Brandi explain it, because not all of

1 you have been through the electronic exhibit protocol in the
2 past.

3 Mike, you're up.

4 MR. DOAN: So this is a jury trial, so a high level.
5 We expect three drives, a working copy, a golden copy, and
6 then a blank for the jury that everything that gets accepted
7 or submitted in a group will be over on that drive.

8 Depending on the number of drives is just based on
9 the space. So if your teams, whoever's putting these drives
10 together -- we have problems if you get a million exhibits on
11 one drive or even 600,000 on one drive. Not so much even the
12 space, it's just navigating through those files. And so as
13 long as your team can navigate and view the files, that's okay
14 for us. We don't have like a set number. We just ask that
15 the drives be twice as big as the amount of the exhibits,
16 because in theory everything could get accepted, and therefore
17 everything would be stamped and there'd be duplicate on the
18 drive.

19 THE COURT: And when it's stamped there's a program
20 that goes through and it puts a stamp on each page of the
21 electronic exhibit that says it's admitted so that we have
22 your original proposed copy and then your admitted copy. The
23 one drawback for lawyers is if you decide you want to admit a
24 partial version of an exhibit, we cannot do that with
25 electronic exhibits. We need you to submit a replacement

1 electronic exhibit that includes only the pages that you are
2 offering. That will then have an exhibit marker placed upon
3 it. But I can't with the electronic exhibits admit pages 6
4 through 10 of the 25-page document.

5 So, Mike, what did I miss?

6 MR. DOAN: That's it.

7 THE COURT: Okay, Brandi. You're up.

8 MS. WENDELL: Have you already given them the
9 ranges? Do we have --

10 THE COURT: No, we have not done ranges yet.

11 MS. WENDELL: Okay. The protocol is pretty basic.
12 Your paralegals or your IT people that are going to be working
13 on those might have questions. Usually -- a lot of times on
14 all the other trials Litigation Services was used. They're
15 very familiar with this program. I'm not advocating for them
16 or anything, but if anybody's contracted with them, they're
17 pretty familiar with how to do it. It's really important that
18 you pay attention to the naming convention. Make sure there
19 are no letters in it. It has to be strictly numbers and then
20 .pdf. The last time there was a question about whether .tifs
21 worked, and Mike was able to verify that .tifs are -- we're
22 able to use those. But color photos can be done as long as
23 there's a little border up at the top for the stamping program
24 to mark all of the information.

25 Another thing that we have found useful, it's not in

1 the protocol, but at least a couple weeks before the trial
2 starts we do like a dry run, because your exhibit list, the
3 templates that Dulce went ahead and emailed to you, you cannot
4 change that, the formatting. It's critical because Mike's
5 team will do a validation, and it validates the exhibit
6 numbers to what is on the drive, each exhibit. And it'll
7 identify if there's something that's missed or skipped that's
8 on the list but it's not actually on the drive. And a lot of
9 times there's been some formatting problems when people try to
10 get creative. So, you know, just a little advice that we
11 found from trial and error that that is an important piece.

12 What else?

13 MR. DOAN: That's the biggest thing, is if you can
14 get with us -- and we'll make ourselves available as soon as
15 you're available to do like an initial run before you start
16 all printing and doing all these other things just so
17 everything can be tested for format so there's not a lot of
18 time wasted.

19 MS. WENDELL: The clerk must have -- the exhibit
20 list must be printed out.

21 THE COURT: Not in 2 font, Ms. Hendricks.

22 MS. HENDRICKS: [Inaudible] that was not our
23 office's fault, Your Honor.

24 MS. WENDELL: That should be in a binder so that the
25 clerk as you're actually offering and admitting the evidence

1 during the trial, she'll be working on that. Later that day
2 she'll be doing the electronic stuff or we'll have a second
3 clerk that'll be helping her. Antoinette is court clerk
4 supervisor, and so she's here to make sure that, you know, if
5 we have any questions that have to be answered.

6 A lot of times -- oh. Last trial somebody asked if
7 because the exhibit list itself was going to be like 14 of
8 those big binders, they asked if they could print on the front
9 and the back. That was in Judge Kishner's big trial. We let
10 them do it, and -- but the trial settled, so it wasn't an
11 issue.

12 THE COURT: It's not a good idea.

13 MS. WENDELL: It's not ideal, so --

14 THE COURT: Please don't do a front and back.

15 MS. WENDELL: Anybody have any idea how many
16 exhibits you're looking at?

17 THE COURT: We're going to start with them and do
18 our ranges first. But we're not quite there yet.

19 So if anybody has questions or your staffs have
20 questions, would you like contact information to reach out to
21 either Antoinette, Brandi, or Mike?

22 MR. TAYBACK: Yes.

23 MS. HENDRICKS: That would be great, Your Honor.

24 THE COURT: So tell them or give them business
25 cards.

1 MS. WENDELL: Okay.

2 MR. FERRARIO: If you all have cards, then that'd be
3 easiest.

4 THE COURT: They're County employees. Does that
5 mean they get cards?

6 MR. DOAN: Yeah.

7 THE COURT: Oh. Look at that.

8 MR. DOAN: You know, and it's best to have one point
9 of contact so then we don't get confused.

10 MS. WENDELL: I'm putting my cards away now.

11 THE COURT: Who do you guys want to be the person
12 that calls? Do they want to call Antoinette, they want to
13 call you, want call Mike?

14 MS. WENDELL: Well, Antoinette is -- she's not
15 Dulce's direct supervisor, but I can be the point of contact,
16 and then I can go ahead and let you guys know. My email
17 address and my phone number are both on here. If you could
18 pass some of these out, that'd be great. And then I'll
19 probably hand you off depending on the questions that come up.
20 Most of them are going to be technical questions, but I'll try
21 to help if I can.

22 THE COURT: All right. So do you have any more
23 questions for the Clerk's Office, the IT folks, in the
24 electronic exhibit protocol? You will notice because of what
25 happened in CityCenter in paragraph 6 it now says the exhibit

1 list will be font size 12, Times New Roman. So we're very
2 specific on what size, because the clerk's actually have to
3 work with the paper copy. And so although you can blow up the
4 Xcel spreadsheet and see it when it's 2 font, they can't. So
5 we have to have it in a larger font.

6 Any more questions?

7 Okay. Mr. Krum, how many exhibits do you think
8 you're going to have so I can set the exhibit ranges?

9 MR. KRUM: The answer is it's in the hundreds, not
10 in the thousands. So if --

11 THE COURT: So if I give you 1 to 9999, you will be
12 okay?

13 MR. KRUM: Yes.

14 THE COURT: All right. Who wants to have 10000 as
15 their start? Mr. Searcy, how many have you got?

16 MR. SEARCY: I think our approximation is basically
17 the same. It's in the hundreds, not the thousands. So if we
18 had 10000 to --

19 THE COURT: 1999 [sic]?

20 MR. SEARCY: Yeah, that would be perfect.

21 THE COURT: I have to give you lots of extras,
22 because if you're going to do partial exhibits, we need that
23 space to be able to add those. So if you've got subparts of
24 one exhibit, I need an exhibit number for each one of those.
25 So I'm giving you more than you need.

1 Mr. Ferrario, how many do you need?

2 MR. FERRARIO: Your Honor, Your Honor, I would
3 suspect our -- any exhibits we would introduce independent of
4 what Mr. Krum and the other defendants would be nominal. So
5 you can give us a very short range.

6 THE COURT: 20000 to 2499 [sic].

7 THE COURT: Who else wants exhibit lists that's not
8 one of those three? Anybody else need --

9 MR. TAYBACK: Counsel for Mr. Gould is sitting
10 behind me.

11 THE COURT: So Mr. Gould's counsel, you want about
12 the same range Mr. Ferrario has, 25000 to 30000?

13 MR. RHOW: That's fine, Your Honor. Just for
14 protocol --

15 THE COURT: Hold on. They've got to get your name,
16 because otherwise I'm going to get really -- I'm going to
17 screw up.

18 MR. FERRARIO: Can you let Ekwan speak today? He's
19 been here all -- he hasn't even got to argue one time, Your
20 Honor.

21 THE COURT: All right, Mr. --

22 MR. RHOW: I'm actually in this case. Ekwan Rhow,
23 Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. RHOW: We can have a separate range for sure,

1 but is there any problem with incorporating Mr. Gould's
2 exhibits into the exhibits for Mr. Searcy that he presents?

3 THE COURT: There is absolutely no problem with your
4 exhibits being within their exhibit range, but I need to give
5 you a separate range for your own in case you all don't reach
6 an agreement.

7 MR. RHOW: I see.

8 THE COURT: So my exhibit ranges based on what I've
9 heard today is 1 to 9999 for the plaintiffs, 10000 to 1999
10 [sic] for the Quinn Emanuel folks and their associated, which
11 includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic]
12 for Mr. Ferrario and his team. And, Mr. Krum, we gave you
13 25000 to 2999 [sic] for Mr. Gould.

14 Do we anticipate there is anyone else who's going to
15 need more numbers? Anybody else who's going to show up
16 randomly in the case?

17 All right. Any other stuff I need to do on your
18 part?

19 MS. WENDELL: No. Based on that, that's very good
20 news. The goal will be for all counsel to prepare your
21 exhibits and then everybody put them one drive. The only
22 reason why we do different drives is because if there's like
23 10,000 exhibits on one, like Mike said, so if there's any way
24 possible -- and you all have to use the same exhibit list
25 template. Now, if that's a problem to do that, then if your

1 exhibits are on your own hard drive, then your exhibit list
2 must be what is on that drive. So if two of you get together
3 or three of you get together, everything that's on that drive
4 must be one exhibit list, because it cross-checks and makes
5 sure it validates.

6 THE COURT: So it's okay for the plaintiffs to have
7 one drive and an exhibit list of 1 through 9999 -- or up to
8 that number, and the defendants to decide jointly they're just
9 going to use the 10000 to 1999 [sic], have one drive, and one
10 exhibit list?

11 MS. WENDELL: That is okay. But based on the size,
12 you know, we're -- I think that, you know, it's better to
13 always have one --

14 THE COURT: Yeah. But you're asking for
15 cooperation?

16 MS. WENDELL: Yes.

17 THE COURT: Just because you worked for Commissioner
18 Biggar for however many years and you could make them
19 cooperate doesn't make I can as a trial judge.

20 All right. So anybody else have more stuff?

21 Yeah. Your history will never die.

22 MS. WENDELL: I know. It's going to follow me out
23 of here in February.

24 THE COURT: All right. Anybody else have any more
25 questions for my IT team or my Clerk's Office team so that

1 they can leave and not have to sit here through your motion
2 practice?

3 Dulce wants you to set the dry run date today. We
4 have a holiday coming up, and you have asked me to let you go
5 the second week. I'm going to be able to accommodate that
6 request. I found some victim to go the first week.

7 MR. FERRARIO: So we start on the 8th now?

8 THE COURT: Plan is for you to start on the 8th. So
9 when do you want your dry run to be with your staff to bring
10 over the lists and the drives? It doesn't have to be you
11 guys. It can be your paralegals.

12 MR. FERRARIO: But you said you want enough time in
13 case there's glitches. So --

14 MS. WENDELL: If there's a glitch, then you'll need
15 time to fix it.

16 MR. FERRARIO: So at least the week before -- we
17 need it two weeks before; right?

18 THE COURT: Two weeks before is the week of
19 Christmas, so we'll be here the 26th through the 29th working
20 that week.

21 MR. FERRARIO: And then you guys will be here to do
22 that?

23 MR. DOAN: We'll make it work.

24 THE COURT: Some of them will be here.

25 MR. FERRARIO: I think it has to be that week in

1 case there's a problem. Because then the following week is
2 short, and then we're right up on trial and won't be able to
3 correct any of the stuff.

4 MR. KRUM: So why don't we say the 29th?

5 THE COURT: You guys all okay with the 29th? What
6 time do you want to meet?

7 MR. KRUM: I think we need to talk to the people who
8 are going to do it.

9 THE COURT: Okay. I would recommend the morning.
10 And the reason I recommend the morning is typically on the
11 weekend of New Year's Eve they try and get everybody out of
12 downtown by about 2:00 o'clock because of all the things that
13 happen in the streets here on that weekend.

14 MR. KRUM: Understood.

15 THE COURT: So -- and we will tell you what
16 courtroom we are able to find. I'm pretty sure on that day I
17 could get a courtroom on this floor. And if you guys want a
18 morning, if you can accommodate that, we'll do that.
19 Otherwise --

20 MR. FERRARIO: I'm going to tell you, Judge,
21 [inaudible] people are going to be in this trial, I think if
22 you could convince Judge Sturman to let you have this for the
23 length of the trial, that would [inaudible].

24 THE COURT: She has a trial that I had to vacate
25 when her mom became ill that I think she's going to try and

1 restart in January. I will know better when she actually gets
2 back to town. But we will talk to her. Her courtroom and
3 Judge Johnson's courtrooms are equipped differently than the
4 other courtrooms, so they are a little bit bigger.

5 MR. FERRARIO: Yes. This would accommodate
6 [inaudible].

7 THE COURT: I was thinking of putting you in
8 Potter's courtroom and having a special corner for you.

9 MR. KRUM: Your Honor, I've just been reminded that
10 it was presumptuous of me to speak for others.

11 THE COURT: You want to talk to the staff members to
12 see who's taking the week off?

13 MR. KRUM: Here's the question. And I'm now taking
14 Mr. Ferrario's line. Would it be possible for us to start the
15 following week so we could make --

16 THE COURT: No. We won't get done. If we do that,
17 we won't get done in time for me to do my February stuff.
18 It's a five-week stack. It starts on the 2nd of January. So
19 if you need to talk to your teams and see if being here on
20 January 2nd at 8:00 o'clock in the morning is a preference for
21 them instead of the 29th, which gives you -- you lose the
22 weekend, but you're here the rest of the time. It gives you
23 almost two weeks to straighten it out.

24 MR. KRUM: Okay.

25 THE COURT: And that's okay with me. Even though

1 Mike would say he needs two weeks before, January 2nd is okay
2 with me.

3 MR. KRUM: Okay. We will check with our people.

4 THE COURT: Okay. So any other electronic exhibit
5 lists?

6 So, Dulce, just mark them down that they are
7 planning to visit with you on January 2nd. I'm fairly certain
8 I can find a courtroom on January 2nd, but there's no
9 guarantees on that day.

10 All right. 'Bye, guys. Thank you for being here.
11 Antoinette, thank you for being here. I know it's going to be
12 exciting again.

13 All right. That takes me to the motions. Do you
14 have a preferred order you'd like to argue them in? I usually
15 try and do the summary judgments and then go to the motions in
16 limine.

17 MR. KRUM: That would be our suggestion, as well.

18 MR. TAYBACK: That makes sense, Your Honor. You can
19 go numerical order is fine.

20 THE COURT: Whatever you want to do.

21 Can I have my calendar. I don't need -- well, I
22 have notes all over the motions, so --

23 MR. FERRARIO: Are we on the clock?

24 THE COURT: You have until five till 12:00. So
25 we've got an hour.

1 (Pause in the proceedings)

2 MR. TAYBACK: Mr. Krum was just suggesting that I
3 raise the parties' -- both filed joint motions -- or filed
4 motions to seal. We'd ask you to grant them.

5 THE COURT: Is there any objection to any of the
6 motions to seal? They weren't all motions to seal. Some of
7 them were motions to redact, and that was appropriate. The
8 motions to seal I do have a question for Mr. Morris's office,
9 and so I'll ask you -- hold on, if I can find the one I wrote
10 the page on. Got a question. It was a process question, not
11 a substance question, so let me hit it before we go to the
12 next step.

13 When you sent me a courtesy copy and the courtesy
14 copy had a sealed envelope in that did you also file the
15 sealed version of the document that has like this sealed
16 envelope that's with the Clerk's Office?

17 MS. LEVIN: I don't believe, Your Honor.

18 THE COURT: And we have to do it that way --

19 MS. LEVIN: Okay.

20 THE COURT: Because otherwise I can't even grant
21 your motion now, because then it's going to get screwed up.

22 MS. LEVIN: I understand, Your Honor. And I think
23 that this was based on our conversations with the clerk, who
24 said you cannot submit it until you have the order. And we
25 were saying, but that --

1 THE COURT: No. You submit it when you file the
2 motion. When you file the motion with it, which is why you
3 have to file them at the counter. You can't efile when you're
4 filing under seal.

5 MS. LEVIN: Right.

6 THE COURT: And that's why it gets screwed up.

7 So I have some process concerns about the
8 plaintiff's filings related to that, and I'm going to let you
9 and Dulce talk about those after we finish the hearing to see,
10 if we can.

11 I'm going to grant the motion, but it may be that
12 you have to do something different to have a motion that
13 actually goes with it to the Clerk's Office instead of an
14 order. Because having the order will not accomplish what you
15 want.

16 All right. So to the extent that you asked
17 previously for a motion to seal and/or redact, it appears to
18 be commercially sensitive information related to financial
19 issues, and there's some other sensitive information that
20 relates to individuals' personal information, so I'm going to
21 grant the requests for sealing and redacting that have been
22 submitted.

23 Okay. You're up. What motion do you want to start
24 with?

25 MR. TAYBACK: It'll be Summary Judgment Motion

1 Number 1. And it also -- there's -- relates to Summary
2 Judgment Motion Number 2. So I will argue them jointly. They
3 were at least opposed jointly, and we replied jointly with
4 respect to those two motions.

5 THE COURT: Okay.

6 MR. TAYBACK: I'm here on behalf of the director
7 defendants Michael Wrotniak, Judy Coddington, Douglas McEachern,
8 Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As
9 Your Honor will recall and as addressed in the briefing, Your
10 Honor said, and this is a truism, really, for any case, you've
11 got to analyze claims defendant by defendant, in this case
12 director by director, and transaction by transaction. And
13 that's, you know, just basic, basic legal analysis.

14 On top of that, sort of as an overlay, another thing
15 that I know Your Honor is well aware of is the recent law that
16 clarifies -- I see you chuckling --

17 THE COURT: I don't know anything about the Wynn-
18 Okada case. You don't know anything about it, because your
19 firm wasn't involved at all, and Mr. Ferrario doesn't know
20 anything, and Mr. Morris I'm sure was involved, too, because
21 he's been involved in some of the appellate process in that
22 case, too.

23 Right, Mr. Morris?

24 MR. MORRIS: Yes.

25 THE COURT: See, so we all know.

1 MR. TAYBACK: But all I need to know, all I need to
2 know and all I really care about here and all that matters
3 here is the language of the Supreme Court's opinion, because
4 that's really what animates the business judgment rule in
5 Nevada as we stand here now. And I think that combined with
6 the recent clarifications by the legislature regarding the
7 latitude afforded directors work together to set the bar very,
8 very high. I'm sure Your Honor has read the opinion multiple
9 times, applied it in that case, a case I'm not privy to, but
10 it's --

11 THE COURT: I did. I granted partial summary
12 judgment, which is on a writ.

13 MR. TAYBACK: And, as you well know --

14 THE COURT: Are we supposed to be calling somebody?

15 MR. FERRARIO: No.

16 THE COURT: I have a call-in number. I'm not in
17 charge of doing this.

18 (Pause in the proceedings)

19 THE COURT: Hold on. Apparently someone thinks
20 they're calling in.

21 MR. RHOW: It's okay, Your Honor. No need. I'm
22 here.

23 THE COURT: Oh. It was you?

24 MR. RHOW: Not necessary.

25 THE COURT: Okay. Good. I'm glad we don't have to

1 call you.

2 Okay. Keep going. So I granted partial summary
3 judgment, but I found some directors were not disinterested,
4 so not all of the directors were covered by the summary
5 judgment. I also in that case made a determination the
6 business judgment rule only applies to officers and directors,
7 it does not apply to the corporation itself. Just so you
8 know.

9 MR. TAYBACK: And I'm aware of that only through
10 having read the pleadings and having read now the court's
11 opinion here. But the question is as it applies to this case.
12 And as it applies to this case collectively that recent
13 guidance and the guidance from the legislature make it clear
14 that it's not really the province of a plaintiff or a court or
15 jury to come in and say the business judgment rule should be
16 overridden in order to second guess a particular decision made
17 by a corporation's directors or its officers. And if you
18 start at that premise, the idea that the applicable Nevada
19 statutes here elevate -- give that sort of latitude to
20 directors in the first instance and then you take it to sort
21 of the next level of analysis, that is to say, even if one
22 could rebut the presumption, even it's rebutted the standard
23 then for imposing liability is even higher, because there
24 remains still a two-prong test for which plaintiffs have to
25 show a material disputed issue of fact to proceed to trial.

1 Both an individual director on a particular transaction
2 breached their fiduciary duty and, secondly, that that
3 individual director did so with fraud, knowing -- as a knowing
4 violation of the law or engaged in intentional misconduct.

5 THE COURT: Well, you understand that finding is
6 only needed to make a determination as to whether the
7 individual officer or director is insulated from -- for
8 personal liability purposes, as opposed to derivative
9 liability, which would be funded through the corporation.

10 MR. TAYBACK: Correct.

11 THE COURT: Okay.

12 MR. TAYBACK: Though they are seeking personal
13 liability. Their complaint makes that clear.

14 THE COURT: I understand they are. But your motion
15 seemed to take the position that unless I found fraud they
16 need to be dismissed. And that's not how it works.

17 MR. TAYBACK: Well, but they do need to rebut the
18 presumption with respect to the business judgment rule.

19 THE COURT: That's a different issue, Counsel.

20 MR. TAYBACK: It is a different issue. And it's a
21 multiple-hurdle test.

22 THE COURT: Yes.

23 MR. TAYBACK: And with respect to that second hurdle
24 even the issue comes down to Your Honor's adjudicating their
25 claim for personal liability, then that's also part of the

1 motion.

2 But you don't need to get there, because they have
3 not established the evidence necessary to rebut the initial
4 presumption. And that's clear because when you look at what
5 governs the decision here by these individual directors on
6 termination, which I'm going to take that transaction because
7 that's the subject of our first motion for summary judgment,
8 if you look at that, what governs that decision are the
9 bylaws. And the bylaws which we've submitted are amply clear
10 that the board was given complete discretion, that officers,
11 including the CEO, serve at the pleasure of the board and can
12 be terminated with or without cause at any time.

13 With the bylaws being the operative rules of the
14 road, so to speak, and the law being what it is with respect
15 to the deference afforded boards and individual board members,
16 plaintiff's efforts to try to get around the idea that that
17 presumption should be applied here are based on generalized
18 allegations of disinterestedness. But you don't see specific
19 evidence in the record anywhere that any of the three
20 directors who voted to terminate Mr. Cotter, Jr. --

21 THE COURT: And you're including Mr. Adams in that,
22 are you?

23 MR. TAYBACK: I am including Mr. Adams in that.

24 THE COURT: Just checking. So what happens if I
25 make a determination that Mr. Adams is not disinterested? You

1 then do not have a majority of disinterested directors;
2 correct?

3 MR. TAYBACK: If you made that finding that would be
4 true. But it wouldn't change the liability, the claim against
5 Mr. McEachern or Mr. Kane.

6 THE COURT: You mean for personal liability?

7 MR. TAYBACK: I mean whether -- not whether or not
8 you can say we need to revisit that action, but whether or not
9 they were disinterested, whether they breached their fiduciary
10 duty. That would be adjudicated in their favor even if you
11 found against Mr. Adams on a particular transaction -- but I
12 would say you should not find against Mr. Adams on this
13 transaction. The evidence isn't that his -- that the decision
14 to terminate had any connection to his -- the level of his
15 income, the amount of his -- the amount of his income, the
16 amount of his expenditures, his continuity on the board.
17 There's no connectivity, which is required in order to find
18 disinterestedness even if disinterestedness was the standard.
19 Because I will say the standard in Nevada is not independence
20 for -- unless it's a transaction in which the director is on
21 both sides of the transaction or it's a change of control
22 circumstance. The termination of a CEO is an operational
23 matter where you don't get to the independence question unless
24 and until you have established a basis, a legitimate basis in
25 the law to show that the presumption should not apply.

1 In light of the law, in light of the bylaws, in
2 light of the undisputed evidence with respect to Mr. Adams,
3 Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Coddington --
4 and, of course, Mr. Wrotniak and Ms. Coddington weren't even on
5 the board at the time of this transaction -- the fact is that
6 there's no basis upon which to allow plaintiff's claim to
7 proceed.

8 The last point that I want to make with respect to
9 Summary Judgment Motion Number 1 and 2 as it relates to that
10 point is the plaintiff has tried to really muddy the law. And
11 I think whatever you ultimately decide on this motion for
12 summary judgment -- and I absolutely believe that these
13 defendants are entitled to summary judgment on this record,
14 but whatever you decide the parties will be well served by
15 understanding Your Honor's view of the law. Because we do not
16 see eye to eye with the plaintiffs on the law. They strive to
17 import this Delaware entire fairness test.

18 THE COURT: I rejected that in Wynn, because that
19 was the part that the Okada parties argued once the writ came
20 back on [inaudible].

21 MR. TAYBACK: And notwithstanding that, I believe
22 the plaintiffs are still advocating for it. It shows up in
23 their papers.

24 THE COURT: I understand it's in their briefing.

25 MR. TAYBACK: And the law at least in Nevada with

1 respect to that is that it doesn't apply here. Independence
2 for the same reasons is not required for the benefit of the
3 business judgment rule where, as here --

4 THE COURT: You don't think the Shoen case says that
5 independence is required for application of business judgment
6 rule?

7 MR. TAYBACK: In Shoen to the extent it says that at
8 all it says it in the context of demand futility. It's not
9 the presumption that we're talking about here. And in fact
10 that's -- I believe that's exactly what certainly the Wynn
11 Supreme Court --

12 THE COURT: There's two Shoen cases; right?

13 MR. TAYBACK: Yes.

14 THE COURT: There's the first Shoen case and the
15 second one that they gave a different name to.

16 MR. TAYBACK: Independence is not required unless
17 you have a director who's on both sides of a transaction.

18 THE COURT: Okay.

19 MR. TAYBACK: I believe the law is amply clear on
20 that.

21 THE COURT: Okay. I think their analysis is
22 slightly broader than that, but okay.

23 MR. TAYBACK: Given the bylaws, given the fact that
24 entire fairness does not apply, you cannot simply get past or
25 rebut the presumption of the applicability of the business

1 judgment rule by saying a director is biased, a director has
2 some family connection, a director has income that's
3 attributable to the company. And that's really what this case
4 comes down to. Where the facts here are frankly undisputed
5 summary judgment is warranted.

6 That's it for Summary Judgment 1 and 2, Your Honor,
7 unless you have any questions.

8 THE COURT: No. It's okay.

9 Mr. Krum, Mr. Morris?

10 MR. KRUM: Good morning, Your Honor. Thank you.

11 So I have some argument to make about what are
12 pervasive misstatements of the law that were made with respect
13 to Number 1, as well as the other ones. That said, if I'm
14 listening, you're prepared to deny Number 1, just as you did
15 previously, nothing has changed, including the law; and if
16 that's the case, I'll just defer those comments till we get to
17 something else.

18 THE COURT: Well, then let me ask you a question.
19 Because when I read all these I have notes all over them,
20 because some of them are interrelated and the
21 disinterestedness issue is an issue that is involved in some
22 of the motions in limine, as well as this.

23 Can you tell me what evidence, other than what is
24 listed on page -- you had -- in your brief you had a list of
25 all of the company activities that you believe show decisions

1 that were made by certain of the directors that showed they
2 were interested. Can you tell me, other than that list -- and
3 I can't, of course, find it right now, but I'm looking for it
4 -- is there any other information other than from Mr. Adams
5 that you have that would provide a basis for the Court to
6 determine that they are not disinterested?

7 MR. KRUM: I'm sorry. That who is not disinterested
8 with respect --

9 THE COURT: Anyone except Mr. Adams and the two Ms.
10 Cotters. The two Ms. Cotters I think is fairly easy. They
11 didn't even move, from what I can tell. But, for instance,
12 for Mr. Kane.

13 MR. KRUM: Certainly, Your Honor. In our -- first
14 let me say I think the list to which you're referring is a
15 list that I had understood the Court to request when we last
16 argued summary judgment motions and was intended, Your Honor,
17 to identify the particular matters which we contend give rise
18 to or constitute breaches of fiduciary duty in and of
19 themselves as well as together with other matters. And so --

20 THE COURT: I don't know that that's the reason you
21 did it. I found it. It is on pages 5 and 6. I'm on the
22 Supplemental Opposition to Motion for Summary Judgment Number
23 1 and 2 and Gould Motion for Summary Judgment, and there is a
24 list that includes threats of termination if you don't get
25 along with your sisters and resolve the probate case --

1 MR. KRUM: Yes.

2 THE COURT: -- exercise of the options, the
3 termination, the method of the CEO search. All of those are
4 company transactions. What I'm trying to find out is, other
5 than for Mr. Adams, is there other evidence of a lack of
6 disinterestedness that you have other than what is included in
7 the list of activities that relate to their work as directors
8 which are on pages 5 and 6 of that brief in the bullet points.

9 MR. KRUM: Let me answer it this way, Your Honor. 5
10 and 6 was our effort to do what I just said. And what that
11 is, to try to be clear, is to identify particular activities
12 that we thought would be the subject of, as is appropriate,
13 either instructions or interrogatories to the jury with
14 respect to these particular matters.

15 So let's take Number 1 bullet point, the first
16 bullet point, the threat by Adams, Kane, and McEachern to
17 terminate plaintiff if he did not resolve trust disputes with
18 his sisters on terms satisfactory to them. That, Your Honor,
19 from our perspective is separate from the termination which is
20 the subject of Number 1. And on this --

21 THE COURT: I see that. But let me have you fall
22 back, because I certainly understand those may be issues that
23 you may want to submit interrogatories or just to include in
24 jury instructions related to breaches of fiduciary duty by
25 someone who survives this motion, who I don't grant it on

1 behalf of.

2 But my question is different. Other than these
3 which you've argued in your brief are evidence of a lack of
4 disinterestedness separate and apart from Mr. Adams, who you
5 have other evidence that is presented related to a lack of
6 disinterestedness, is there any evidence that has been
7 attached to your various supplements and other motions related
8 to a lack of disinterestedness for the other directors known
9 as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Coddling, and Mr.
10 Wrotniak?

11 MR. KRUM: The answer is yes, Your Honor. So I'm
12 going to try to do it a couple ways.

13 THE COURT: Tell me where to go. Because I looked
14 through this whole pile of about 2 foot of paper last night
15 trying to find it, and the only one I could find specific
16 allegations of a lack of disinterestedness, besides the two
17 Cotter sisters, was Mr. Adams.

18 MR. KRUM: Okay. Well, so, for example, with
19 respect to Mr. Kane in the response to MSJ Number 1 and 2 we
20 introduced evidence that showed that Kane was of the view that
21 he knew best what James Cotter, Sr., wanted in his trust
22 documentation.

23 THE COURT: I see he understood what Mr. Cotter,
24 Sr.'s plan was. How does that make him have a lack of
25 disinterestedness?

1 MR. KRUM: Well, the answer, Your Honor, is he acted
2 on that. That was the basis on which he decided to vote to
3 terminate the plaintiff. He -- and, for example, the evidence
4 includes an email from Mr. Adams to Mr. Kane in April or early
5 May 2015 in which Mr. Adams says, "This was difficult. We had
6 to pick sides in this family dispute. But we can take comfort
7 that Sr. would have approved our decision." And so the point
8 from our perspective, Your Honor, is Kane, in acting as a
9 director, in fact acted to carry out what in his judgment were
10 the personal interests of Sr. with respect to his trust
11 planning. And on that basis he voted to terminate Mr. Cotter.
12 There are emails from Mr. Kane to Mr. Cotter telling him, I
13 don't know what the sisters' settlement is but I urge you to
14 take it. Well, we think the evidence also shows that he knew
15 what it was, that it entailed Mr. Cotter giving up control of
16 the issues they've been litigating.

17 THE COURT: Under the Shoen analysis do you believe
18 that that contact and that information is sufficient to show
19 that Mr. Kane is not disinterested?

20 MR. KRUM: Well, the answer is, yes, we do, Your
21 Honor. And I hasten to add that the way Shoen puts it is that
22 disinterestedness and independence are a prerequisite to
23 having standing to invoke the business judgment rule.

24 THE COURT: I'm aware of that. Which is why we're
25 having this discussion. So -- but usually we have either a

1 direct financial relationship, even if it's not on both sides
2 of the transaction, or we have a very close personal or
3 familial relationship with the people who are subject to the
4 transaction. And simply believing you understand Sr.'s plan
5 -- estate plan does not, I don't think, rise to that same
6 level to show a lack of disinterestedness; but I'm waiting for
7 you to give me a spin on that argument I may not have thought
8 of.

9 MR. KRUM: Sure, Your Honor. The answer is -- and I
10 say this because I appreciate what the finder of fact -- what
11 the Court has to do now and what the finder of fact has to do.
12 The evidence has to be assessed collectively, not
13 individually. And you understand that. We've cited cases for
14 that. The other side disputes that. There's "The complaint
15 of acts and omissions upon which plaintiff's claims are based
16 must be viewed and assessed collectively, not separately in
17 isolation." That's the Ebix case that we've cited. And there
18 are other cases for that proposition. The point, Your Honor,
19 is "assessing whether a director was independent and in a
20 particular instance acted independently or whether the
21 director was disinterested as required or whether -- and made
22 the decision based entirely on the corporate merits, not
23 influence by personal or extraneous considerations," that was
24 CVV Technicolor, that's the test. And so, Your Honor, in
25 Shoen, just to go back to that, "Independence can be

1 challenged by showing that the directors' execution of their
2 duties is unduly influenced." If Kane made a decision based
3 in any respect on his view that Sr. intended for one or both
4 of the sisters to have something and Jr. was in the way of
5 that, that, Your Honor, at a minimum survives summary judgment
6 so the finder of fact can make a determination after
7 considering all the evidence whether the director acted and
8 decided in that particular instance entirely on the corporate
9 merits. So what is --

10 THE COURT: Let's skip ahead, then. Mr. McEachern.
11 What evidence of disinterestedness do you have for Mr.
12 McEachern? And if you could tell me where in the briefing it
13 is, I will look at it again. But, as I've said, other than
14 Mr. Adams I did not see evidence of disinterestedness as
15 opposed to allegations of breach of fiduciary duty.

16 MR. KRUM: Mr. McEachern attempted to extort Mr.
17 Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter,
18 you need to go resolve your disputes with your sisters and
19 we're going to reconvene at 6:00 o'clock and if you don't
20 you'll be terminated. Now, there's no dispute about that. We
21 have in evidence the testimony --

22 THE COURT: I understand that that's one of your
23 claims of breach of fiduciary duty. But I'm trying to
24 determine if there was any additional evidence, other than
25 those items that are those bullet points you put in the brief,

1 which are on pages 5 and 6 of your supplemental opposition,
2 that goes to Mr. McEachern. And then I'm going to ask you the
3 same question for Mr. Gould and Ms. Coddington and Mr. Wrotniak.

4 MR. KRUM: Your Honor, as a threshold matter, the
5 presumption can be rebutted by showing conduct in derogation
6 of the presumption. It's not simply a interest or
7 disinterested phenomenon, cite Shoen. Let me be clear. I
8 don't want to talk past you. The other side argues there are
9 only two circumstances in which interestedness matters. Well,
10 that's belied by Shoen. It says, "Business judgment rule
11 pertains only to directors whose conduct falls within its
12 protections. Thus, it applies only in the context of a valid
13 interested director transaction --" that's 138 -- 78.140,
14 excuse me "-- or the valid exercise of business judgment by
15 disinterested director in light of their fiduciary duties."
16 And to be a valid exercise, Your Honor, it has to be made in
17 the interest of the corporation.

18 So Mr. McEachern -- let me go through the list
19 mentally. He attempted to extort Mr. Cotter to resolve the
20 trust disputes in favor of the sisters, he voted to terminate
21 -- he decided not to terminate after he understood an
22 agreement had been reached to resolve those disputes. And
23 when that didn't come to pass he voted to terminate. He,
24 along with Mr. Gould, chose the wishes of the controlling
25 shareholders. Rather than to complete the process he had set

1 up, they aborted the CEO search. So, Your Honor, that's
2 squarely within the Shoen language of manifesting a direction
3 of corporate conduct in such a way as to comport with the
4 wishes or interests of the person doing the controlling.

5 Now, I heard you. You view that as a fiduciary
6 breach.

7 THE COURT: An allegation of a fiduciary duty
8 breach.

9 MR. KRUM: Allegation of fiduciary duty breach,
10 right. But that's -- if proven, that rebuts the presumption,
11 and off we go.

12 I skipped over Mr. McEachern's role in involuntarily
13 retiring Mr. Storey. Mr. McEachern, together with Mr. Adams
14 and Mr. Kane, in October and November -- September or October
15 I guess it was of 2015 comprised the ad hoc first time one
16 time special nominating committee. That committee had two
17 roles. One was to tell noncompliant director Timothy Storey
18 that he wasn't going to be renominated, and they explained to
19 him that the sisters, who controlled the vote, had told him
20 they weren't going to vote to elect him so he could either
21 resign and get a year's benefits of some sort or just be left
22 off.

23 What else did that committee do? They approved Judy
24 Coddington and Michael Wrotniak. Did they undertake to search
25 for candidates? No. Did they do anything that one would do

1 as a director of a nominating committee to identify and
2 recruit directorial candidates? No. What did they do? They
3 did what they were asked and told. Ellen Cotter gave them
4 Judy Coddington, good friend of Mary Ellen Cotter, the mother,
5 with whom Ellen Cotter lives, and Michael Wrotniak, husband of
6 Patricia Wrotniak, one of Margaret Cotter's few good friends.
7 And they obviously did virtually nothing, because promptly
8 after the company announced Ms. Coddington had been added to
9 board a shareholder brought to their attention there were lots
10 of Google articles that raised questions about Ms. Coddington's
11 relationship with her prior employer and the prior employer's
12 conduct.

13 So on the nominating issue, Your Honor, on the board
14 stacking our view is that all evidences loyalty to the
15 controlling shareholders. And that, Your Honor, would be
16 somewhere in the range of lack of independence or
17 disinterestedness.

18 THE COURT: So, Mr. Krum, if we're going to get
19 through all the motions this morning I need you to wrap up.
20 Because I think I have all the information I need on Motion
21 for Summary Judgment Number 1.

22 MR. KRUM: Okay. Certainly, Your Honor.

23 So just to finish the bullet points which you
24 brought to my attention, these directors, Kane, Adams,
25 McEachern, they're all on record dating back to the fall of

1 2014 that, yes, we should find a position for Margaret Cotter
2 at the company so she can have health insurance, but, no, she
3 can't be running our real estate. Well -- that's in the
4 emails we have in the evidence actually, Your Honor, the first
5 time around. And there's some more from Mr. Gould or
6 McEachern. We had some additional testimony that we added
7 this time. And so what happens? Ellen Cotter is made CEO
8 after the aborted CEO search, she says, I want Margaret to the
9 have the senior executive position, for which she has no prior
10 experience and no qualifications. And what do these people do
11 as committee members and board members? They say, where do we
12 sign.

13 So, Your Honor, it's an ongoing, recurring,
14 pervasive lack of independence or disinterestedness. And the
15 conclusion of that, Your Honor, of course, was by what they
16 did in response to the offer -- and I've sort of wrapped up
17 the whole thing without talking about the law I intended to
18 discuss -- and that is they ascertained what the controlling
19 shareholders wanted to do and they did it in an hour-and-
20 twenty-five-minute telephonic board meeting.

21 I didn't discuss what I intended to discuss, but I
22 tried to answer your questions.

23 THE COURT: I understand, Mr. Krum. But the
24 briefing was very thorough, which is why I tried to hit the
25 questions --

1 MR. KRUM: Understood.

2 THE COURT: -- because I had some questions after
3 reading it.

4 So Motion for Partial Summary Judgment Number 1 is
5 granted in part. It is granted with respect to Edward Kane,
6 Douglas McEachern, William Gould, Judy Coddington, and Michael
7 Wrotniak.

8 It is denied as to Margaret Cotter, Ellen Cotter,
9 and Guy Adams because there are genuine issues of material
10 fact related to the disinterestedness of each of those
11 individuals. As a result, they cannot at this point rely upon
12 the business judgment rule.

13 MR. TAYBACK: Your Honor, is there a ruling on the
14 aspect of the motion that goes to inability to hold the
15 individuals personally liable for this claim?

16 THE COURT: For the three that I didn't grant the
17 business judgment?

18 MR. TAYBACK: Correct.

19 THE COURT: No, you do not get a ruling to that
20 effect.

21 Did you want to go to your next motion for summary
22 judgment?

23 MR. TAYBACK: Yes, Your Honor.

24 THE COURT: And I'm trying to be consistent with the
25 decision I made in the Wynn based upon the facts that seem to

1 be slightly different on the conduct of directors. I've got
2 this thing in my head that nobody understands but me, so I'm
3 trying to draw that line by asking questions so I can figure
4 out where that is. Mr. Ferrario knows nobody understands but
5 me. And I can't say it in a way the Supreme Court will
6 understand, because they don't understand it, except for Chris
7 Pickering, and she won't be deciding your appeal.

8 MR. TAYBACK: Your Honor, we have a second motion.
9 It's Motion Number 2. It's also woven through some of the
10 other motions. For the sake of just clarity I'll address
11 Motion Number 2 separately, and I'll only --

12 THE COURT: Briefly.

13 MR. TAYBACK: -- briefly. I'll only say this. Even
14 if you go to the -- well, I've certainly said my piece
15 already, and I think you can just incorporate what I've said
16 previously on this point, that independence I do not believe
17 is a legal prerequisite to the invocation of the business
18 judgment rule. Even if you look at the Shoen case, which Your
19 Honor has discussed, where it talks about interestedness and
20 the word it uses "interestedness," the quote there is, "To
21 show interestedness a shareholder must allege that --" it's
22 talking about allegations in that case "-- allege that a
23 majority of the board members would be, quote, 'materially
24 affected' either to benefit or detriment by a decision of the
25 board in a manner not shared by the corporation and the

1 stockholders." To the extent there is a question of
2 independence, it's not the generalized allegations that I
3 think pollute the claims here, the transaction-by-transaction
4 claims that the plaintiff seems to be asserting. You can't
5 just say independence is lacking because there's -- one of the
6 directors favored one of the board members versus one of the
7 others, favored the sisters versus the brother. You have to
8 show that there's a material impact in the transaction itself
9 that was being voted upon, and that's the contention that
10 we're making with respect to independence and how plaintiff's
11 claims, all of them against all of the individual defendants
12 transaction by transaction should fail under a summary
13 judgment standard.

14 With that I'll stop, and then I'll allow him to
15 address it, and then I've got on Motion Number 3.

16 THE COURT: Okay. Mr. Krum, anything else on Motion
17 Number 2?

18 MR. KRUM: Just briefly, Your Honor, because I think
19 we have a fundamental -- I'm going to repeat myself in one
20 respect -- misapprehension of law. This is not a check-the-
21 box exercise.

22 THE COURT: No, it is not.

23 MR. KRUM: So in Shoen the court says, "Thus, as
24 with the Aronson test, under the Brehm test, director
25 independence can be implicated by particularly alleging that