

1                   THIS MATTER CAME BEFORE THE COURT on the Motion for  
2 Rule 54(b) Certification and Stay of plaintiff James J. Cotter, Jr. ("Plaintiff").

3 The Court, having considered any papers filed and arguments made in  
4 support of and in opposition to the Motion, and for good cause appearing,

5                   IT IS HEREBY ORDERED THAT Plaintiff's Motion for Rule 54(b)  
6 Certification is GRANTED because Plaintiff will be severely prejudiced if  
7 required to wait to appeal and the remaining defendants will not be  
8 prejudiced if the Court's December 28, 2017 order dismissing defendants  
9 Edward Kane, Douglas McEachern, William Gould, Judy Coddington, and  
10 Michael Wrotniak is certified.

11                  The Court therefore finds and determines, under Nev. R. Civ. P.  
12 54(b), that there is no just reason for delay and hereby directs entry of  
13 judgment as to defendants Edward Kane, Douglas McEachern, William  
14 Gould, Judy Coddington, and Michael Wrotniak on all of Plaintiff's claims  
15 against them.  
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1 IT IS FURTHER ORDERED THAT the case is stayed pending  
2 Plaintiff's appeal.  
3

4 DATED this \_\_\_\_ day of \_\_\_\_\_, 2017.  
5

6  
7 THE HONORABLE ELIZABETH  
8 GONZALEZ,  
9 DISTRICT COURT JUDGE

10 Submitted by:

11 MORRIS LAW GROUP  
12

13 By: /s/ Akke Levin

14 Steve Morris, Bar No. 1543  
15 Akke Levin, Bar No. 9102  
16 411 E. Bonneville Ave., Ste. 360  
17 Las Vegas, Nevada 89101

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21 Boston, MA 02108

22 Attorneys for Plaintiff  
23 James J. Cotter, Jr.  
24  
25  
26  
27  
28


**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.

**FLORENCE HOYT  
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

12/12/17

DATE



**ORDER**

**COHEN|JOHNSON|PARKER|EDWARDS**

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Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane

Judy Coddington, and Michael Wrotniak

**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**

**ORDER REGARDING DEFENDANTS'  
MOTIONS FOR PARTIAL SUMMARY  
JUDGMENT AND PLAINTIFF'S AND  
DEFENDANTS' MOTIONS *IN LIMINE***

Judge: Hon. Elizabeth Gonzalez

Date of Hearing: December 11, 2017

Time of Hearing: 8:30 a.m.



1                   THIS MATTER HAVING COME TO BE HEARD BEFORE the  
2 Court on December 11, 2017, Mark G. Krum, Steve Morris, and Akke Levin  
3 appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); James L. Edwards,  
4 Christopher Tayback, and Marshall M. Searcy III appearing for defendants  
5 Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward  
6 Kane, Judy Coddington, and Michael Wrotniak (collectively, the "Individual  
7 Defendants"); Mark E. Ferrario and Kara B. Hendricks appearing for  
8 nominal defendant Reading International, Inc. ("RDI"); and Ekwan Rhaw  
9 appearing for defendant William Gould ("Gould," together, with the  
10 Individual Defendants and RDI, "Defendants"), on the following motions:

- 11           • Individual Defendants' Motion for Partial Summary Judgment  
12           (No. 1) re: Plaintiff's Termination and Reinstatement Claims,  
13           and supplement thereto;
- 14           • Individual Defendants' Motion for Partial Summary Judgment  
15           (No. 2) re: The Issue of Director Independence, and supplement  
16           thereto;
- 17           • Individual Defendants' Motion for Partial Summary Judgment  
18           (No. 3) on Plaintiff's Claims Relating to the Purported  
19           Unsolicited Offer, and supplement thereto;
- 20           • Individual Defendants' Motion for Partial Summary Judgment  
21           (No. 5) on Plaintiff's Claims Related to the Appointment of  
22           Ellen Cotter as CEO, and supplement thereto;
- 23           • Individual Defendants' Motion for Partial Summary Judgment  
24           (No. 6) re: Plaintiff's Claims Related to the Estate's Option  
25           Exercise, the Appointment of Margaret Cotter, the  
26           Compensation Packages of Ellen Cotter and Margaret Cotter,

and the Additional Compensation to Margaret Cotter and Guy Adams, and supplement thereto;

- Defendant Gould's Motion for Summary Judgment;
- Individual Defendants' Renewed Motion *in Limine* to Exclude Expert Testimony of Myron Steele Based on Supplemental Authority;
- Individual Defendants' Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than Probative;
- Defendant Gould's Motion *in Limine* to Exclude Irrelevant Speculative Evidence;
- RDI's Motion to Redact Opposition to Plaintiff James J. Cotter, Jr.'s Motion *in Limine* No. 1 re: Advice of Counsel and File Exhibit "E" Under Seal;
- Plaintiff's Motion *in Limine* No. 1 re: Advice of Counsel;
- Plaintiff's Motion *in Limine* No. 2 re: the Submission of Merits-Related Evidence by Nominal Defendant Reading International, Inc.;
- Plaintiff's Motion *in Limine* No. 3 re: After-Acquired Evidence;
- Plaintiff's Motion to Seal Exhibit 2 to Plaintiff James J. Cotter's Opposition to Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than Probative;
- Plaintiff's Motion to Seal Exhibits 3-6, 8-9, 11-2 and to Redact Portions of Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 3 and Gould Summary Judgment Motion;

- Plaintiff's Motion to Seal Exhibits 7-11, and 15-17 to Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 5 and Gould Summary Judgment Motion; and
- Plaintiff's Motion to Seal Exhibits 4 Through 11 to Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 6 and Gould Summary Judgment Motion.

IT IS HEREBY ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims is GRANTED with respect to Defendants Edward Kane, Douglas McEachern, William Gould, Judy Coddling, and Michael Wrotniak because there are no genuine issues of material fact related to the disinterestedness and/or independence of those directors, and is DENIED with respect to Defendants Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness and/or independence of those directors.

IT IS FURTHER ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: The Issue of Director Independence is GRANTED with respect to Defendants Edward Kane, Douglas McEachern, William Gould, Judy Coddling, and Michael Wrotniak because there are no genuine issues of material fact related to the disinterestedness and/or independence of those directors, and is DENIED with respect to Defendants Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness and/or independence of those directors.

IT IS FURTHER ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims Relating to the Purported Unsolicited Offer is GRANTED because of

1 Plaintiff's failure to show damages related to an unenforceable, unsolicited,  
2 nonbinding offer. While Plaintiff at trial cannot claim any damages arising  
3 from Defendants' actions with respect to the Patton Vision indications of  
4 interest, Plaintiff may still attempt to use evidence regarding the Patton  
5 Vision indications to show a breach of fiduciary duty.

6 IT IS FURTHER ORDERED THAT the Individual Defendants'  
7 Motion for Partial Summary Judgment (No. 5) on Plaintiff's Claims Related  
8 to the Appointment of Ellen Cotter as CEO is DENIED.

9 IT IS FURTHER ORDERED THAT the Individual Defendants'  
10 Motion for Partial Summary Judgment (No. 6) re: Plaintiff's Claims Related  
11 to the Estate's Option Exercise, the Appointment of Margaret Cotter, the  
12 Compensation Packages of Ellen Cotter and Margaret Cotter, and the  
13 Additional Compensation to Margaret Cotter and Guy Adams is DENIED.

14 IT IS FURTHER ORDERED THAT Defendant Gould's Motion  
15 for Summary Judgment is GRANTED.

16 IT IS FURTHER ORDERED THAT judgment in favor of  
17 Defendants Edward Kane, Douglas McEachern, William Gould, Judy  
18 Coddling, and Michael Wrotniak is GRANTED on all claims asserted by  
19 Plaintiff.

20 IT IS FURTHER ORDERED THAT the Individual Defendants'  
21 Renewed Motion *in Limine* to Exclude Expert Testimony of Myron Steele  
22 Based on Supplemental Authority is DENIED.

23 IT IS FURTHER ORDERED THAT the Individual Defendants'  
24 Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than  
25 Probative is DENIED.

26 IT IS FURTHER ORDERED THAT Defendant Gould's  
27 Motion *in Limine* to Exclude Irrelevant Speculative Evidence is DENIED as

1 premature, with the issues raised in the motion to be addressed at trial  
2 based upon the relevant foundation laid.

3 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
4 No. 1 re: Advice of Counsel is DENIED.

5 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
6 No. 2 re: the Submission of Merits-Related Evidence by Nominal  
7 Defendant Reading International, Inc. is DENIED.

8 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
9 No. 3 re: After-Acquired Evidence is DENIED. However, to the extent that  
10 Plaintiff's retention and use of Highpoint Associates and Derek Alderton is  
11 admitted at trial, it will be admitted with an instruction limiting the  
12 evidence solely to the issue of Plaintiff's suitability as President and CEO of  
13 RDI.

14 IT IS FURTHER ORDERED THAT RDI's Motion to Redact  
15 Opposition to Plaintiff James J. Cotter, Jr.'s Motion *in Limine* No. 1 re:  
16 Advice of Counsel and File Exhibit "E" Under Seal is GRANTED.

17 IT IS FURTHER ORDERED THAT Plaintiff's Motions to Seal  
18 and/or Redact are GRANTED.

19  
20 DATED this 28<sup>th</sup> day of December, 2017.

21   
22 DISTRICT COURT JUDGE  
23  
24  
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26  
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1  
2 PREPARED AND SUBMITTED BY:

3 COHEN|JOHNSON|PARKER|EDWARDS

4  
5 By: /s/ H. Stan Johnson

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26 *Ellen Cotter, Douglas McEachern, Guy Adams,*  
27 *Edward Kane, Judy Coddington, and Michael*  
28 *Wrotniak*

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**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 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 STAY**

**AND**

**APPLICATION FOR ORDER  
SHORTENING TIME**

**MORRIS LAW GROUP**

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1 Plaintiff James J. Cotter, Jr. ("Plaintiff") hereby moves the Court  
2 to stay this case pending filing and resolution of his forthcoming petition for  
3 writ of mandamus of the Court's impending order granting the individual  
4 defendants' motions for partial summary judgments Nos. 1 and 2 ("Partial  
5 MSJ Nos. 1 and 2") and William Gould's motion for summary judgment  
6 ("Gould MSJ"). Plaintiff further moves the Court under EDCR 2.26 for an  
7 Order shortening time to notice and hear this Motion.

8  
9 MORRIS LAW GROUP

10 By: 

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19 Attorneys for Plaintiff  
20 James J. Cotter, Jr.  
21  
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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 individual defendants' Partial MSJs, Gould's MSJ, 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 Coddling, and Michael Wrotniak on all four of Plaintiff's breach of fiduciary duty claims asserted against them.

3. On December 18, Plaintiff submitted a motion for reconsideration of the Court's rulings on Partial MJS Nos. 1 and 2, Gould's MSJ, and the Court's dismissal of William Gould, Edward Kane, Douglas McEachern, Judy Coddling, and Michael Wrotniak from the case.

4. On December 21, 2017, Plaintiff submitted to the Court a proposed order on all the Court's December 11 rulings.

5. The Motion for Reconsideration is set for hearing on December 28, 2017.

6. Good cause exists under EDCR 2.26 to shorten the time for notice and hearing of this Motion to Stay. Trial is set to begin on January 8,


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2018. If the Motion to Stay is set on the regular calendar, it would not be heard until after trial begins, which would defeat its purpose. Plaintiff proposes that the Court hears this Motion on December 28, 2017, the same day and time that the Court scheduled hearing on Plaintiff's Motion for Reconsideration.

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

8. 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 28<sup>th</sup> day of December, 2017, at the hour of 9:00 a.m. .

(per agreement)

  
Judge Elizabeth Goff Gonzalez  
District Court Judge, Dept. 11

DATED: 28 DECEMBER 2017

I. INTRODUCTION

The Court on December 11, 2017 dismissed all Plaintiff's four claims against five of the eight defendants because the Court found there were no issues of material fact as to their disinterestedness and

1 independence. The Court's rulings were based the individual defendants'  
2 Partial MSJ Nos. 1 and 2 and Gould's MSJ. Plaintiff is seeking  
3 reconsideration of this ruling. Plaintiff has prepared and will file—as soon  
4 as the Court enters an order on these rulings—a petition for writ of  
5 mandamus seeking to vacate the impending order on the motions for  
6 summary judgment to the extent the Court does not amend its December 11  
7 rulings following the hearing on Plaintiff's Motion for Reconsideration. A  
8 stay of this case pending the resolution of Plaintiff's Writ Petition is  
9 warranted under *Renown Reg'l Med. Ctr. v. Second Jud. Dist. Ct.*, 130 Nev. \_\_\_,  
10 \_\_\_, 335 P.3d 199 (2014) and NRAP 8(c).

## 11 II. ARGUMENT

### 12 A. The Court Should Stay the Case to Permit Plaintiff to file a 13 Writ Petition.

14 Plaintiff's writ petition is based, in part, on the Court's dismissal  
15 of all four *claims* against five defendants whereas the individual director  
16 defendants other than Gould had filed only motions for partial summary  
17 judgment on certain *issues*. In *Renown Reg'l Med. Ctr. v. Second Jud. Dist. Ct.*  
18 —a case on point in which the district court found in favor of the plaintiff on  
19 two claims "even though the full merits of these claims were not specifically  
20 argued" in the motions or at the hearing—the district court "stayed the  
21 remainder of the case so that Renown could seek writ relief in [the Nevada  
22 Supreme Court]." 130 Nev. \_\_\_, \_\_\_, 335 P.3d 199, 201 (2014). Given the  
23 similarities of both cases (as more fully further discussed in Plaintiff's  
24 Motion for Reconsideration) the Court should likewise stay this case.

### 25 B. The Court Should Stay the Case Pending the Outcome of 26 Plaintiff's Writ Petition.

27 A party may seek a stay of the proceedings in the district court  
28 pending the "resolution of a petition to the Supreme Court or Court of  
Appeals for an extraordinary writ." NRAP 8(a)(1)(A). The initial stay

1. motion must be made in the district court. *Id.* "In deciding whether to issue  
2 a stay or injunction, the Supreme Court or Court of Appeals will generally  
3 consider the following factors: (1) whether the object of the appeal or writ  
4 petition will be defeated if the stay or injunction is denied; (2) whether  
5 appellant/petitioner will suffer irreparable or serious injury if the stay or  
6 injunction is denied; (3) whether respondent/real party in interest will  
7 suffer irreparable or serious injury if the stay or injunction is granted; and  
8 (4) whether appellant/petitioner is likely to prevail on the merits in the  
9 appeal or writ petition." NRAP 8(c). Not all factors have to weigh in the  
10 moving party's favor: some factors may be particularly strong and  
11 "counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120  
12 Nev. 248, 251, 89 P.3d 36, 38 (2004). As discussed below, however, each of  
13 these factors weighs in Plaintiff's favor.

14 **1. The Object of the Writ Petition Would be Defeated if the**  
15 **Stay is Denied.**

16 The object of Plaintiff's writ petition will be defeated if trial  
17 proceeds on January 8 against just three defendants when the result of a  
18 successful writ petition will require a second trial against all eight individual  
19 defendants. *Cf. McCrea*, 120 Nev. at 251, 89 P.3d at 39 (finding that the  
20 benefits of arbitration, including its purpose to avoid "longer time periods  
21 associated with litigation," would "likely be lost" if the appellant "had to  
22 simultaneously or sequentially proceed in both judicial and arbitral  
23 forums"). Thus, the first factor weighs in Plaintiff's favor.

24 **2. Plaintiff Would Suffer Serious Harm Without a stay.**

25 As demonstrated in Plaintiff's Motion for Reconsideration, the  
26 presumption under NRS 78.138 is rebuttable. If Plaintiff is not allowed to  
27 rebut the rebuttable presumption against the five dismissed director  
28 defendants at trial, Plaintiff will suffer severe harm at trial, because it

1 deprives him of his right to present his case against the five dismissed  
2 director defendants to a jury.

3 **3. Defendants would not Suffer Prejudice, much less**  
4 **Irreparable Harm, if a Stay is granted.**

5 It would be in all the parties' interest—including defendants'  
6 interest—to stay the case and avoid a costly and time-consuming "do over"  
7 of the trial that is about to start if the Nevada Supreme Court vacates the  
8 district court's impending order. This factor therefore also weighs in  
9 Plaintiff's favor.

10 **4. Plaintiff is likely to succeed on the merits.**

11 Plaintiff is likely to prevail on one or more aspects of his Writ  
12 Petition, which seeks an order vacating the impending order on Partial MSJ  
13 Nos. 1 and 2, Gould's MSJ, and the Court's ruling to dismiss five of the  
14 director defendants from the case on the grounds that: (1) Plaintiff did not  
15 get notice and an opportunity to be heard before all four claims were  
16 dismissed against these five defendants; (2) briefing on Gould's MSJ was still  
17 open; and (3) the Court's ruling deprived Plaintiff of the right to introduce  
18 evidence at trial to rebut the presumption that the acts and omissions of the  
19 five dismissed directors were protected by the business judgment rule.

20 In *Renown*, the Nevada Supreme Court granted the hospital's  
21 writ petition in similar circumstances. There, the district court found in  
22 favor of the plaintiff "on his breach of contract and intentional interference  
23 with contract claims, even though the full merits of these claims were not  
24 specifically argued in the cross-motions for summary judgment or at the  
25 hearing." 130 Nev. at \_\_\_, 335 P.3d at 202. The Nevada Supreme Court  
26 granted the writ petition because these claims were not mentioned  
27 anywhere "in the six summary judgment briefs" and *Renown* did not receive  
28 ten days notice and an opportunity to defend itself on those claims. *Id.*


1 Similarly here, the director defendants other than Gould filed only motions  
2 for partial summary judgment on certain issues (not claims) and Plaintiff  
3 did not receive notice and an opportunity to defend himself before  
4 summary judgment was granted as to five defendants.

5 As to the third ground, Plaintiff raises a sound legal issue that is  
6 meritorious as well: the district court decided Plaintiff's fiduciary duty  
7 claims against five directors based solely on the grounds that Plaintiff had  
8 failed to raise a disputed issue of material fact regarding their  
9 disinterestedness or independence. This factor therefore also weighs in  
10 Plaintiff's favor.

11 **III. CONCLUSION**

12 For the reasons stated above, the Court should stay this action  
13 pending decision of the Writ Petition.

14 MORRIS LAW GROUP

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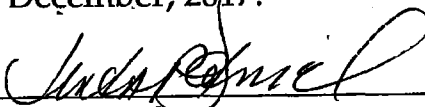
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**CERTIFICATE OF SERVICE**

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 TO STAY 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 17th day of December, 2017.

By:   
An employee of Morris Law Group

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

JAMES COTTER, JR.

Plaintiff

vs.

MARGARET COTTER, et al.

Defendants  
.....

CASE NO. A-15-719860-B  
A-16-735305-B  
P-14-082942-E

DEPT. NO. XI

**Transcript of  
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON MOTION FOR RECONSIDERATION  
AND MOTION FOR STAY**

THURSDAY, DECEMBER 28, 2017



**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.

**FLORENCE HOYT  
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

12/28/17

DATE

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.  
AKKE LEVIN, ESQ.

FOR THE DEFENDANTS:

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MARSHALL M. SEARCY, ESQ.  
MARK E. FERRARIO, ESQ.  
SHOSHANNA BANNETT, ESQ.

1 LAS VEGAS, NEVADA, THURSDAY, DECEMBER 28, 2017, 9:02 A.M.

2 (Court was called to order)

3 THE COURT: Good morning.

4 Mr. Ferrario, so kind of you to join us.

5 MR. FERRARIO: Wouldn't miss it.

6 THE COURT: You can sit down.

7 Mr. Ferrario called my staff yesterday to see if he

8 could get out of coming to court.

9 MR. FERRARIO: I just hinted.

10 THE COURT: So I have a motion for stay that was

11 submitted on an OST, but it was submitted after 5:00 o'clock

12 on Tuesday, so we didn't get it in time to set it for this

13 morning. Does anyone have an objection to the motion for stay

14 being heard after I hear the motion for reconsideration?

15 MR. SEARCY: No objection.

16 THE COURT: Okay. So we'll hear that this morning.

17 I'll have Dulce take care of whatever that means. But come on

18 up and let's do the motion.

19 (Pause in the proceedings)

20 THE COURT: Ms. Levin, I don't know what happens

21 after this, but I'm now handing it to Dulce, and you and Dulce

22 talk after the hearing.

23 MS. LEVIN: The motion to stay?

24 THE COURT: Okay. You're up, Mr. Krum.

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

1           The motion for reconsideration, as I trust you saw,  
2 raises three arguments. And I'll speak to the two principal  
3 arguments, the first of which is what we view as the error of  
4 granting a dismissal of the case when it wasn't sought. The  
5 second is what we view as the error of the application of the  
6 business judgment rule. The motion -- excuse me. The  
7 oppositions pretty much agree with us on how you handle this,  
8 and we just disagree about how it should have been handled.

9           But before I speak to that, Your Honor, I note that  
10 there was some complaint about there wasn't any new evidence.  
11 I don't know if that's correct or not, but there is new  
12 evidence that we were not in a position to include in our  
13 motion because we just received it last night. And what it  
14 is, Your Honor, is that the five individuals with respect to  
15 whom you made a determination that there was no disputed issue  
16 of material fact --

17           THE COURT: Coddling, Kane, Gould, Wrotniak, and  
18 McEachern.

19           MR. KRUM: Correct. Yeah. Those five individuals  
20 have apparently requested that the matter be added to a board  
21 meeting agenda tomorrow. And what they propose to do is to  
22 ratify the conduct of some of them and some of others as to  
23 matters, Your Honor, with respect to which you denied motions  
24 for summary judgment. So --

1           THE COURT: Mr. Krum, let me step back for a minute  
2 just so we're clear. Because it may be that I communicated  
3 poorly when we were all here. I made a determination that  
4 there was no genuine issue of material fact as to the  
5 interestedness of those five individuals. As a result, that  
6 means the direct claims against those individuals for personal  
7 liability was granted, because I did not make a finding that  
8 there was an interestedness on their part. I understand you  
9 may have issues with that from a factual standpoint, and we'll  
10 talk about that in a minute.

11           The impact of that is that it doesn't affect the  
12 claims that you're making against the company. Because while  
13 you are arguing that there has been a breach of an agreement  
14 and other things related to the conduct of those individuals,  
15 as well, that doesn't preclude from making that argument. It  
16 simply precludes under the business judgment rule from  
17 obtaining personal liability against those five directors who  
18 I made a determination there was insufficient evidence to go  
19 forward given the business judgment rule.

20           So I'm just trying to make sure that we're clear on  
21 what I did. Because when I was reading your briefing I wasn't  
22 really sure that that came across.

23           MR. KRUM: Well, Your Honor, I think so. I think  
24 that we just have a disagreement.

25           THE COURT: All right.

1           MR. KRUM: And disagreement, Your Honor, not with --  
2 so much with respect to the facts, but rather with respect to  
3 the law and the application of the business judgment rule.  
4 But may I finish this new evidence?

5           THE COURT: Yes, please.

6           MR. KRUM: Because I think, Your Honor, this goes to  
7 interestedness or --

8           THE COURT: Ratification?

9           MR. KRUM: -- independence. Indeed it does, Your  
10 Honor, independence.

11          THE COURT: Okay.

12          MR. KRUM: So here's what we have. We have five  
13 individuals who think they're out of the case now, and they're  
14 prepared to take steps so that new evidence can be introduced  
15 in the case against the other individual defendants. What  
16 they're trying to do, Your Honor, is change the burden of  
17 proof at trial we're supposed to commence on January 8th.  
18 Because what they're going to say is that a majority of  
19 disinterested and independent directors have ratified all  
20 these actions and that Mr. Krum's argument that the remaining  
21 directors bear the burden of proof and so forth and so on  
22 doesn't play anymore. And so what they're doing, Your Honor,  
23 is creating an entire new fact set so the lawyers can try to  
24 argue different legal standards apply.

1           Now, if I may, because I don't want to speak to the  
2 particulars, it's easy to look at them. May I give this to  
3 you?

4           THE COURT: Is it okay if I mark it as Court's  
5 Exhibit 1, since you're getting a copy?

6           MR. SEARCY: That's acceptable, Your Honor, now that  
7 I've got a copy.

8           MR. KRUM: And it's stamped as confidential.

9           THE COURT: Court's Exhibit 1, please.

10          Okay. Since it's stamped as confidential because it  
11 apparently includes commercially sensitive information, I am  
12 going to not talk about it specifically, but only in  
13 generalities. How's that?

14          MR. KRUM: Thank you, Your Honor.

15          THE CLERK: So you want this sealed, Your Honor?

16          THE COURT: It will be sealed.

17          THE CLERK: Thank you.

18          THE COURT: Thank you, Dulce.

19          MR. KRUM: So, Your Honor, the point of this action  
20 to date and action that's anticipated is that it shows -- it  
21 evidences further the lack of independence of these persons  
22 who are undertaking to ratify conduct you have found to be  
23 such that it raises a triable issue of fact. So on the issue  
24 of independence with respect to which we disagree,  
25 respectfully, as to how that can be rebutted -- I mean, I

1 think I understood what you said, and the opposition takes the  
2 position that reflects my understanding of what you said, that  
3 we didn't show disinterestedness, actually was what you said,  
4 and therefore --

5 THE COURT: Lack of interestedness.

6 MR. KRUM: Yeah. And therefore the rule applies and  
7 there's no liability. And I respectfully disagree. And  
8 we've talked past each other at some length at the last  
9 hearing where I kept talking about the evidence and you kept  
10 telling me I was talking about evidence of breach of fiduciary  
11 duty. And I don't intend to repeat that. But this, Your  
12 Honor, is new evidence. It is new evidence of a lack of  
13 independence. And that's without regard to the issue that  
14 what do we do now. These five people who are witnesses, based  
15 on your decision, are going to come in here and testify, we  
16 ratified the actions set out in pages 3(a) and (b) of the  
17 document that I handed to the Court. And these are matters  
18 that -- as to which you denied summary judgment. They're  
19 matters as to which equitable relief is sought, and they're  
20 going to argue to you, Judge, based on the actions of these  
21 five people you've found are independent the case is over, you  
22 can't grant equitable relief no matter whether you could  
23 before. So I --

24 THE COURT: Most people might say that's a little  
25 late in the game.



1           MR. KRUM: Well, I think it is, Your Honor. And so  
2 maybe I'm ahead of myself on the stay issue.

3           But -- so that's the new evidence that we learned --  
4 I learned about 10:00 o'clock when I landed in LAX back on the  
5 48 last night.

6           So on the first issue, Your Honor, that was in our  
7 motion the Court granted summary judgment as to these five  
8 individuals and dismissed the case as to the claims for breach  
9 of the duty of care, breach of the duty of loyalty, and breach  
10 of the duty of candor.

11           Now, the only motion that sought summary judgment  
12 across the board was the one by Mr. Gould. And, of course,  
13 you know our point on that, and we talked about it at the last  
14 hearing. I'm not going to repeat myself.

15           The other ones were described as motions for partial  
16 summary judgment, and they were directed at specific issues.  
17 There wasn't a single one that said dismiss the case. And  
18 with respect to partial -- Motion for Partial Summary Judgment  
19 Number 2, which was the one -- that director interestedness,  
20 that didn't request dismissal, either. All that did was  
21 request a determination on that discrete issue. And, Your  
22 Honor, the business judgment rule is a evidentiary  
23 presumption, and we're entitled to rebut it, and we're  
24 entitled to do so by showing that they breached their

1 fiduciary duties. I'm not going to go into that, because I'm  
2 already repeating myself.

3           The other thing I'd say, Your Honor, is at the  
4 hearing in October of 2016 we had some discussion about the  
5 nature of these motions, and at page 83, line 8 to 12, you  
6 said, "It's not summary judgment, but, yeah, I understand  
7 you're asking for a pretrial ruling or a pretrial  
8 determination. But it's not supposed to be summary judgment  
9 on that kind of fact." And the fact that was raised by Mr.  
10 Tayback to which you responded was independence. And so  
11 that's why we understood we were supposed to provide these  
12 details. And then we get to the question of what's jury  
13 instruction going to be with respect to, for example, the  
14 abort CEO search.

15           So, Your Honor, the last point on this independence  
16 issue, independence isn't required. You know, their duty of  
17 care claims can be made and brought regardless of whether  
18 there's independence or interest and so forth. And the same,  
19 by the way, is true for duty of candor claims. That issue  
20 really ties in with the duty of loyalty. So now the last  
21 comment on that is -- and this perhaps is why we seem to be  
22 talking past one another or perhaps I wasn't listening well,  
23 as the case may be -- breaches of the duty of loyalty are  
24 evidence of a lack of independence. It's -- the loyalty is  
25 supposed to be singular. It's supposed to be to the company.

1 It's not supposed to be divvied up between the company and the  
2 controlling shareholders or any other party. And where it is  
3 -- where there's evidence that it is, that's evidence of a  
4 lack of independence.

5           So on the business judgment rule, Your Honor, I  
6 think we've covered that. We have a different view of what it  
7 means to have a director who is not -- does not lack  
8 independence and who is disinterested. All that means in our  
9 view is that the presumption applies, the three-part  
10 presumption, and that we can rebut it by evidencing any one of  
11 those three parts didn't happen. And the Shoen case talks  
12 about that and the cases we cited in the briefing, and so I'm  
13 not going to belabor that.

14           So I guess with that, unless you have questions,  
15 I'll stop.

16           THE COURT: I don't have any questions. Thank you.

17           MR. SEARCY: Your Honor, I'll try to be brief. The  
18 plaintiff's claim that we didn't move on all the causes of  
19 action is a red herring here. We moved on all the specific  
20 breaches that were supposedly put at issue by plaintiff in  
21 their causes of action, and in fact at the Court's direction  
22 plaintiff identified the breaches that are at issue in their  
23 supplemental briefing, and we moved on all of those issues.  
24 And those are set forth on page 6 of our opposition.

1           With respect to Motion Number 2 that we filed, which  
2 went specifically to the issue of disinterestedness, that was  
3 clearly dispositive on all claims with respect to those  
4 directors, because it implicated the business judgment rule.

5           Issues in this case have been briefed extensively.  
6 They've had every opportunity to submit evidence on these  
7 issues, and they failed to come forward with any evidence that  
8 would show a lack of disinterestedness with respect to the  
9 directors on whom you've granted summary judgment,  
10 specifically Mr. Kane, Mr. McEachern, Mr. Wrotniak, and Ms.  
11 Coddling. They haven't come forward with any evidence showing  
12 a beholdenness or some sort of self interest that is  
13 implicated in any of the transactions that are at issue in  
14 this case.

15           With respect to the new evidence that plaintiff has  
16 now come forward with --

17           THE COURT: Court Exhibit 1.

18           MR. SEARCY: Court Exhibit 1. Thank you, Your  
19 Honor.

20           -- this simply demonstrates the problem with the  
21 reasoning of plaintiffs with respect to all of this.  
22 Plaintiff disagrees with the decision of the board, therefore  
23 that somehow is supposed to be an indication of lack of  
24 disinterestedness. It doesn't work that way with the business  
25 judgment rule. He's got to come forward with evidence that

1 shows that their reasoning, that their thought process was  
2 somehow impacted. He's failed to do that.

3 Your Honor, the motion for reconsideration should be  
4 denied.

5 THE COURT: Thank you.

6 Ms. Bannett.

7 MS. BANNETT: Mr. Krum didn't address Mr. Gould  
8 specifically when he spoke, but, again, he did not point to  
9 any evidence that shows that Mr. Gould had a financial  
10 relationship with either of the Cotter sisters or that Mr.  
11 Gould had a close personal relationship with either of the  
12 Cotter sisters. And under the business judgment rule that is  
13 what is needed in order to rebut the presumption and move on  
14 to the next part of the case. It's not only what the Court  
15 has said, it's also what plaintiff's own expert witness said.  
16 That would be Chief Justice Steele from the Delaware Supreme  
17 Court, former Chief Justice. He found that there was no  
18 evidence that Mr. Gould was -- lacked independence or lacked  
19 disinterested and, as a result, he found that there is no  
20 basis for the claims against Mr. Gould to proceed. He did not  
21 apply his opinions about breaches of fiduciary duty to Mr.  
22 Gould, and he specifically excepted him from his opinions in  
23 this case.

24 If the Court has any questions about Mr. Gould --

25 THE COURT: I don't have any questions. Thank you.

1           Mr. Ferrario, anything on behalf of the nominal  
2 defendant?

3           MR. FERRARIO: No, Your Honor. Other than I think  
4 your ruling initially was correct and I think it should stand.  
5 And I suspect that coming out of the meeting Friday, depending  
6 on what occurs, there may be some issues we may need to bring  
7 to Your Honor's attention at the pretrial conference set for  
8 next Friday. And I'm not saying this to be facetious. I have  
9 gone through Mr. Krum's complaint, participated in one of the  
10 calls, you know, dealing with the pretrial order, and I've  
11 gone through the pretrial order. And I really think it would  
12 be beneficial for the Court -- we're going to have a jury  
13 impaneled -- that at that pretrial conference that plaintiff  
14 articulate clearly what claims plaintiff believes he still has  
15 left.

16           THE COURT: I'm not there.

17           MR. FERRARIO: Okay. I'm just --

18           THE COURT: That is technically part of what has to  
19 be in the pretrial order, though.

20           MR. FERRARIO: And, Judge, the pretrial order, Ms.  
21 Cowden and I have gotten into a number of arguments over the  
22 last couple days about what I heard coming out of the call and  
23 what's in the pretrial order. I think everybody was pressed  
24 due to the holidays. We got this in. I'm just going to  
25 encourage Your Honor at that pretrial conference, and it may

1 be a somewhat unusual pretrial conference, that we have some  
2 delineation as to what the claims remaining actually are.  
3 Because I don't think we -- my reading of it in light of the  
4 Court's ruling, there's very little, if anything, left to be  
5 tried. And, again, there may be something occurring, and Mr.  
6 Krum assumes certain things are going to happen. There may be  
7 something occurring on Friday that may provide some relief  
8 under Nevada Revised Statutes, NRS 78.140 in particular, and  
9 there may be something --

10 THE COURT: Little late for ratification. It's a  
11 little late for ratification, Mr. Ferrario.

12 MR. FERRARIO: Well, Your Honor -- and I anticipated  
13 you may say that. But keep in mind --

14 THE COURT: I've got a trial starting a week from  
15 Monday.

16 MR. FERRARIO: Your Honor, I understand that. But  
17 keep in mind because of how this unfolded and what happened  
18 with the motions for summary judgment until the Court ruled,  
19 any attempted ratification would have involved arguments by  
20 them as to lack of independence, that type stuff. So there  
21 has been a change in the tenor of the case. That's all I'm  
22 telling the Court. I'm just giving you a heads up. Lots of  
23 stuff going on. And looking forward to the pretrial  
24 conference.

25 THE COURT: Okay. Oh, swell.

1           Mr. Krum.

2           MR. KRUM: Briefly, Your Honor. The assertion by  
3 Mr. Searcy that they moved on everything is incorrect. First,  
4 as we discussed last October, the manner in which the duty of  
5 loyalty claim is pleaded, for example, is all this conduct  
6 collectively evidences a breach of the duty of loyalty.  
7 That's the same thing as moving for summary judgment of the  
8 case, and they didn't do that, either.

9           Second, Your Honor, they didn't even move on all the  
10 particular matters we identified as matters that we thought in  
11 and of themselves, not just with others, constituted or gave  
12 rise to breaches of fiduciary duty. And we've said this. And  
13 the first example is the first one, which is threat, the  
14 attempted extortion by Adams, Kane, and McEachern when they  
15 threatened plaintiff with termination if he didn't resolve his  
16 personal trust and estate disputes with his sisters on terms  
17 satisfactory to them.

18           As to the comments by counsel for Mr. Gould -- and I  
19 try to be descriptive, not disparaging -- reliefs a check-the-  
20 box analysis to the question of independence. It's not are  
21 they financially dependent and are they -- have thick-as-blood  
22 relations, yes, no, end of analysis.

23           THE COURT: Do they sleep on an air mattress in the  
24 Manhattan apartment and go visit.



1           MR. KRUM: I recall that conversation. And so the  
2 point is particularly important with respect to Mr. Gould,  
3 because we have, as we've described, an ongoing course of  
4 conscious -- a conscious decision not to do his job and to  
5 acquiesce to the wishes of the controlling shareholders.

6           And the last thing I want to say in reply is the  
7 characterization of Chief Justice Steele is misleading and in  
8 fact actually it's inaccurate. He answered a specific  
9 question that was in the nature of a hypothetical question  
10 that didn't go to anything beyond that. And because he didn't  
11 need to get to that second step for the purpose of his  
12 opinion, he didn't do it.

13           Unless you have questions, Your Honor, I have  
14 nothing further.

15           THE COURT: I don't have any questions.

16           The motion for reconsideration is denied. I do not  
17 see -- although I've reviewed Court's Exhibit 1, I do not see  
18 any new information that would cause me to change my decision  
19 from a factual standpoint, and I have not been provided with  
20 any new legal analysis that would cause me to change my  
21 decision.

22           That takes me to the motion to stay.

23           MR. KRUM: Your Honor, on the motion to stay we have  
24 the same two principal issues, whether the Court committed  
25 error when it granted summary judgment and dismissed the case

1 as to those individuals -- I'm not going to repeat that;  
2 you've read it, you've heard it -- on the second issue the  
3 question is one where I think we respectfully disagree with  
4 the Court and the defendants as to what the consequence is of  
5 a director being able to invoke the statute and the business  
6 judgment rule. And in our view that's nothing more than the  
7 -- than that the plaintiff bears the initial burden of proving  
8 that the director didn't in fact do what he's presumed to do.

9           And those are -- those are questions, Your Honor,  
10 along with a third one about viewing the evidence collectively  
11 that we're going to make the subject of a writ.

12           In terms of a stay what we have is the prospect of,  
13 in our view, Your Honor, trying substantially the same case  
14 without these five people as defendants, having an appeal with  
15 respect to them and whatever is appealed from the trial, and  
16 then, if we're successful, looking at a do over. If we're  
17 successful on any of these issues. And --

18           THE COURT: That's how it is on every time I grant  
19 partial summary judgment, Mr. Krum.

20           MR. KRUM: Understood, Your Honor. Understood. I  
21 think that -- we think, respectfully, these issues are  
22 particularly apt for review, but we'll see.

23           The other issue is what we just talked about with  
24 Exhibit 1. And, you know, we have people who are attempting  
25 to move the target, so to speak, and that puts us in a

1 completely untenable position. As I explained earlier,  
2 they're going to introduce evidence -- they're going to seek  
3 to introduce evidence about something that happened -- actions  
4 they took based on a decision you made; they're going to  
5 argue, Your Honor, that that's a different --

6 THE COURT: After the pretrial order was submitted.

7 MR. KRUM: Well, they're going to argue, Your Honor,  
8 that there are different burdens of proof as a result of that.  
9 And if --

10 THE COURT: I understand, Mr. Krum.

11 MR. KRUM: If you don't let them do that, Your  
12 Honor, then they're going to preserve that for appeal. And  
13 so --

14 THE COURT: People preserve things for appeal every  
15 day in Department -- well, every Monday in Department 11.

16 MR. KRUM: Yeah. So that's all I have, Your Honor.  
17 Thank you.

18 THE COURT: Anything else?

19 MR. SEARCY: Nothing from me, Your Honor.

20 THE COURT: The motion for stay is denied.

21 MR. KRUM: Well, Your Honor, we've submitted an  
22 order that I think we indicated in our cover letter was  
23 acceptable to the defendants except in one respect, and that  
24 single respect was that Mr. Gould's counsel initially  
25 objected, and the other individuals have joined, that we

1 included once or twice in that order a sentence or phrase to  
2 the effect that Mr. Gould's summary judgment motion was set  
3 for January 8th. And our thinking was no more complicated  
4 than this. You can either sign the order as we submitted it,  
5 or you can interlineate that out and sign it. Because  
6 otherwise it's a mutually acceptable order. And we'd like to  
7 have that signed as quickly as possible.

8 THE COURT: If Cassandra was here, I would ask if we  
9 had it. But she's not here.

10 MR. KRUM: We'll be happy to deliver another --

11 THE COURT: Did you submit a competing order in Word  
12 format the way I require it?

13 MS. BANNETT: We didn't. We can do that if --

14 THE COURT: Well, see, that creates a problem with  
15 me getting Mr. Krum an order if you intend to submit a  
16 competing order in Word format.

17 MS. BANNETT: We can do that.

18 MR. SEARCY: We'll take care of that today.

19 MR. KRUM: Actually, let us be helpful. We'll  
20 submit ours in Word, and we'll have one with and one without.  
21 They objected to objectionable language.

22 MR. SEARCY: That's certainly acceptable, Your  
23 Honor.

1           THE COURT: That's perfect, as well. Either way you  
2 do it. Just so I have the two versions in Word so I can look  
3 at them and make a decision which is the most appropriate.

4           MR. KRUM: Will do, Your Honor.

5           MS. LEVIN: And to who -- I'm sorry, Your Honor. To  
6 who do we send it?

7           THE COURT: Send it to  
8 kutinacd@clarkcountycourts.us. And  
9 dept111c@clarkcountycourts.us. That's for my JEA and my law  
10 clerk.

11           All right. So just so everybody remembers, I don't  
12 think Mr. Gould is going to be at issue given my ruling, so I  
13 think he will only be involved as a witness, so I'm not  
14 addressing these comments to Ms. Bannett.

15           Addressing them to you, Mr. Searcy. You know that  
16 Nevada counsel has to be present at your side the entire  
17 trial.

18           MR. SEARCY: Thank you, Your Honor.

19           THE COURT: So someone from the Cohen firm has to be  
20 here sitting there with you doing whatever it is they have to  
21 do. So if there becomes an issue on our quirky Eighth  
22 Judicial District Court rules or other unusual procedures in  
23 Nevada, you can turn to them and say, hey, really, and we can  
24 deal with it then.

1           MR. SEARCY: He has been sending me notes throughout  
2 the entire hearing, Your Honor.

3           THE COURT: I know he has. I know. Well, and  
4 you've had Mr. Edwards some and you've had Mr. Johnson some,  
5 and, you know, it's not like you haven't had one of them. I'm  
6 just reminding you I'm not waiving it for the trial.

7           MR. SEARCY: Thank you, Your Honor. I understand.

8           THE COURT: All right. Anything else?

9           MR. KRUM: No, Your Honor.

10          THE COURT: Okay. When you meet with the IT folks  
11 next week on Tuesday please make sure everything works. If  
12 there are concerns, I would rather know about the problems  
13 soon. We are still working with the facility across the  
14 street.

15          MR. FERRARIO: Are we meeting over there?

16          THE COURT: Well, I'm not in charge of that. That's  
17 Dulce.

18          THE CLERK: I think we're meeting in this courtroom,  
19 but I want to confirm with Brandi. [Inaudible].

20          MR. FERRARIO: Whatever we do here will transfer  
21 over there?

22          THE COURT: When Judge Bailless lets us. We are  
23 serving at his pleasure. I don't have a courtroom.

24          MR. FERRARIO: If think if you say that like every  
25 day on the record, some little --

1           THE COURT: I have a meeting with County Management  
2 next week. All right. What else?

3           MR. FERRARIO: I thought we were getting the big one  
4 upstairs when they refurb it.

5           THE COURT: And when's that going to be, Mr.  
6 Ferrario? How long do you think that construction project's  
7 going to last?

8           MR. FERRARIO: I agree. Okay. That I do know.

9           THE COURT: Okay. Anything else?

10          MR. KRUM: No, Your Honor.

11          THE COURT: All right. So, Mr. Krum, Ms. Levin,  
12 you're sending me the versions. I'm going to review them, I'm  
13 going to sign one. We'll let you know which one is signed,  
14 and then you do what you've got to do with the Supreme Court  
15 and ask them for the stay, because I've already denied it.

16          MR. KRUM: Understood.

17          THE COURT: And if they want to stay your trial,  
18 they'll stay your trial.

19          MR. KRUM: Thanks, Your Honor.

20          MR. FERRARIO: Thank you, Your Honor.

21          MR. SEARCY: Thank you.

22          THE COURT: Otherwise I will have you guys visiting  
23 with Dulce on the 2nd and visiting with me on the 5th.

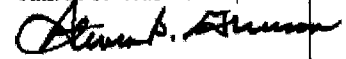
24                 THE PROCEEDINGS CONCLUDED AT 9:31 A.M.

25                         \* \* \* \* \*

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PA 3656



**MORRIS LAW GROUP**

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702/474-9400 · FAX 702/474-9422

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18 Attorneys for Plaintiff  
19 James J. Cotter, Jr.

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

16 JAMES J. COTTER, JR., ) Case No. A-15-719860-B  
17 derivatively on behalf of Reading ) Dept. No. XI  
18 International, Inc., )

19 Plaintiff,

20 v.

21 MARGARET COTTER, ELLEN  
22 COTTER, GUY ADAMS,  
23 EDWARD KANE, DOUGLAS  
24 McEACHERN, WILLIAM  
GOULD, JUDY CODDING,  
MICHAEL WROTONIAK,

25 Defendants.

26 and

27 READING INTERNATIONAL,  
INC., a Nevada corporation,

28 Nominal Defendant.

) Coordinated with:

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

) Jointly Administered

) **NOTICE OF ENTRY OF ORDER**

MORRIS LAW GROUP  
411 E. BONNEVILLE AVE., STE. 360 · LAS VEGAS, NEVADA 89101  
702/474-9400 · FAX 702/474-9422

1 PLEASE TAKE NOTICE that an Order Regarding Defendants'  
2 Motions for Partial Summary Judgment and Plaintiff's and Defendants'  
3 Motions *in Limine* was entered by this Honorable Court on the 28<sup>th</sup> day of  
4 December, 2017. A copy of the Order is attached hereto as Exhibit A.  
5

6 MORRIS LAW GROUP  
7

8 By: /s/ Akke Levin

9 Steve Morris, Bar No. 1543  
10 Akke Levin, Bar No. 9102  
11 411 E. Bonneville Ave., Ste. 360  
12 Las Vegas, Nevada 89101

13 Mark G. Krum, Bar No. 10913  
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15 1 Washington Mall, 11th Floor  
16 Boston, MA 02108

17 Attorneys for Plaintiff  
18 James J. Cotter, Jr.  
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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 on all interested parties as registered with the Court's E-Filing/E-Service System: **NOTICE OF ENTRY OF ORDER**. 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 29th day of December, 2017.

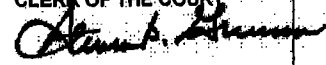
By: /s/ Linda P. Daniel  
An employee of Morris Law Group

12/2912/29

## EXHIBIT A

PA3660

Electronically Filed  
12/28/2017 4:22 PM  
Steven D. Grierson  
CLERK OF THE COURT



**ORDR**  
**COHEN|JOHNSON|PARKER|EDWARDS**  
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Los Angeles, CA 90017  
Telephone: (213) 443-3000

Attorneys for Defendants Margaret Cotter,  
Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane  
Judy Coddington, and Michael Wrotniak

# **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**

## **ORDER REGARDING DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S AND DEFENDANTS' MOTIONS *IN LIMINE***

Judge: Hon. Elizabeth Gonzalez

Date of Hearing: December 11, 2017  
Time of Hearing: 8:30 a.m.

1 THIS MATTER HAVING COME TO BE HEARD BEFORE the  
2 Court on December 11, 2017, Mark G. Krum, Steve Morris, and Akke Levin  
3 appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); James L. Edwards,  
4 Christopher Tayback, and Marshall M. Searcy III appearing for defendants  
5 Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward  
6 Kane, Judy Coddington, and Michael Wrotniak (collectively, the "Individual  
7 Defendants"); Mark E. Ferrario and Kara B. Hendricks appearing for  
8 nominal defendant Reading International, Inc. ("RDI"); and Ekwan Rhaw  
9 appearing for defendant William Gould ("Gould," together, with the  
10 Individual Defendants and RDI, "Defendants"), on the following motions:

- 11 • Individual Defendants' Motion for Partial Summary Judgment  
12 (No. 1) re: Plaintiff's Termination and Reinstatement Claims,  
13 and supplement thereto;
- 14 • Individual Defendants' Motion for Partial Summary Judgment  
15 (No. 2) re: The Issue of Director Independence, and supplement  
16 thereto;
- 17 • Individual Defendants' Motion for Partial Summary Judgment  
18 (No. 3) on Plaintiff's Claims Relating to the Purported  
19 Unsolicited Offer, and supplement thereto;
- 20 • Individual Defendants' Motion for Partial Summary Judgment  
21 (No. 5) on Plaintiff's Claims Related to the Appointment of  
22 Ellen Cotter as CEO, and supplement thereto;
- 23 • Individual Defendants' Motion for Partial Summary Judgment  
24 (No. 6) re: Plaintiff's Claims Related to the Estate's Option  
25 Exercise, the Appointment of Margaret Cotter, the  
26 Compensation Packages of Ellen Cotter and Margaret Cotter,

and the Additional Compensation to Margaret Cotter and Guy Adams, and supplement thereto;

- Defendant Gould's Motion for Summary Judgment;
- Individual Defendants' Renewed Motion *in Limine* to Exclude Expert Testimony of Myron Steele Based on Supplemental Authority;
- Individual Defendants' Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than Probative;
- Defendant Gould's Motion *in Limine* to Exclude Irrelevant Speculative Evidence;
- RDI's Motion to Redact Opposition to Plaintiff James J. Cotter, Jr.'s Motion *in Limine* No. 1 re: Advice of Counsel and File Exhibit "E" Under Seal;
- Plaintiff's Motion *in Limine* No. 1 re: Advice of Counsel;
- Plaintiff's Motion *in Limine* No. 2 re: the Submission of Merits-Related Evidence by Nominal Defendant Reading International, Inc.;
- Plaintiff's Motion *in Limine* No. 3 re: After-Acquired Evidence;
- Plaintiff's Motion to Seal Exhibit 2 to Plaintiff James J. Cotter's Opposition to Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than Probative;
- Plaintiff's Motion to Seal Exhibits 3-6, 8-9, 11-2 and to Redact Portions of Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 3 and Gould Summary Judgment Motion;



- Plaintiff's Motion to Seal Exhibits 7-11, and 15-17 to Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 5 and Gould Summary Judgment Motion; and
- Plaintiff's Motion to Seal Exhibits 4 Through 11 to Plaintiff's Supplemental Opposition to Motion for Summary Judgment Nos. 2 and 6 and Gould Summary Judgment Motion.

IT IS HEREBY ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims is GRANTED with respect to Defendants Edward Kane, Douglas McEachern, William Gould, Judy Coddling, and Michael Wrotniak because there are no genuine issues of material fact related to the disinterestedness and/or independence of those directors, and is DENIED with respect to Defendants Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness and/or independence of those directors.

IT IS FURTHER ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: The Issue of Director Independence is GRANTED with respect to Defendants Edward Kane, Douglas McEachern, William Gould, Judy Coddling, and Michael Wrotniak because there are no genuine issues of material fact related to the disinterestedness and/or independence of those directors, and is DENIED with respect to Defendants Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness and/or independence of those directors.

IT IS FURTHER ORDERED THAT the Individual Defendants' Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims Relating to the Purported Unsolicited Offer is GRANTED because of

1 Plaintiff's failure to show damages related to an unenforceable, unsolicited,  
2 nonbinding offer. While Plaintiff at trial cannot claim any damages arising  
3 from Defendants' actions with respect to the Patton Vision indications of  
4 interest, Plaintiff may still attempt to use evidence regarding the Patton  
5 Vision indications to show a breach of fiduciary duty.

6 IT IS FURTHER ORDERED THAT the Individual Defendants'  
7 Motion for Partial Summary Judgment (No. 5) on Plaintiff's Claims Related  
8 to the Appointment of Ellen Cotter as CEO is DENIED.

9 IT IS FURTHER ORDERED THAT the Individual Defendants'  
10 Motion for Partial Summary Judgment (No. 6) re: Plaintiff's Claims Related  
11 to the Estate's Option Exercise, the Appointment of Margaret Cotter, the  
12 Compensation Packages of Ellen Cotter and Margaret Cotter, and the  
13 Additional Compensation to Margaret Cotter and Guy Adams is DENIED.

14 IT IS FURTHER ORDERED THAT Defendant Gould's Motion  
15 for Summary Judgment is GRANTED.

16 IT IS FURTHER ORDERED THAT judgment in favor of  
17 Defendants Edward Kane, Douglas McEachern, William Gould, Judy  
18 Coddington, and Michael Wrotniak is GRANTED on all claims asserted by  
19 Plaintiff.

20 IT IS FURTHER ORDERED THAT the Individual Defendants'  
21 Renewed Motion *in Limine* to Exclude Expert Testimony of Myron Steele  
22 Based on Supplemental Authority is DENIED.

23 IT IS FURTHER ORDERED THAT the Individual Defendants'  
24 Motion *in Limine* to Exclude Evidence That Is More Prejudicial Than  
25 Probative is DENIED.

26 IT IS FURTHER ORDERED THAT Defendant Gould's  
27 Motion *in Limine* to Exclude Irrelevant Speculative Evidence is DENIED as

1 premature, with the issues raised in the motion to be addressed at trial  
2 based upon the relevant foundation laid.

3 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
4 No. 1 re: Advice of Counsel is DENIED.

5 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
6 No. 2 re: the Submission of Merits-Related Evidence by Nominal  
7 Defendant Reading International, Inc. is DENIED.

8 IT IS FURTHER ORDERED THAT Plaintiff's Motion *in Limine*  
9 No. 3 re: After-Acquired Evidence is DENIED. However, to the extent that  
10 Plaintiff's retention and use of Highpoint Associates and Derek Alderton is  
11 admitted at trial, it will be admitted with an instruction limiting the  
12 evidence solely to the issue of Plaintiff's suitability as President and CEO of  
13 RDI.

14 IT IS FURTHER ORDERED THAT RDI's Motion to Redact  
15 Opposition to Plaintiff James J. Cotter, Jr.'s Motion *in Limine* No. 1 re:  
16 Advice of Counsel and File Exhibit "E" Under Seal is GRANTED.

17 IT IS FURTHER ORDERED THAT Plaintiff's Motions to Seal  
18 and/or Redact are GRANTED.

19  
20 DATED this 28<sup>th</sup> day of December, 2017.

21   
22 DISTRICT COURT JUDGE  
23  
24  
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26  
27  
28

1  
2 PREPARED AND SUBMITTED BY:

3 COHEN|JOHNSON|PARKER|EDWARDS

4  
5 By: /s/ H. Stan Johnson

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22 Los Angeles, CA 90017

23 Telephone: (213) 443-3000

24  
25 *Attorneys for Defendants Margaret Cotter,*  
26 *Ellen Cotter, Douglas McEachern, Guy Adams,*  
27 *Edward Kane, Judy Coddling, and Michael*  
28 *Wrotniak*

## Envelope Information

Envelope Id  
1943169Submitted Date  
12/29/2017 1:50 PM PSTSubmitted User Name  
lpd@morrislawgroup.com

## Case Information

Location  
Department 11Category  
CivilCase Type  
NRS Chapters 78-89Case Initiation Date  
6/12/2015Case #  
A-15-719880-8Assigned to Judge  
Gonzalez, Elizabeth

## Party Information

Party Type	Party Name	Lead Attorney
Plaintiff	James J Cotter	
Defendant	William Gould	Donald Lattin
Other	Diamond A Partners LP	James Murphy
Other	Diamond A Investors LP	James Murphy
Defendant	Judy Coddington	Harold Johnson
Other	Mark Cuban	
Defendant	Margaret Cotter	
Defendant	Ellen Cotter	
Defendant	Guy Adams	
Defendant	Edward Kane	
1	2	10

Items per page

1 - 10 of 13 Items

## Filings

Filing Code	Client Ref #	Filing Description
Motion - MOT (CIV)	3505-001	Motion for Rule 54(b) Certification and Stay and Ap...

## Filing Details

Filing Type  
EFileAndServeFiling Code  
Motion - MOT (CIV)Filing Description  
Motion for Rule 54(b) Certification and Stay and  
Application for Order Shortening TimeClient Reference Number  
3505-001Courtesy Copies  
lpd@morrislawgroup.comFiling on Behalf of  
James J CotterFiling Status  
Submitted

## Lead Document

File Name	Security	Download Original File
2017-12-29 Motion for Rule 54b Certification and Stay and Application for Order Shortening Time.pdf 554.39 KB		

## eService Details

Status	Name	Firm	Served	Date Opened	Log
Not Sent	Steve Morris	Morris Law Group	<input type="checkbox"/>	Not Opened	
Not Sent	Akke Levin	Morris Law Group	<input type="checkbox"/>	Not Opened	
Not Sent	Mark G. Krum	Yurko, Salvesen & Remz, P.C.	<input type="checkbox"/>	Not Opened	
Not Sent	"Alan D. Freer, Esq."		<input type="checkbox"/>	Not Opened	
Not Sent	"H. Stan Johnson, Esq."		<input type="checkbox"/>	Not Opened	
Not Sent	"Scott C. Thomas, Esq."		<input type="checkbox"/>	Not Opened	
Not Sent	"Thomas M. Melshelmer, Esq."		<input type="checkbox"/>	Not Opened	
Not Sent	6085 Joyce Hellich .		<input type="checkbox"/>	Not Opened	
Not Sent	7132 Andrea Rosehill .		<input type="checkbox"/>	Not Opened	
Not Sent	Aaron D. Shipley .		<input type="checkbox"/>	Not Opened	

1 2 3 4 5 ... 10 Items per page 1 - 10 of 60 Items

## Service Contacts

Se...	Name	Email
▶	Party: William Gould - Defendant	
▼	Party: James J Cotter - Plaintiff	
<input checked="" type="checkbox"/>	Mark G. Krum	mkrum@bizlit.com
<input checked="" type="checkbox"/>	Akke Levin	al@morrislawgroup.com
<input checked="" type="checkbox"/>	Steve Morris	sm@morrislawgroup.com
▶	Party: Diamond A Partners LP - Other	
▶	Party: Diamond A Investors LP - Other	
▶	Party: Judy Coddling - Defendant	
▶	Party: Mark Cuban - Other	
▶	Party: Margaret Cotter - Defendant	

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▶ Party: Ellen Cotter - Defendant

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▶ Party: Guy Adams - Defendant

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▶ Party: Edward Kane - Defendant

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1 2 10 Items per page

1 - 10 of 14 Items

## Parties with No eService

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Name	Address
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William Gould

Diamond A Partners LP

Diamond A Investors LP

Judy Coddling

Mark Cuban

Margaret Cotter

Ellen Cotter

Guy Adams

Edward Kane

Douglas McEachern

1 2 10 Items per page

1 - 10 of 12 Items

## Fees

## ▼ Motion - MOT (CIV)

Description	Amount
Filing Fee	\$0.00
<b>Filing Total:</b>	<b>\$0.00</b>

Total Filing Fee	\$0.00
E-File Fee	\$3.50
<b>Envelope Total:</b>	<b>\$3.50</b>

Party Responsible for Fees  
Payment Account  
Filing Attorney  
Transaction Response

James J Cotter  
Morris Law Group  
Akke Levin  
Authorized

Transaction Amount	\$3.50
Transaction Id	2555489
Order Id	001943169-0

MORRIS LAW GROUP

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Email: mkrum@bizlit.com

Attorneys for Plaintiff  
James J. Cotter, Jr.

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

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

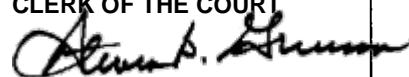
**MOTION FOR RULE 54(b)  
CERTIFICATION AND STAY**

**AND**

**APPLICATION FOR ORDER  
SHORTENING TIME**

Hrg: 01/04/18  
@ 8:30 a.m.

Electronically Filed  
12/29/2017 5:15 PM  
Steven D. Grierson  
CLERK OF THE COURT



**FILE WITH  
MASTER CALENDAR**

12-29-17A05:39 RCVD



**MORRIS LAW GROUP**

411 E. BONNEVILLE AVE., STE. 360 - LAS VEGAS, NEVADA 89101  
702/474-9400 - FAX 702/474-9422

1 Plaintiff James J. Cotter, Jr. ("Plaintiff") hereby moves the Court  
2 on an emergency basis under Nev. R. Civ. P. 54(b) for an order certifying the  
3 portion of her December 28, 2017 Order that grants William Gould's Motion  
4 for Summary Judgment ("Gould MSJ"), grants defendants' motions for  
5 partial summary judgments Nos. 1 and 2 ("Partial MSJ Nos. 1 and 2") and  
6 dismisses defendants William Gould, Douglas McEachern, Edward Kane,  
7 Judy Coddington, and Michael Wrotniak from the case as final. Plaintiff further  
8 moves the Court under EDCR 2.26 for an Order shortening time to notice  
9 and hear this Motion.

10  
11 MORRIS LAW GROUP

12  
13 By: 

14 Steve Morris, Bar No. 1543  
15 Akke Levin, Bar No. 9102  
16 411 E. Bonneville Ave., Ste. 360  
17 Las Vegas, Nevada 89101

18 Mark G. Krum, Bar No. 10913  
19 YURKO, SALVESEN & REMZ, P.C.  
20 1 Washington Mall, 11th Floor  
21 Boston, MA 02108

22 Attorneys for Plaintiff  
23 James J. Cotter, Jr.  
24  
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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 individual defendants' Partial MSJs, Gould's MSJ, 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 Plaintiff's breach of fiduciary duty claims asserted against them.

3. On December 18, 2017, Plaintiff submitted a motion for reconsideration of the Court's rulings on Partial MJS Nos. 1 and 2, Gould's MSJ, and the Court's dismissal of William Gould, Edward Kane, Douglas McEachern, Judy Coddington, and Michael Wrotniak from the case. Plaintiff also submitted a Motion to Stay on December 26, 2017.

4. During the December 28, 2017 hearing, the Court denied Plaintiff's Motion for Reconsideration and Motion to Stay.

5. On December 28, 2017, the Court signed the order on Gould's MSJ, the individual defendants' Partial MSJs, and the MILs ("Order").

1           6.     Good cause exists under EDCR 2.26 to shorten the time for  
2 notice and hearing of this Motion for Rule 54(b) certification. Trial is set to  
3 begin on January 8, 2018. The Court denied Plaintiff's Motion to Stay.  
4 Plaintiff plans to seek immediate relief in the Nevada Supreme Court, but  
5 the form of relief—direct appeal or writ petition—depends on whether the  
6 Court will certify portions of the order as final. If this Motion for Rule 54(b)  
7 certification is set on the regular calendar, it would not be heard until after  
8 trial begins. Plaintiff proposes a telephonic hearing with counsel on Friday  
9 afternoon, December 29, 2017, so that Plaintiff may timely file his writ  
10 petition or appeal immediately thereafter.

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

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

15   
16 \_\_\_\_\_  
17 Akke Levin, Bar No. 9102  
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MORRIS LAW GROUP

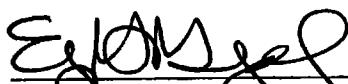
411 E. BONNEVILLE AVE., STE. 360 - LAS VEGAS, NEVADA 89101  
702/474-9400 - FAX 702/474-9422

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 4<sup>th</sup> day of

June, 2018 at the hour of 8<sup>30</sup> a.m. .



Judge Elizabeth Goff Gonzalez  
District Court Judge, Dept. 11

DATED: 29 Dec 17

1 I. INTRODUCTION

2 The Court on December 11, 2017 dismissed all of Plaintiff's  
3 claims against five of the eight defendants because the Court found there  
4 were no issues of material fact as to their disinterestedness and  
5 independence. The Court's rulings were based the individual defendants'  
6 Partial MSJ Nos. 1 and 2 and Gould's MSJ. For the reasons stated below, the  
7 Court should certify as final its order (1) granting Gould's MSJ, (2) granting  
8 Partial MSJ Nos. 1 and 2, and (3) dismissing defendants William Gould,  
9 Douglas McEachern, Edward Kane, Judy Coddington, and Michael Wrotniak.  
10 The Court should further stay the case pending Plaintiff's appeal. A  
11 proposed order is attached as Exhibit 1.

12 II. ARGUMENT

13 A. The Legal Basis for this Motion

14 NRCP 54 (b) provides, in relevant part:

15 (b) Judgment Involving Multiple Parties. When multiple parties  
16 are involved, the court may direct the entry of a final judgment  
17 as to one or more but fewer than all of the parties only upon an  
18 express determination that there is no just reason for delay and  
upon an express direction for the entry of judgment . . . .

19 When "asked to certify a judgment based on the elimination of a  
20 party, [the district court] should first consider the prejudice to that party in  
21 being forced to wait to bring its appeal." *Mallin v. Farmers Ins. Exch.*, 106  
22 Nev. 606, 611, 797 P.2d 978, 981 (1990). "Second, the district court should  
23 consider the prejudice to the parties remaining below if the judgment is  
24 certified as final." *Id.* "[T]he fact that a decision by [the Nevada Supreme  
25 Court] will affect the decision below cannot be the deciding issue" and  
26 preclude a finding that there is no just reason to delay an appeal. *Id.* at 610,  
27 797 P.2d at 981. "The district court should weigh the prejudice to the various  
28 parties and should certify a judgment as final in a 'parties' case if the

1 prejudice to the eliminated party would be greater than the prejudice to the  
2 parties remaining below." *Id.* at 611, 797 P.2d at 981.

3 **B. Plaintiff will be Severely Prejudiced If Required to Wait to**  
4 **Appeal.**

5 Plaintiff will be severely prejudiced if required to wait to appeal,  
6 for a number of reasons.

7 First, as the remaining defendants have made clear, they will  
8 take the position that dismissal of this case as against the five individual  
9 director defendants severely limits the matters on which Plaintiff can base  
10 breach of fiduciary duty claims against the remaining defendants. In that  
11 regard, defendants have indicated that they will take the position that, with  
12 respect to any matter as to which a majority of the directors making or  
13 approving a decision have been dismissed by the Court, those matters alone  
14 may not serve as bases for breach of fiduciary duty claims against the  
15 remaining defendants. Any doubt that that is the position defendants  
16 intend to pursue is put to rest by Court Exhibit 1 to the December 28, 2018  
17 hearing, which shows that the dismissed five director defendants intend to  
18 take action to formally ratify prior conduct as to which the remaining  
19 director defendants will not be able to show that a majority of the directors  
20 who made or approved the decision were disinterested and independent.  
21 For example, with respect to the 3-to-2 vote to terminate Plaintiff, the five  
22 dismissed director defendants intend to ratify that vote, and then allow the  
23 remaining defendants to argue that Adams' lack of independence does not  
24 matter and that the termination vote cannot serve as a basis for liability on  
25 his part. Thus, according to the remaining defendants, the Court's ruling  
26 dismissing the five director defendants effectively guts Plaintiff's case.

27 Second, as the remaining director defendants have previewed,  
28 they will take the position that dismissal of the case as against the five  
dismissed director defendants affects which party bears the burden of proof.

1 With respect to matters as to which the Court has determined that the  
2 remaining defendants lacked disinterestedness, independence or both and  
3 therefore cannot invoke the statutory presumptions typically referred to as  
4 the business judgment rule, the remaining defendants will argue that the  
5 business judgment rule nevertheless applies because a majority of the  
6 directors who made or approved the challenged decision were found by the  
7 Court not to lack disinterestedness or independence and were dismissed.  
8 As to matters with respect to which they cannot show that a majority of the  
9 directors who made or approved the challenged decision were dismissed by  
10 the Court, the remaining defendants clearly intend to rely on the  
11 forthcoming ratification of those actions by the dismissed five director  
12 defendants. One example that illustrates this point is the 3-to-2 termination  
13 vote.

14 Third, and independent of the foregoing, Plaintiff is severely  
15 prejudiced because the jury is certain to be confused about why the same  
16 evidence showing breaches of fiduciary duty by a more than one director is  
17 introduced when fewer than all of the directors who engaged in such  
18 fiduciary breaches remained defendants. For example, as the Court has  
19 seen, the evidence will show clearly that Adams, Kane and McEachern  
20 threatened Plaintiff with termination if he did not resolve trust and estate  
21 disputes with his sisters on terms satisfactory to them. In particular, the  
22 evidence will show that at the board meeting adjourned in the early  
23 afternoon on May 29, 2015, the three told Plaintiff that the meeting would  
24 reconvene telephonically at 6:00 p.m. that evening and that they would vote  
25 to terminate him as President and CEO of RDI if he had not resolved the  
26 trust and estate disputes on terms satisfactory to his sisters. The likely and  
27 reasonable inferences jurors will draw from the fact that only Adams of the  
28 three remains a defendant is that extortionate conduct in furtherance of the

1 interests of the sisters, not the interests of RDI, is not a breach of fiduciary  
2 duty.

3 Fourth, plaintiff's ability to present this case, which arises from  
4 an ongoing course of breaches of loyalty by directors who consistently and  
5 repeatedly deferred to the wishes of the controlling shareholders rather than  
6 protecting only the interests of the Company, is severely impaired.

7 **C. The Remaining Defendants Will not be Prejudiced if the**  
8 **Order Dismissing the Five is Certified.**

9 On the other hand, the remaining defendants will not be  
10 prejudiced, much less severely prejudiced, if the Court grants the rule 54(b)  
11 certification Plaintiff requests. Presumably they will complain about delay,  
12 but delay does not compare to substantive prejudice and, as a practical  
13 matter, they lack standing to complain, having effectively stayed this case  
14 for approximately a year by their writ practice regarding discovery matters.  
15 Indeed, the only "prejudice" to which the remaining defendants can cite is  
16 the possible loss of the ability to defend the case against them based on the  
17 Court's ruling dismissing the five, which will be lost only if this case is  
18 stayed. In other words, the remaining defendants will suffer no actual  
19 prejudice, much less severe prejudice, if the Court grants rule 54(b)  
20 certification.

21 / / /

22 / / /

23 / / /

24 / / /



1 **III. CONCLUSION**

2 For the reasons stated above, the Court should grant this Motion  
3 and certify under Rule 54(b) as final its order (1) granting Gould's MSJ, (2)  
4 granting Partial MSJ Nos. 1 and 2; and (3) dismissing defendants William  
5 Gould, Douglas McEachern, Edward Kane, Judy Coddling, and Michael  
6 Wrotniak, and stay the case pending Plaintiff's appeal.

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8  
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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 on all interested parties, as registered with the Court's E-Filing and E-Service System:  
**MOTION FOR RULE 54(b) CERTIFICATION AND STAY AND APPLICATION FOR ORDER SHORTENING TIME.** 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 29<sup>th</sup> day of December, 2017.

By: /s/ Linda P. Daniel  
An employee of Morris Law Group

# Exhibit 1

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**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 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

) **[PROPOSED] ORDER GRANTING  
PLAINTIFF'S MOTION FOR RULE  
54(b) CERTIFICATION AND STAY**

) **Date of Hearing: December \_\_, 2017**

) **Time of Hearing: \_\_a.m./P.M.**

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. Coddling --  
4 and, of course, Mr. Wrotniak and Ms. Coddling 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. Coddington, 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, 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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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 03:21 p.m.  
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Clerk of Supreme Court

CASE NO.:

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

**PETITIONER'S APPENDIX TO  
PETITION FOR WRIT OF  
MANDAMUS**

**VOLUME XV (PA3487-3685)**

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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**

<b>Date</b>	<b>Description</b>	<b>Vol. #</b>	<b>Page Nos.</b>
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**

<b>Date</b>	<b>Description</b>	<b>Vol. #</b>	<b>Page Nos.</b>
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, XV (PA3487-3685)** was served by the following method(s):

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Dated: January 2, 2018

**Courtesy Copy Hand  
Delivered**

To:

Judge Elizabeth Gonzalez  
Eighth Judicial District  
Court of Clark County,  
Nevada  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89101

By: /s/ PATRICIA FERRUGIA

<p>1 (Whereupon the video record 2 commenced: 3 THE VIDEOGRAPHER: We're now on the 4 record. 5 My name is Russ Strain representing 6 Veritext Legal Solutions. The date today is 7 October 19th, 2016. The time is 8 approximately 10:25 a.m. This deposition is 9 being held at the office of Greenberg 10 Traurig, 2001 Market Street, Philadelphia, 11 PA. 12 The caption of this case is James 13 Cotter, Jr., et al, versus Margaret Cotter, 14 et al, filed in the Eighth Judicial District 15 Court, Clark County, Nevada, Case 16 No. A-15-719860-B and Case 17 No. P-14-082942-E. 18 The name of the witness is Myron 19 Steele. 20 If counsel at this time would please 21 introduce themselves for the record. 22 MR. SEARCY: Marshall Searcy on 23 behalf of Judy Coddington, Michael Wrotniak, 24 Margaret Cotter, Ellen Cotter, Guy Adams, 25 Doug McEachern, and Ed Kane.</p> <p style="text-align: right;">Page 6</p>	<p>1 matter Cotter versus Cotter; is that right? 2 A. Yes. 3 Q. Have you had your deposition taken 4 before? 5 A. Yes. 6 Q. In how many instances? 7 A. One. 8 Q. So you've been deposed one time 9 previously? 10 A. I have. 11 Q. Are you familiar with the -- the 12 basic ground rules of depositions? 13 A. Yes. 14 Q. Okay. The most important, I suppose, 15 for today's purposes would be that we should try to 16 avoid talking over each other so that the court 17 reporter can take down everything. Do you 18 understand that? 19 A. Yes. 20 Q. And if you have any -- any questions 21 about any of my questions, if anything is unclear in 22 my question, you'll be sure to ask me for 23 clarification. 24 A. I will. 25 Q. Okay. And I'll do my best to clarify</p> <p style="text-align: right;">Page 8</p>
<p>1 MR. RHOW: Ekwon Rhow and Shoshana 2 Barnett on behalf of Bill Gould. 3 MR. FERRARIO: Mark Ferrario on 4 behalf of Reading. 5 MR. KRUM: Mark Krum representing 6 plaintiff, James J. Cotter, Jr., and the 7 witness today. 8 THE VIDEOGRAPHER: The court reporter 9 is Susan Migatz of Veritext. Would the 10 court reporter please swear in the witness. 11 --- 12 MYRON STEELE, after having been first 13 duly sworn, was examined and testified as 14 follows: 15 --- 16 THE VIDEOGRAPHER: The testimony can 17 now proceed. 18 --- 19 EXAMINATION 20 --- 21 BY MR. SEARCY: 22 Q. Good morning, Justice Steele. 23 A. Good morning. 24 Q. You understand that I'm here on 25 behalf of certain individual defendants in this</p> <p style="text-align: right;">Page 7</p>	<p>1 it. If you don't ask me for a clarification, I'll 2 assume that you understand my question. Okay? 3 A. Fair enough. 4 Q. Okay. Now, we're going to look at 5 your expert report in a moment, but Exhibit A to 6 your expert report, is that your CV? Is that right? 7 A. I would assume so. I really didn't 8 look at the letter/number of any of the exhibits. 9 Q. All right. Well, we'll take a look 10 at it in a second just to make sure that everything 11 on it is true and accurate to your recollection. 12 Basically you've served as a judge in 13 Delaware in some form or another over the last how 14 many years? 15 A. Well, for 25 years from beginning to 16 end. 17 Q. Okay. And now you're currently 18 practicing law in Delaware? 19 A. Yes. 20 Q. Have you ever been a practitioner in 21 Nevada? 22 A. No. 23 Q. Have you ever had the opportunity to 24 write a paper on Nevada law? 25 A. No.</p> <p style="text-align: right;">Page 9</p>



<p>1 Q. During your time as a judge in 2 Delaware did you ever have a case that applied or 3 used Nevada law? 4 A. No. 5 Q. Have you ever, by yourself or working 6 with others, ever conducted any research into Nevada 7 corporate law? 8 A. The closest to that was participation 9 in an ABA seminar in Nevada in Las Vegas with 10 practicing lawyers from Nevada where the discussion 11 for the audience focused on similarities and 12 dissimilarities between Nevada and Delaware law. 13 That's one CL -- CLE out of many over the years, but 14 the only one where the focus was a comparison 15 between Nevada and Delaware. 16 Q. And do you recall when that CLE took 17 place? 18 A. No. 19 Q. Okay. 20 A. It was when I was still on the bench. 21 Q. For -- for purposes of that CLE did 22 you personally conduct any research into Nevada law? 23 A. I looked at the Nevada statutes and 24 compared them to our general corporation law; yes. 25 Q. For those purposes did you -- when</p> <p style="text-align: right;">Page 10</p>	<p>1 exculpation statute? 2 A. That's the only part of it that I 3 recall discussing. 4 Q. And do you remember there that there 5 was a discussion during that time that the Nevada 6 exculpation statute -- that's a mouthful, I'll get 7 it out -- that the Nevada exculpation statute was 8 broader than the Delaware statute? 9 A. Well, the distinction, as I 10 understood it at the time, was that Nevada allows 11 exculpation for a breach of duty of loyalty. 12 Delaware does not. 13 Q. Do you remember anything else that 14 was discussed on that panel? 15 A. Oh, there was some discussion about 16 why Nevada was doing this, whether it was to affect 17 the number of charters that it could attract to the 18 State, whether there was any case law that focused 19 on what that really would mean, and there was a 20 discussion about what implications that might have 21 for federal intervention into state space if things 22 went awry in a Nevada case where there was an 23 egregious breach of the duty of loyalty that 24 resulted in damage and then exculpation resulted in 25 no punishment for the directors.</p> <p style="text-align: right;">Page 12</p>
<p>1 you looked at the Nevada statutes, did you write 2 anything down? 3 A. No. 4 Q. Did you give any sort of presentation 5 at the CLE about the similarities or differences 6 between the Nevada statutes and Delaware statutes? 7 A. I -- it wasn't in the form of a paper 8 that was presented. It was more of a panel 9 dialogue. And the discussion was focused on 10 Nevada's adoption of exculpation for breach of duty 11 of loyalty as opposed to Delaware's 102(b)(7), which 12 would not allow that to occur. 13 Q. All right. And so you in that 14 presentation -- or I guess panel discussion is the 15 way you described it -- 16 A. Yes. 17 Q. -- that was a discussion between -- 18 was it law -- I'm sorry -- lawyers or judges from 19 Nevada and yourself? 20 A. All I remember are two attorneys 21 practicing in the area from Nevada. I don't 22 remember a Nevada judge being part of the panel. 23 Q. And you recall that there was a 24 discussion on the panel of the differences between 25 the Nevada exculpation statute and the Delaware</p> <p style="text-align: right;">Page 11</p>	<p>1 It was more of a political 2 discussion, what are the ramifications potentially 3 of that. It wasn't a discussion about which policy 4 is the better policy relative to corporate 5 governance. 6 Q. And in terms of the discussion on the 7 panel for exculpation for breach of duty of loyalty, 8 what was the panel's -- you said that the -- let me 9 back up for a second. 10 You said that the panel discussed the 11 ramifications of exculpation for breach of duty of 12 loyalty in terms of bringing in businesses into 13 Nevada; is that right? 14 A. Well, that was the -- ramifications 15 meaning what could one expect, worst case/best case 16 scenario. No one knew at the time what -- to my 17 knowledge, no one on the panel knew at the time what 18 the implications might ultimately be. There was 19 speculation about it. 20 Q. And is that -- part of the reason why 21 no one knew what the ramifications would be was 22 because the Nevada exculpation statute was so 23 different than the Delaware exculpation statute? 24 A. Well, different and had social policy 25 implications that follow exculpation for a breach of</p> <p style="text-align: right;">Page 13</p>

<p>1 duty of loyalty. It's contrary to the common law 2 and there are -- there are social policy 3 implications there. 4 And that's what drew us into the 5 discussion about if there's an egregious case, would 6 this result in, by way of example, an institutional 7 investor invested in a Nevada corporation running to 8 Washington, D.C., as a part of a group of 9 institutional investors and complaining to the SEC 10 and to Congress that there was an egregious result 11 and it was because Nevada went so far as to 12 exculpate for a breach of duty of loyalty. 13 It was pure discussion about what 14 could happen down the road with no factual basis to 15 support there would be such a case or that Congress 16 would do anything, but just like most CLEs, it was 17 talking heads on a panel discussing the issues. 18 Q. And in -- in preparation -- excuse 19 me -- for your report in this litigation, did you 20 have the opportunity to review the Nevada 21 exculpation statute? 22 A. I did look at it, yes. 23 Q. And is the text of that statute still 24 the same as it was when you were back on the panel? 25 A. To the best of my recollection. But</p> <p style="text-align: right;">Page 14</p>	<p>1 Q. Other than what you've just 2 described, have you ever been involved in any other 3 research or discussions involving Nevada corporate 4 law? 5 A. No. 6 Q. Okay. Would you agree, sir, that 7 you're not an expert in Nevada corporate law? 8 A. I would agree. 9 Q. In preparation for your expert 10 reports that you submitted, you submitted an initial 11 report and then a supplemental report; correct? 12 A. Correct. 13 Q. In preparation of those reports did 14 you conduct any research into Nevada corporate law? 15 A. No. 16 Q. Okay. In preparation of your initial 17 and expert report did anyone at your direction 18 conduct any research into Nevada corporate law? 19 A. I asked the associate who worked with 20 me in preparation of the report to document one 21 footnote you'll see in the report that refers to 22 Nevada looking from time to time to Delaware case 23 law for guidance where there was no existing Nevada 24 law. That's what I've understood largely because of 25 the CLE that I mentioned earlier, but I wanted</p> <p style="text-align: right;">Page 16</p>
<p>1 I don't -- I didn't research any changes from what 2 the Nevada lawyers told me and what I saw initially, 3 what was given to me in the materials, and what I 4 had seen most recently, which were in the papers 5 connected to this case. 6 Q. So in your research in preparation 7 for the papers in this case, did you observe that 8 the Nevada exculpation statute was still 9 fundamentally different than the Delaware 10 exculpation -- 11 A. Yes. 12 Q. -- statute? 13 A. Yes. 14 Q. And to your knowledge, has there ever 15 been any of the type of federal, we'll say, 16 interference or concerns about the Nevada 17 exculpation statute that was discussed at that -- 18 A. No. My focus my entire career has 19 been entirely on federal interference and internal 20 governance of Delaware charter corporations. 21 Q. Okay. So you -- so you're not aware 22 of any -- any federal interference when it comes to 23 Nevada corporations or in particular the Nevada 24 exculpation statute. 25 A. I am not.</p> <p style="text-align: right;">Page 15</p>	<p>1 something to document that. That is the extent to 2 which I looked into Nevada law because that was not 3 my role. 4 Q. When you say it was not your role, 5 you mean you didn't intend to or expect to provide 6 any expert testimony or opinion about Nevada 7 corporate law; is that right? 8 A. That's correct. 9 Q. The associate that you mentioned, 10 what is his or her name? 11 A. Diva Bole. Sorry; we have so many 12 and I'm not sure about your firm, but they come and 13 go. It's hard to keep up with them. 14 Q. All right. In terms of -- of 15 Ms. Bole's research -- and, you know, I've got an 16 e-mail here that may help us with the spelling of 17 her name -- 18 A. B-O-L-E. 19 Q. B-O-L-E. 20 In terms of her research into Nevada 21 law, do you know what she did to conduct any 22 research into Nevada law? 23 A. To my knowledge, she did what I asked 24 her to do, and that is document the one statement 25 that I just made so I could rely that that -- there</p> <p style="text-align: right;">Page 17</p>

5 (Pages 14 - 17)

<p>1 was some case law to support it.  2 Q. When you say "document the one  3 statement," do you mean put it in the expert report?  4 A. Yeah. It's a footnote.  5 Q. And the footnote that you're  6 referring to -- why don't we go ahead and attach  7 your expert report right now as the next exhibit so  8 we can refer to it. Let me see if I can pull it  9 out.  10 MR. SEARCY: Okay. We're going to  11 attach this as Exhibit 441.  12 ---  13 (Whereupon the document was marked  14 for identification purposes as Exhibit 441.)  15 ---  16 BY MR. SEARCY:  17 Q. And looking at Exhibit 441, that's a  18 copy of your expert report; correct?  19 A. Yes.  20 Q. And there's a footnote on Exhibit  21 441, Footnote No. 1 on Page 2; correct?  22 A. Correct.  23 Q. Okay. Is that the footnote that you  24 were referring to previously?  25 A. It is.</p> <p style="text-align: right;">Page 18</p>	<p>1 A. That's what it says and that's  2 correct.  3 Q. Okay. Because you don't have any  4 expertise or knowledge in Nevada law; correct?  5 A. Yes, just as I stated earlier.  6 Q. The cases that are cited in Footnote  7 1, those were put in the footnote by Ms. Bole; is  8 that correct?  9 A. Correct.  10 Q. And Ms. Bole, do you know where she  11 got those cases from?  12 A. Do you mean do I know whether she --  13 Q. Well, let me ask it this way.  14 THE WITNESS: -- went to the  15 Reporters or Lexus-Nexus or --  16 BY MR. SEARCY:  17 Q. It's correct that she received those  18 cases from plaintiff's counsel; correct?  19 A. I don't know the answer to that.  20 Q. So as you sit here right now, you  21 don't know whether Ms. Bole researched those cases  22 independently or whether she received the case  23 citations from plaintiff's counsel; correct?  24 MR. KRUM: Or both.  25 THE WITNESS: Well, what I know is</p> <p style="text-align: right;">Page 20</p>
<p>1 Q. Okay. And looking at Page 2, you  2 have a "SUMMARY OF OPINIONS." Do you see that? And  3 the very first sentence of it says: "Based on the  4 facts as I understand them, it is my opinion that a  5 court applying Delaware law" --  6 A. Yes.  7 Q. -- "would conclude the following?"  8 So your opinion throughout the expert  9 report that we've attached now as Exhibit 441 has to  10 do with Delaware law; correct?  11 A. Yes.  12 Q. And it's a legal opinion about  13 Delaware law?  14 A. It's an expression of the analytical  15 framework that a Delaware court would use under what  16 I understand to be the factual circumstances here.  17 Q. And when you say "the analytical  18 framework," you mean the legal framework; right?  19 A. Yeah, the legal analysis, yes.  20 Q. Okay. And the Footnote 1 that's  21 added about Nevada courts --  22 A. Yeah.  23 Q. -- that's on Page 2, that footnote  24 isn't intended to express that you have any  25 expertise or knowledge in Nevada law; correct?</p> <p style="text-align: right;">Page 19</p>	<p>1 when I asked her to document that, I  2 expected that it would appear only if she  3 had found the cases by whatever method, read  4 them, and concluded that they supported the  5 proposition that they state. Otherwise,  6 they wouldn't appear in the report.  7 BY MR. SEARCY:  8 Q. Okay. And did you ask Ms. Bole  9 whether she independently researched the cases that  10 are included in your Footnote 1?  11 A. I did not ask that question, no.  12 Q. Excuse me one second.  13 Let me hand you what we'll -- thank  14 you -- what we'll attach as the next exhibit. I  15 think it's Exhibit 442.  16 THE COURT REPORTER: That's right.  17 ---  18 (Whereupon the document was marked  19 for identification purposes as Exhibit 442.)  20 ---  21 THE WITNESS: I have one marked and  22 one unmarked. What do you --  23 BY MR. SEARCY:  24 Q. Oh, I'll take the unmarked one back  25 from you so that I can share it with my colleague,</p> <p style="text-align: right;">Page 21</p>

6 (Pages 18 - 21)

<p>1 Mr. Rhow. Thank you.  2 Now, you see Exhibit 442 --  3 A. I do.  4 Q. -- in front of you?  5 Okay. And Ms. Bole, who is the -- is  6 listed at the very top of this document; correct?  7 It appears to have been printed out from her  8 computer?  9 A. Yes -- well, I don't know whether it  10 was printed out from her computer or not, but her  11 name's at the top.  12 Q. Okay. And you see that it's a --  13 there's an e-mail there from Mark Krum to Ms. Bole;  14 correct?  15 A. Yes.  16 Q. And it's dated Thursday, August 25th,  17 at 1:25 PM?  18 A. Yes.  19 Q. And the "Subject" is "Reading"?  20 A. That's what it says.  21 Q. Okay. And then the e-mail in Exhibit  22 442, the substance of it contains a number of case  23 citations; is that right?  24 A. It does.  25 Q. And if you compare those case</p> <p style="text-align: right;">Page 22</p>	<p>1 research she conducted to determine when or if a  2 Nevada court would ever apply Delaware law; correct?  3 A. I don't think the research went  4 beyond the footnotes; correct.  5 Q. And in preparing your expert report  6 you did not conduct any research yourself into  7 determining when a Nevada court would apply Delaware  8 law; correct?  9 A. I did not.  10 Q. And you don't -- you're not providing  11 any expert opinion on the circumstances under which  12 a Nevada court would apply Delaware law; correct?  13 A. Correct. That's why the footnote  14 starts with "It's my understanding that..."  15 Q. The term -- the use of the words  16 there, "It's my understanding...", are an indication  17 that you're -- you're borrowing that information  18 from someone else; is that right?  19 A. Yeah.  20 Q. Okay.  21 A. Based on my limited experience as I  22 described it with Nevada law, that's what Nevada  23 lawyers have explained to me.  24 Q. Okay. And the Nevada lawyer that  25 you're referring to, is it Mr. Krum or are you</p> <p style="text-align: right;">Page 24</p>
<p>1 citations to your Footnote 1 in your expert  2 report --  3 A. Yes.  4 Q. -- those cited cases appear to be the  5 same; correct?  6 A. Yes.  7 Q. Okay. And your expert report that  8 you submitted in this case was signed by you on  9 August 25th; isn't that right?  10 A. That's correct.  11 Q. So from the e-mail at Exhibit 442, it  12 appears that Ms. Bole received the cases that are  13 contained in your Footnote 1 on the same day that  14 you signed the expert report; correct?  15 A. That appears to be so.  16 Q. And she received those from Mr. Krum,  17 who is plaintiff's counsel; correct?  18 A. Yes.  19 Q. Okay. And I believe you testified  20 earlier, but I just want to clarify, you're not  21 aware of what, if anything, Ms. Bole did to conduct  22 her legal research into Nevada law; correct?  23 A. I don't have personal knowledge of  24 how she did the research, no.  25 Q. And you're not aware of what, if any,</p> <p style="text-align: right;">Page 23</p>	<p>1 referring back to the --  2 A. Both.  3 Q. -- members on the panel?  4 A. All three.  5 Q. Okay. So Mr. -- Mr. Krum is one of  6 the Nevada lawyers you spoke to. You described some  7 lawyers who were on a panel back when you were in  8 the judiciary.  9 A. Correct.  10 Q. Any other Nevada lawyers whom you've  11 spoken to?  12 A. No.  13 Q. Looking back at your report, I  14 believe there's one more footnote that's also  15 contained that makes a reference to Nevada law. Let  16 me have you turn to it. It's Footnote 162 on Page  17 121.  18 A. Page 121?  19 Q. Oh, I'm sorry; Page 21. I must have  20 misspoke. But the footnote is 162.  21 A. Yes.  22 Q. To your knowledge, Footnote 162 would  23 have been inserted into the expert report by  24 Ms. Bole; is that correct?  25 A. Correct.</p> <p style="text-align: right;">Page 25</p>

<p>1 Q. And do you know when she would have 2 inserted Footnote 162 into the expert report? 3 A. No. 4 Q. And do you know where -- whether 5 Ms. Bole conducted any research to locate the cases 6 that are contained in Exhibit 162? 7 A. Let me be careful as I answer that. 8 I certainly didn't see her do it, but the 9 understanding was if she were to develop cases as a 10 result of joint preparation of this report, it was 11 assumed she would read those cases and assure me 12 that they stood for the proposition that was recited 13 in the footnote. But did I look over her shoulder? 14 No. 15 Q. Did you have an expectation that she 16 would conduct her research into Nevada law 17 independently of plaintiff's counsel? 18 A. Yes. 19 Q. So if Ms. Bole didn't do that, then 20 she wouldn't have been following your instructions; 21 is that right? 22 A. No. That would have been my 23 expectation. If she cited a Nevada case, as she did 24 in this footnote, that basically signals the same 25 result as the Delaware cases, I assume she found</p> <p style="text-align: right;">Page 26</p>	<p>1 plaintiff's counsel, to Ms. Bole; correct? 2 A. That's what it says here. 3 Q. And it's dated Thursday, August 25th, 4 at 3:44 PM; correct? 5 A. Correct. 6 Q. And the body of the e-mail from 7 Mr. Krum to Ms. Bole contains a number of Nevada 8 case citations; correct? 9 A. Yes. 10 Q. And if you look at your Footnote 162, 11 there are a number of citations there; correct? 12 A. There appear to be three; yes. 13 Q. And a number of those citations 14 appear to be taken from Mr. Krum's e-mail; correct? 15 MR. KRUM: Objection. The documents 16 speak for themselves, foundation. 17 THE WITNESS: Two seem to be; yes. 18 BY MR. SEARCY: 19 Q. And, again, these case citations were 20 sent to Ms. Bole by Mr. Krum at 3:44 on the day that 21 you signed your report; correct? 22 MR. KRUM: Same objections. 23 THE WITNESS: They were in an e-mail 24 of that date; yes. 25</p> <p style="text-align: right;">Page 28</p>
<p>1 that case, read that case, and represented to me 2 that that is the holding of the case. 3 Q. Do you recall if, with respect to 4 Footnote 162, she represented to you that she had 5 read the cases and was aware of the holdings? 6 A. Not orally. That was the expectation 7 as my assistant. 8 Q. Let me show you Exhibit -- what we'll 9 mark as Exhibit 443. 10 You know what, I've handed that to 11 you, Justice Steele, but the court reporter will 12 have to mark it as Exhibit 443. 13 --- 14 (Whereupon the document was marked 15 for identification purposes as Exhibit 443.) 16 --- 17 BY MR. SEARCY: 18 Q. And have you ever seen Exhibit 443 19 before? 20 A. No. 21 Q. Okay. This also appears to be 22 another printout of an e-mail from Ms. Bole's 23 account; correct? 24 A. It appears to be so, yes. 25 Q. And it's an e-mail from Mr. Krum, the</p> <p style="text-align: right;">Page 27</p>	<p>1 BY MR. SEARCY: 2 Q. And with respect to Footnote 162, 3 that footnote is to a statement that under Delaware 4 law corporate directors and officers owe fiduciary 5 duties to a corporation and its stockholders. Do 6 you see that? 7 A. Yes. 8 Q. And then there's a citation to a 9 Delaware case in your Footnote 162? 10 A. Yes. 11 Q. And then there's the statement after 12 that: "The same is true under Nevada law." 13 A. Yes. 14 Q. Do you see that? 15 You're not claiming to provide any 16 opinion in this matter about the fiduciary duties of 17 directors under Nevada law; correct? 18 A. Correct. 19 Q. Okay. Let me ask you now some more 20 general questions -- 21 A. Sure. 22 Q. -- about your expert report. 23 What was the first contact that you 24 had between -- with anyone acting on behalf of the 25 plaintiff in this matter?</p> <p style="text-align: right;">Page 29</p>

<p>1 A. Well, it -- the first you mean the 2 first person who contacted me or the date or both? 3 Q. Thanks for the -- that's a fair 4 question. 5 Who was the first person who 6 contacted you about providing an expert opinion in 7 this matter? 8 A. The first and only person is 9 Mr. Krum. 10 Q. When did he contact you? 11 A. I don't remember. 12 Q. Do you recall who -- how soon it was 13 before the preparation of your expert report that he 14 contacted you? 15 A. No. 16 Q. Do you recall if it was a matter of 17 days? weeks? 18 A. I don't recall. If I -- I know it 19 was more than a matter of days. It was certainly 20 more than a matter of a week or two. So it -- to 21 answer your question, was it a matter of weeks? I 22 guess the answer to that has to be yes, although I 23 don't know how many weeks. 24 Q. All right. In your -- as you sit 25 here, you estimate it's more than one or two weeks;</p> <p style="text-align: right;">Page 30</p>	<p>1 Q. All right. Your best recollection, 2 though, is -- and I want to make sure that this is 3 correct -- more than one or two weeks. 4 A. Yes. 5 Q. Okay. But beyond that you can't be 6 more specific. 7 A. That's correct. 8 Q. Now, when Mr. Krum contacted you, 9 what did he say to you? 10 A. He contacted me and asked if I was in 11 a position to consider an expert witness report for 12 a case in Nevada and I said the first thing we have 13 to do, if I'm going to help, is a conflicts check. 14 So that was the first step. 15 And then he indicated to me, because 16 I stated I didn't find myself in a position to offer 17 an opinion on Nevada law, he said I'm interested in 18 whether you can give an opinion on Delaware law as 19 it may apply in this case. 20 And I said I can give an opinion 21 perhaps after I review what's available to me and it 22 will be basically the analytical framework that a 23 Delaware court would apply in attempting to resolve 24 the issues that are posed by the pleadings. 25 Words to that effect. Those</p> <p style="text-align: right;">Page 32</p>
<p>1 is that correct? 2 A. That's my best recollection, yeah. 3 Q. Is it fewer than three? 4 A. I really can't safely answer that. I 5 don't recall. I didn't -- I didn't focus on that. 6 Q. One or two weeks is your best 7 estimate? 8 MR. KRUM: No. Mischaracterizes the 9 testimony. 10 THE WITNESS: No. What I said was it 11 had to be more than a week and your question 12 said was it a few weeks, so if it's more 13 than a week or two, it could have been a few 14 weeks, yeah. 15 BY MR. SEARCY: 16 Q. Okay. And I'm not trying to put 17 words in your mouth with the -- with the deposition 18 testimony. 19 A. No. I -- 20 Q. That's quite all right. 21 A. Sorry. 22 Q. I'm just trying to get your best 23 estimate of how long it was before you prepared your 24 expert report that you spoke to Mr. Krum. 25 A. I don't have a clear recollection.</p> <p style="text-align: right;">Page 31</p>	<p>1 obviously aren't the exact words. 2 Q. Sure. When Mr. Krum indicated to 3 you or used the words "Delaware law as it may 4 apply," did he indicate to you that there might be 5 instances in the case where Delaware law might apply 6 instead of Nevada law? 7 A. He indicated to me, my best 8 recollection, similarly to the Footnote No. 1, that 9 where Nevada did not have developed law, Nevada 10 courts often looked to Delaware to see what the 11 Delaware answer would be. He never represented to 12 me that Delaware was a gap-filler to the extent that 13 a Nevada court was either obligated or even inclined 14 to follow Delaware law. Simply that they would look 15 to Delaware law, which is something I've heard my 16 entire career; not just from Nevada, but from any 17 other jurisdictions. 18 Q. And did -- 19 A. So that didn't surprise me at all. 20 Q. Okay. But you didn't see yourself 21 as -- as being asked to provide an expert opinion on 22 any aspect of Nevada law; correct? 23 A. He absolutely never asked for that. 24 He would have -- that would have been our last 25 conversation.</p> <p style="text-align: right;">Page 33</p>

<p>1 Q. You wouldn't have --  2 A. I couldn't have done.  3 Q. Right. Okay.  4 And in terms of areas where a court  5 in Nevada might look to Delaware law, did he  6 indicate what those areas might be?  7 A. No. He just made the general  8 comment, as I recall.  9 Q. And as you sit here today, are you  10 aware of any areas where a Nevada court might look  11 to Delaware law?  12 A. I didn't -- let me state that a  13 little more carefully.  14 I made no inquiry. I only did what I  15 was asked to do in what I believed to be a limited  16 scope in order to provide the court guidance if the  17 court wanted it about how Delaware would analyze  18 this dispute.  19 Q. Okay. After your initial  20 conversation with Mr. Krum, did you decide to take  21 the -- the engagement?  22 A. Yes.  23 Q. Okay.  24 A. After the conflicts check.  25 Q. Okay. After you ran the conflicts</p> <p style="text-align: right;">Page 34</p>	<p>1 A. Correct.  2 Q. Is that material that's identified  3 in -- in your expert report as Exhibit B?  4 A. Yes, the --  5 Q. I'm sorry; let me take that back.  6 A. Whatever the exhibit number is.  7 Q. Exhibit C, yeah.  8 A. Whatever the exhibit letter is.  9 Q. All right. And just for  10 clarification, looking to Exhibit C of your expert  11 report, that identifies the information that was  12 considered; correct?  13 A. Yes.  14 Q. Okay. And to your -- and it's your  15 understanding that Ms. Bole received the information  16 considered that's on Exhibit C from Mr. Krum; is  17 that right?  18 A. Either from Mr. Krum or from me. I  19 don't know whether the e-mails would reflect that he  20 sent information to both of us or simply to me and  21 some was sent by my office to Diva Bole or whether  22 she received anything directly. I don't know the  23 answer to that.  24 Q. Do you recall if there was any  25 information that Ms. Bole asked for from Mr. Krum</p> <p style="text-align: right;">Page 36</p>
<p>1 check, did you then prepare or start preparing a  2 draft of your report?  3 A. Did I start a draft? No, I did not  4 start a draft of the report.  5 Q. Who -- who did?  6 A. Diva Bole did.  7 Q. Okay. When did Diva start with her  8 draft?  9 A. I don't know the answer to that.  10 Q. Do you know how long she spent on  11 that?  12 A. Some considerable time. Obviously we  13 talked in the interim.  14 Q. When you say "some considerable  15 time," can you attach a hours figure to that?  16 A. I can't, no. It may be and should be  17 reflected in any bill that she appears on.  18 Q. And do you know -- in terms of what  19 Ms. Bole did to draft the report, do you know  20 what -- what steps she took to draft the report?  21 A. I know she read all the material that  22 had been sent to us.  23 Q. When you say all the material that  24 had been sent to you, is that material that was sent  25 by -- by plaintiff's counsel?</p> <p style="text-align: right;">Page 35</p>	<p>1 that was not provided for purposes of the report?  2 A. Not to my knowledge.  3 Q. Let me ask you more generally: Do  4 you recall Ms. Bole asking Mr. Krum for any  5 additional information?  6 A. I don't recall.  7 Q. Did you ever ask Mr. Krum for any  8 additional information or documents?  9 A. Either before or after the report was  10 prepared?  11 Q. Well, let me -- let me start with  12 that.  13 A. Yeah.  14 Q. Before the report was prepared, did  15 you ask Mr. Krum for any additional documents?  16 A. I didn't ask him for any specific  17 item, no.  18 Q. Okay. Generally speaking, did you  19 ask him for items?  20 A. Generally, I had an understanding  21 that he would send me any documents that he thought  22 might be helpful to me in reaching the opinion or,  23 after the opinion was written, any additional  24 documents that may have come to his attention that  25 would have bearing on the issues in the opinion.</p> <p style="text-align: right;">Page 37</p>

<p>1 Q. And how did you obtain that</p> <p>2 understanding?</p> <p>3 A. Just by conversation.</p> <p>4 Q. You had a conversation with Mr. Krum</p> <p>5 where Mr. Krum told you that he would send you</p> <p>6 anything helpful; is that right?</p> <p>7 MR. KRUM: Object to the</p> <p>8 characterization of the testimony.</p> <p>9 THE WITNESS: It -- I don't have a</p> <p>10 specific recollection it was that broadly</p> <p>11 stated. There's -- there was an</p> <p>12 understanding that developed out of a</p> <p>13 conversation that if there were any other</p> <p>14 relevant documents that I would need, he</p> <p>15 would send them to me because there -- there</p> <p>16 is always the possibility that something</p> <p>17 pops up that could alter the opinion and I</p> <p>18 would want to know about it.</p> <p>19 BY MR. SEARCY:</p> <p>20 Q. Do you recall what Mr. Krum said to</p> <p>21 you about sending all relevant documents?</p> <p>22 A. No, not specifically.</p> <p>23 Q. And do you have an understanding as</p> <p>24 to whether or not the documents listed in Exhibit C</p> <p>25 are all the relevant documents in the case?</p> <p style="text-align: right;">Page 38</p>	<p>1 I've seen.</p> <p>2 Q. Okay. In terms of any of the</p> <p>3 documents produced by any of the parties in</p> <p>4 discovery, have you looked at any of those --</p> <p>5 A. No.</p> <p>6 Q. -- additional documents?</p> <p>7 Did you ever review the deposition</p> <p>8 testimony of Jim Cotter, Jr.?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. You did. Did you review all</p> <p>11 the -- all the deposition transcripts from his</p> <p>12 deposition, all the volumes?</p> <p>13 A. All that I knew of.</p> <p>14 Q. Okay. Do you recall how many you</p> <p>15 reviewed?</p> <p>16 A. No.</p> <p>17 Q. Okay. Now, with respect to</p> <p>18 Mr. Cotter, Jr.'s, deposition transcript, that's not</p> <p>19 identified as being information considered in</p> <p>20 Exhibit C; correct?</p> <p>21 A. I don't -- I don't know. I haven't</p> <p>22 looked at Exhibit C.</p> <p>23 Q. All right. So Ms. Bole prepared the</p> <p>24 first draft of the expert report; is that right?</p> <p>25 A. Yes.</p> <p style="text-align: right;">Page 40</p>
<p>1 A. No. To my mind, they are not all the</p> <p>2 relevant documents to the case. They were the</p> <p>3 relevant documents to the opinion at the time I gave</p> <p>4 it.</p> <p>5 Q. Okay. And then when you say relevant</p> <p>6 to the opinion, does that mean that they supported</p> <p>7 the opinion?</p> <p>8 A. Oh, they did in part or didn't in</p> <p>9 part. It all depends on what they said and how they</p> <p>10 stated it.</p> <p>11 Q. Beyond the 17 documents -- or beyond</p> <p>12 the documents that are listed in Exhibit C, are you</p> <p>13 aware of any other relevant documents in the case?</p> <p>14 A. That existed --</p> <p>15 MR. KRUM: Objection; vague.</p> <p>16 THE WITNESS: -- before the opinion</p> <p>17 or after?</p> <p>18 BY MR. SEARCY:</p> <p>19 Q. Let's start with before.</p> <p>20 A. No.</p> <p>21 Q. Okay. And I'll ask -- then I'll ask</p> <p>22 you about after.</p> <p>23 A. Yeah. I have seen motions for</p> <p>24 summary judgment. I have seen the objection to my</p> <p>25 report. Those are the additional documents that</p> <p style="text-align: right;">Page 39</p>	<p>1 Q. Do you recall how many drafts of the</p> <p>2 expert report she prepared?</p> <p>3 A. No; but it was more than one.</p> <p>4 Q. Do you recall whether or not</p> <p>5 plaintiff's counsel submitted any portions of the</p> <p>6 draft from Ms. Bole?</p> <p>7 A. I do not.</p> <p>8 Q. Okay. You don't know whether</p> <p>9 plaintiff's counsel might have written some portion</p> <p>10 of the -- of the expert report?</p> <p>11 A. To my knowledge, he didn't.</p> <p>12 Q. Do you know either way?</p> <p>13 A. What?</p> <p>14 Q. Do you know either way?</p> <p>15 A. With certainty? No.</p> <p>16 Q. Okay. Do you recall how many drafts</p> <p>17 there were of the expert report?</p> <p>18 A. Three, I believe.</p> <p>19 Q. Now, and did you take any notes of</p> <p>20 your conversations with plaintiff's counsel?</p> <p>21 A. The ones I produced are the notes I</p> <p>22 took.</p> <p>23 MR. SEARCY: Let's attach this as the</p> <p>24 next exhibit.</p> <p>25 THE COURT REPORTER: 444.</p> <p style="text-align: right;">Page 41</p>



<p>1 MR. SEARCY: What was that number 2 again? 3 THE COURT REPORTER: 444. 4 MR. SEARCY: 444. 5 THE WITNESS: Do you want me to give 6 these other exhibits back? 7 BY MR. SEARCY: 8 Q. Sure. That way we make sure that 9 they don't get lost. 10 A. That was why I asked the question. 11 Q. If you hand them to me, they'll 12 definitely get lost. 13 --- 14 (Whereupon the document was marked 15 for identification purposes as Exhibit 444.) 16 --- 17 BY MR. SEARCY: 18 Q. Justice Steele, are these your notes? 19 A. Yes. 20 Q. Okay. And these notes reflect your 21 conversation with Mr. Krum; is that right? 22 A. I'd have to read them to see whether 23 they're a combination or not of what I read and any 24 conversation with Mr. Krum, because Mr. Krum and I 25 had very little one-on-one conversation about the</p> <p style="text-align: right;">Page 42</p>	<p>1 know how Nevada procedure worked with that respect. 2 And there was another conversation 3 about production. He was to let me know what it -- 4 what the Nevada rules expected me to produce. 5 That's it. 6 Q. Okay. I want to focus on -- on the 7 facts for just a moment -- 8 A. Sure. 9 Q. -- or discussions about the facts. 10 You're not offering any expert 11 opinion about the facts of this case; correct? 12 A. I'm not sure what you mean by an 13 expert opinion about the facts. If -- if -- if your 14 question means am I suggesting that the facts that 15 are important to resolve these disputes are ones 16 that can be found in the absence of hearing 17 witnesses testify about them? Of course I can't 18 offer any opinion about what is fact and what is 19 not. 20 Q. When there are references in your 21 expert report to if a finder of fact finds 22 something -- 23 A. Yes. 24 Q. -- is that a reference to the fact 25 that you as an expert are not offering any opinion</p> <p style="text-align: right;">Page 44</p>
<p>1 facts. 2 I don't have an independent 3 recollection that's absolutely clear about whether 4 this -- these notes are taken from a conversation or 5 conversations with Mr. Krum or whether in part notes 6 taken after reading parts of depositions. But 7 certainly part of these notes come from conversation 8 with Mr. Krum. My -- since they're undated, it -- 9 it appears to me to be the first introduction to 10 what may be the dispute. And then having heard the 11 outline of it, I waited for documentation. 12 Q. You said that -- just a moment ago 13 that you had very little one-on-one conversation 14 with Mr. Krum about the facts -- 15 A. Yes. 16 Q. -- of the case. Did you have any 17 other conversations with Mr. Krum about the case 18 outside of one-on-one interactions? 19 A. What was going on. I had a 20 conversation about what's the procedure in Nevada; 21 what documents could I expect to get; what would be 22 available; if an expert report were to be prepared 23 in writing, whether my deposition would ultimately 24 be taken; whether I might be called upon to testify 25 as a witness or whether it would be taped. I didn't</p> <p style="text-align: right;">Page 43</p>	<p>1 as to what the facts are in the case; correct? 2 A. That -- that's correct. I'm not a 3 fact-finder and I don't in an expert report opine to 4 replace the fact-finder's conclusions about what 5 actually occurred, when, where, who said what, 6 whether X or Y witness was telling the truth or not. 7 That's not my understanding of the expectation of 8 any help that I could give to the Nevada court. 9 Q. So, for example, on the question of 10 whether or not a particular director is independent, 11 you're not offering any opinion on whether or not 12 that's the case; correct? 13 MR. KRUM: Objection; 14 mischaracterizes the testimony and the 15 document. 16 THE WITNESS: I assume that I'm to 17 answer unless I'm instructed not to answer 18 for some reason and then you battle it out, 19 which is the procedure that I'm used to? 20 BY MR. SEARCY: 21 Q. That's right. 22 A. And then we call a judge on the phone 23 and bother her about whether the objection should be 24 sustained or not. That's fine. 25 Q. That's right.</p> <p style="text-align: right;">Page 45</p>

<p>1 A. A little bit of facetiousness is 2 necessary -- 3 Q. I understand. 4 A. -- for me to get through the day 5 because I have some clear recollections of being 6 called at all hours and fully understand that. 7 It is correct that my report is not 8 meant to be a document finding what the ultimate 9 facts at issue would be and how to resolve disputed 10 facts. It is not. 11 What it's intended to do is to set up 12 the analytical framework that Delaware uses for 13 determining what standard of review applies in a 14 given fact situation. 15 Q. And you don't claim to have any 16 independent understanding of the facts in this case; 17 correct? 18 A. That's absolutely correct. 19 Q. In terms of the facts of the case, 20 other than conversations with Mr. Krum, what did you 21 do to acquaint yourself with the facts in this case? 22 A. Well, the first thing, if you don't 23 mind me explaining this in the context of the 24 Delaware analytical framework, the first step is to 25 look at the pleadings and make a determination from</p> <p style="text-align: right;">Page 46</p>	<p>1 determining the extent to which someone is either 2 independent or disinterested. 3 So what my report was trying to do 4 was highlight facts that suggest that there is a 5 dispute over independence or disinterestedness of 6 one or more director and that could affect the 7 process if a majority of disinterested, independent 8 directors did not resolve the process and vote on 9 the decision. 10 That's the essence of the report, 11 with the understanding that the ultimate trier of 12 fact, whether it's a jury or a judge in Nevada, 13 would have to make that determination. 14 Q. With respect to the process that you 15 just described -- 16 A. Yes. 17 Q. -- the first was looking at the 18 pleadings. 19 A. Yes. 20 Q. And I take it that in looking at the 21 pleadings, you assumed that the allegations 22 contained in the pleadings were true; correct? 23 A. Oh, yeah, that's correct. 24 Q. As you might on a motion to dismiss, 25 in other words.</p> <p style="text-align: right;">Page 48</p>
<p>1 reading the pleadings whether they sufficiently 2 plead facts that create a reasonable doubt about the 3 independence or disinterestedness of directors. 4 So I looked at the pleadings to 5 determine who the directors were and looked at what 6 was pleaded and suggest that there were facts 7 sufficient to question the reasonable doubt of the 8 independence and disinterestedness of some of the 9 directors. 10 With that in mind, the burden under 11 Delaware's analysis then shifts to the defendants to 12 establish that they were independent and/or 13 disinterested and that any decisional process in 14 which they engaged was fair and the result obtained 15 from that process was fair. 16 In Delaware we refer to that as the 17 entire fairness standard of review, and that's what 18 I was opining about. 19 Now, that's dependent ultimately, as 20 I think the Orchard case, which I cite in Kahn 21 versus -- I'm trying to think of the name of the 22 grocery store now, it's Dairy Mart, established, 23 that a judge cannot -- in Delaware cannot do that 24 based solely on documents in the record, that it 25 requires trial, because credibility is important to</p> <p style="text-align: right;">Page 47</p>	<p>1 A. Very similar. Perhaps in Delaware 2 not quite as strict as a motion to dismiss, but very 3 similar. 4 Q. Okay. Now, you also made reference 5 to a burden shifting taking place after the 6 review -- 7 A. Yes. 8 Q. -- and that you looked to whether 9 there was a -- was it fundamental fairness -- 10 A. No. 11 Q. -- in the transaction? 12 A. No. It's not a constitutional 13 concept. It's whether or not the pleadings raise a 14 reasonable doubt about the independence or 15 disinterestedness of one or more fiduciaries -- 16 usually, as in this case, directors, but it could 17 also be officers -- that would deprive them of 18 business judgment review and because in a control 19 situation like this one, it would rise to entire 20 fairness. 21 Q. Okay. Now, do you know if Nevada 22 courts apply an entire fairness principle? 23 A. I do not. 24 Q. Do you know if Nevada courts apply 25 any of the legal principles that you just described?</p> <p style="text-align: right;">Page 49</p>

<p>1 A. Well, business judgment.  2 Q. Okay. Beyond business judgment?  3 A. I don't know what Nevada's options in  4 the standard of review are. I do know Delaware's.  5 Q. Okay.  6 A. And my report was to opine on  7 Delaware; not Nevada.  8 Q. Okay. Beyond looking at the  9 pleadings, did you do anything else to acquaint  10 yourself with the facts or the allegations in this  11 case?  12 A. Yeah. I looked at depositions. And  13 ultimately I looked at -- post-report I looked at  14 the motions for summary judgment and the motion to  15 strike or whatever you -- however you characterize  16 your colorful objections to my report.  17 Q. Now, were you asked to prepare an  18 expert report in opposition to the motion for  19 summary judgment?  20 A. No.  21 Q. Did you consider submitting one?  22 A. I haven't considered it, no.  23 Q. Okay.  24 A. I -- sorry.  25 Q. Okay. The depositions that you</p> <p style="text-align: right;">Page 50</p>	<p>1 case. So I paid more attention to his deposition  2 probably than the others.  3 Q. Okay.  4 A. I know I read every bit of those four  5 volumes.  6 To be fair, I try to be conscious of  7 what it costs to retain me as an expert and only do  8 what's necessary.  9 Q. All right.  10 MR. SEARCY: Why don't we take our  11 first break?  12 THE WITNESS: Oh, we were having so  13 much fun.  14 THE VIDEOGRAPHER: Off the record at  15 11:21. This will end Disc No. 1.  16 ---  17 (Whereupon there was a recess in the  18 proceedings.)  19 ---  20 THE VIDEOGRAPHER: The time now is  21 11:40. Back on the record, beginning of  22 Disc No. 2.  23 BY MR. SEARCY:  24 Q. All right. Turning to Page 2 and 3  25 of your expert report, Justice Steele, there's a</p> <p style="text-align: right;">Page 52</p>
<p>1 looked at, did you look at all of the dep -- did you  2 read the entire depositions?  3 A. I didn't read the entirety of every  4 deposition. I skipped through parts that didn't  5 seem to me to be focused on my report. I was only  6 looking to questions and answers that described the  7 relationships between the parties, the  8 qualifications of the directors, the nature of the  9 process in which they engaged, and with a more  10 important focus on any facts that would raise a  11 reasonable doubt and then ultimately perhaps a  12 genuine issue of material fact about their  13 independence or disinterestedness. That was -- that  14 was my focus.  15 Q. Did anyone direct you to the  16 particular questions and answers that you reviewed?  17 A. No.  18 Q. So is it correct then that you  19 personally reviewed the deposition transcripts, you  20 skimmed the portions that didn't seem relevant, and  21 then you read the portions in more detail that did  22 seem relevant to your analysis?  23 A. Yeah. By -- by way of example, I  24 read all four of Mr. Kane's volumes because it  25 seemed to me that he was a critical defendant in the</p> <p style="text-align: right;">Page 51</p>	<p>1 section there titled "SUMMARY OF OPINIONS."  2 A. Yes.  3 Q. I want to take a look at a statement  4 in your "SUMMARY OF OPINIONS." You say "Based on  5 the facts as I understand them..." at the very first  6 sentence.  7 A. Yes.  8 Q. And when you wrote that, "Based on  9 the facts as I understand them..." does that mean  10 the facts that you've obtained from plaintiff's  11 counsel? Is that right?  12 MR. KRUM: Object to the  13 characterization of the testimony.  14 THE WITNESS: Well, based on the  15 documents that I obtained from plaintiff's  16 counsel. To the extent your question  17 suggests that based on the facts that he may  18 have related to me orally, no. Based on  19 what's in the pleadings and ultimately  20 what's in the motions for summary  21 judgment --  22 BY MR. SEARCY:  23 Q. But you --  24 A. -- and what was in the depositions.  25 Q. You made reference to the motions for</p> <p style="text-align: right;">Page 53</p>

<p>1 summary judgment.  2 A. Post-opinion.  3 Q. Post-opinion, okay.  4 A. To the extent my answer was  5 inarticulate, suggesting that based on facts that  6 were in the motion for summary judgment, that would  7 be incorrect. I misspoke.  8 Q. What I'm particularly interested in  9 is, though, you used the phrase "as I understand  10 them" in characterizing the facts there.  11 A. It means on how -- meaning how  12 they're pleaded.  13 Q. Right.  14 A. I don't -- I mean to say I don't  15 conclude that inconsistent facts, one side is  16 absolutely accurate and the other side who has  17 inconsistent interpretation of the facts or the  18 inferences drawn from them are incorrect and the  19 other is correct. Just as pleaded, the facts that I  20 had seen in the pleadings themselves and to some  21 extent from the depositions, that's what I'm basing  22 it on.  23 Q. So by use of the phrase "as I  24 understand them" there, you're highlighting that you  25 don't claim to have knowledge of what the actual</p> <p style="text-align: right;">Page 54</p>	<p>1 apply Delaware law in this case; correct?  2 A. That's correct.  3 Q. And you're certainly not providing  4 any opinion as to what a Nevada court would do or  5 should do in this case?  6 A. More importantly, I'm definitely not  7 impertinent enough to suggest what the Nevada court  8 should do, nor am I suggesting they would follow  9 this pattern that's used in Delaware. Just that  10 this opinion is designed to be helpful to the court  11 should the court choose to look at it and understand  12 how the analysis would occur in Delaware. That --  13 that's -- that's all. That was all I was asked to  14 do. That's all I intended to do.  15 Q. Unless a Nevada court decides that it  16 should apply Delaware law, then your opinion  17 wouldn't have any relevance; is that right?  18 MR. KRUM: Objection; foundation.  19 THE WITNESS: No. I don't think the  20 opinion would have no relevance. I think  21 not knowing how developed Nevada law may be  22 on the precise issues here and offering no  23 opinion about whether that's good, bad, or  24 indifferent, it is possible that a Nevada  25 judge could look at the way Delaware does it</p> <p style="text-align: right;">Page 56</p>
<p>1 facts are; correct?  2 A. That is correct, yes.  3 Q. Okay. Then you go on to say: "...it  4 is my opinion that a court applying Delaware law  5 would conclude the following" in your summary;  6 correct?  7 A. Yes.  8 Q. So if I understand your summary  9 correctly, your opinion is providing a legal  10 framework to analyze the facts as set forth in the  11 pleadings; is that right?  12 MR. KRUM: Object to the  13 characterization of the testimony; asked and  14 answered.  15 You can answer again.  16 THE WITNESS: It's correct that I'm  17 trying to set out the analytical framework  18 that Delaware would apply.  19 BY MR. SEARCY:  20 Q. And that's an analytical legal  21 framework that a Delaware court might apply;  22 correct?  23 A. Yes.  24 Q. Okay. And you're not offering any  25 opinion as to whether a Nevada court would even</p> <p style="text-align: right;">Page 55</p>	<p>1 and conclude that that is a meaningful and  2 thoughtful way to apply the analysis in  3 Nevada. And, on the other hand, or not.  4 That's -- I'm not suggesting to her what she  5 should do.  6 BY MR. SEARCY:  7 Q. And if the answer then is or not, if  8 the court decides that Delaware law doesn't apply,  9 doesn't need to apply, then the opinion wouldn't be  10 relevant; correct?  11 A. Well, it's possible that --  12 MR. KRUM: Same objection.  13 THE WITNESS: I'm sorry.  14 MR. KRUM: Go ahead. Same objection.  15 THE WITNESS: That's a little too  16 black and white. It may be that if Delaware  17 law doesn't apply, meaning it doesn't have  18 precedential value from the view of the  19 judge, knowing what the analysis is may  20 nonetheless be helpful to the judge in  21 approaching the issues that are raised by  22 the parties.  23 That's all this report is trying to  24 do. It's trying to be helpful. It's not  25 even trying to be instructive other than</p> <p style="text-align: right;">Page 57</p>

15 (Pages 54 - 57)

<p>1 this is the Delaware framework. It's not  2 suggesting to the judge what she ought to  3 do. It's saying hopefully this analytical  4 framework and the opinions you find here are  5 helpful to your analysis. That's -- that's  6 the extent of it.  7 BY MR. SEARCY:  8 Q. And the assistance that you're  9 offering is for the judge in this case; correct?  10 A. Uh-huh.  11 Q. Not for the finder of fact; correct?  12 A. Well --  13 MR. KRUM: Objection; asked and  14 answered and mischaracterizes the testimony.  15 THE WITNESS: To some degree there's  16 a mix here. I'm not altogether sure  17 because, as we've agreed earlier, whether  18 the finder of fact would be a jury here or  19 whether it would be a judge.  20 But initially, at least under the  21 Delaware analytical framework, even though  22 we have no jury involved at all, the initial  23 analytical framework is the judge makes a  24 judgment based on the pleadings about  25 whether there's a burden shift, and that's</p> <p style="text-align: right;">Page 58</p>	<p>1 consider witnesses and their credibility and  2 context, I believe you said; correct?  3 A. Yeah, yeah.  4 Q. And you're not -- just to be clear,  5 you're not offering any opinion about what the  6 finder of fact should or should not find with  7 respect to credibility or context or any of those  8 other items; correct?  9 A. That -- that's correct. I'm simply  10 saying that if a Delaware judge were to look at the  11 pleadings here, there would be an issue raised about  12 the disinterestedness or the independence of the  13 majority of the directors who have taken an action  14 as fiduciaries and that as a result it would go to  15 the next stage. There would be the burden shift.  16 They would under entire fairness defend their action  17 by having the burden of establishing that indeed  18 they were independent and disinterested, and that  19 would end the case if the finder of fact reached  20 that conclusion.  21 Q. And what you're describing, the  22 framework you're describing, is the Delaware  23 framework. I understand.  24 A. No. I appreciate it. Yes is the  25 answer.</p> <p style="text-align: right;">Page 60</p>
<p>1 whether there's a reasonable doubt about the  2 independence or the disinterestedness of a  3 majority of the directors who have taken an  4 action to effectuate a transaction of kind.  5 To that extent the judge doesn't  6 decide or the finder of fact doesn't decide  7 at that stage what's a fact and what isn't a  8 fact; just that there is a reasonable doubt  9 about the independence and/or the  10 disinterestedness.  11 And that has to be examined at trial  12 where more than just what's on pieces of  13 paper can be explored. The credibility of  14 the witnesses and, most importantly, the  15 context under which all of this occurred can  16 be explored fully by the trier of the fact.  17 And then that determination is made  18 about whether a majority of the acting  19 fiduciaries were independent or  20 disinterested.  21 BY MR. SEARCY:  22 Q. So after the trier -- just so I  23 understand, you've described a framework whereby a  24 motion to dismiss might be considered and then  25 described a framework where a trier of fact would</p> <p style="text-align: right;">Page 59</p>	<p>1 Q. Okay. So then moving down your  2 "SUMMARY OF OPINIONS," on (i).a, (i).b, (ii), each  3 is prefaced with "if a finder of fact finds that a  4 majority of directors were entitled...," "if entire  5 fairness applies...," (ii), "if a finder of  6 fact...," do you see where I'm referring to?  7 A. Yes.  8 Q. And those are all -- all statements  9 that are made where you're not trying to -- to set  10 forth what the facts are in this case; correct?  11 MR. KRUM: Objection; vague and  12 ambiguous depending on what it means, asked  13 and answered.  14 BY MR. SEARCY:  15 Q. Let me -- let me restate the  16 question.  17 You're making an assumption there  18 about what the finder of facts might find; correct?  19 MR. KRUM: Objection; asked and  20 answered, mischaracterizes the testimony.  21 BY MR. SEARCY:  22 Q. You may answer.  23 A. Yes. I'm suggesting that if the  24 finder of fact reaches the following conclusion and  25 there are facts to support that. But there are</p> <p style="text-align: right;">Page 61</p>

<p>1 facts that are inconsistent with. So the finder of 2 fact has to reach that conclusion. I cannot. No 3 expert should resolve inconsistent facts that have a 4 bearing on a material issue, in my view, and I'm not 5 trying to do that here. 6 Q. And I understand. I just want to 7 make clear that you're -- you're making hypothetical 8 assumptions for the purposes of each of these 9 opinions that are summarized on Page 3; correct? 10 MR. KRUM: Objection; 11 mischaracterizes the testimony. 12 THE WITNESS: No. I wouldn't call 13 them hypothetical. There is a factual basis 14 for the fact-finder to reach that 15 conclusion. I'm only saying I'm not 16 attempting to suggest to the fact-finder 17 what that conclusion should be. 18 BY MR. SEARCHY: 19 Q. You're just assuming that the 20 fact-finder would find a particular way; correct? 21 MR. KRUM: Same objection. 22 THE WITNESS: I'm assuming they 23 could. 24 BY MR. SEARCHY: 25 Q. Okay. And then assuming that they</p> <p style="text-align: right;">Page 62</p>	<p>1 A. I understand it. 2 Q. I'll clarify it to make it clear. 3 A. Okay. 4 Q. Your rebuttal opinion is only 5 offering an analytical framework under Delaware law; 6 correct? 7 A. That's correct. 8 Q. It's not offering anything having to 9 do with Nevada law; correct? 10 A. Correct. 11 Q. It's not making any findings of fact; 12 correct? 13 A. Correct. 14 Q. Now, there's a footnote that's on -- 15 it's Footnote 2 on your rebuttal opinion. Do you 16 see that? 17 A. Yes. 18 Q. Okay. With respect to Footnote 2, 19 did you draft Footnote 2? 20 A. I did not. 21 Q. Okay. That had been drafted by your 22 associate? 23 A. Yes. 24 Q. At the end of Footnote 2 it states: 25 "I understand that the defendants in this action</p> <p style="text-align: right;">Page 64</p>
<p>1 could, then you provide your analytical framework 2 from Delaware law; correct? 3 A. Yes. 4 Q. Okay. Let me give you the next 5 exhibit. 6 THE COURT REPORTER: 445. 7 THE WITNESS: Thank you. 8 --- 9 (Whereupon the document was marked 10 for identification purposes as Exhibit 445.) 11 --- 12 BY MR. SEARCHY: 13 Q. Do you recognize this exhibit? 14 A. I do. 15 Q. This is your supplemental -- I'm 16 sorry -- your rebuttal opinion; correct? 17 A. That's how it characterizes itself, 18 yes. 19 Q. Okay. And in terms of the opinions 20 provided in your rebuttal opinion, they don't 21 differ, correct, in terms of providing an opinion on 22 an analytical framework under Delaware law? 23 Let me restate that question -- 24 A. Oh, I understand it. 25 Q. -- because it was very poorly --</p> <p style="text-align: right;">Page 63</p>	<p>1 have filed a motion in limine because the Steele 2 Report stated that the opinions based therein were 3 based on what a court that applied Delaware law 4 would find." 5 A. Yes. 6 Q. And you say: "That phraseology was 7 intended to refer to my years of experience in 8 Delaware's well-versed body of law"; correct? 9 A. Yes. 10 Q. And then it states: "The Delaware 11 law on which I relied is law that informs any and 12 all Nevada statutes and cases applicable to the 13 matters discussed herein." What did you mean by 14 that last sentence? 15 A. I mean that the information that's 16 contained in both the original report and the 17 rebuttal may help the Nevada judge in the analysis 18 by informing them of how things work in Delaware. 19 It was not intended to mean the converse, which your 20 question implies, which informs means that it has 21 precedential value which a Nevada court will follow. 22 That's not what I said. 23 Q. That's -- that's what I was seeking 24 to clarify. 25 A. Well, I -- I -- I thought so.</p> <p style="text-align: right;">Page 65</p>

<p>1 Q. Right. So to be clear, you're not 2 suggesting with your Footnote 2 that Delaware law 3 has precedential value with respect to Nevada 4 statutes that you're aware of? 5 A. No, I'm not suggesting that. 6 Q. And are you aware of any Delaware law 7 that has been treated as precedential by Nevada 8 courts? 9 A. I -- I haven't -- no. 10 Q. So with respect to Footnote 2, that 11 last sentence is merely to suggest that a Nevada 12 judge might find the opinion of yourself about what 13 Delaware law says to be helpful; correct? 14 A. Correct. 15 Q. Let's turn back to your expert 16 report, your initial expert report. 17 On Page 4 there's a segment called 18 "FACTUAL BACKGROUND." 19 A. Yes. 20 Q. Do you see that? 21 A. Yes. 22 Q. Did you draft any portion of the 23 "FACTUAL BACKGROUND" in the expert report? 24 A. I reviewed it. I didn't draft it. 25 Q. Okay.</p> <p style="text-align: right;">Page 66</p>	<p>1 A. I read her deposition, but I don't 2 have distinct recollections at this stage of quotes 3 from it or questions asked. 4 Q. Do you recall if the cited portion of 5 the testimony says anything about Ms. Cotter or some 6 of the members of the board being angered? 7 A. If -- if you mean specifically 8 Margaret Cotter's deposition, I don't have a 9 distinct recollection. 10 Q. Let me show you her deposition, 11 Volume 1. 12 MR. SEARCY: Mark that as the next 13 exhibit. 14 THE COURT REPORTER: Exhibit 446. 15 MR. RHOW: What was 444? 16 THE COURT REPORTER: The handwritten 17 notes. 18 MR. RHOW: Great. And then 445 was? 19 THE COURT REPORTER: The second 20 report, the rebuttal report. 21 MR. RHOW: That's why I was confused. 22 444 is which exhibit? 23 THE COURT REPORTER: The handwritten 24 notes. 25 MR. RHOW: The handwritten notes,</p> <p style="text-align: right;">Page 68</p>
<p>1 A. I made edits and I obviously read it. 2 Q. Okay. Do you know who undertook the 3 initial drafting of the "FACTUAL BACKGROUND"? 4 A. Diva Bole. 5 Q. Do you know if she had the assistance 6 of plaintiff's counsel in putting this together? 7 A. I do not. 8 Q. Okay. 9 A. I have no basis to believe she did. 10 Q. But do you know one way or the other? 11 A. With certainty? No. 12 Q. Let me show you on Page 5 of the 13 expert report -- 14 A. Yes. 15 Q. -- there is a paragraph that 16 states -- it starts with "Although it angered his 17 sisters and some...members of the board..." Do you 18 see that? 19 A. Yes. 20 Q. And then there's a citation, Footnote 21 11, do you see that, to Margaret Cotter's deposition 22 testimony? 23 A. Yes. 24 Q. Do you recall if you reviewed 25 Ms. Cotter's deposition testimony?</p> <p style="text-align: right;">Page 67</p>	<p>1 okay. 2 MR. KRUM: What happened to the 3 index? 4 MR. SEARCY: Your guess is as good as 5 mine. This is what happens when we're 6 paralegals; right? 7 MR. KRUM: This is somebody's effort 8 to impair my ability to search the text. 9 Well, anyway, it's not mine to do. 10 Go ahead. 11 BY MR. SEARCY: 12 Q. If you'll turn to -- take a look at 13 Pages 81 and 82 and then 145 and 146, which are the 14 cited portions of the deposition. 15 A. Yes. 16 Q. Do you see anything in those cited 17 portions of the deposition about the Cotter sisters 18 or members of the board becoming angry? 19 A. No. 20 Q. Okay. So to the extent that that 21 statement is included in that paragraph, it's 22 certainly not supported by the deposition testimony 23 that's cited in Footnote 11; correct? 24 A. It's not supported by 81 and 82, no. 25 And it suggests that what it's referring to is after</p> <p style="text-align: right;">Page 69</p>

<p>1 the dash, that Margaret Cotter sought the position,  2 and the depositions of everyone involved were  3 replete with discussions about the extent to which  4 she was qualified for the position and who supported  5 her for that position, who did not, and it was an  6 integral part, as I understand the depositions, of  7 the interfamilial dispute which so concerned Ed  8 Kane. So that footnote I think is consistent with  9 at least the information after the dash.  10 Q. And when you say "the information  11 after the dash," that's the -- the last phrase, the  12 position MC sought with respect to the Company's New  13 York City real estate?  14 A. Yeah. The under -- yes. The  15 underlying facts are -- are rife with a dispute over  16 whether she was qualified for the position, should  17 have the position, whether someone with real estate  18 development expertise should be there as opposed to  19 management of theaters. And it -- it -- it runs  20 throughout all the depositions.  21 Now, maybe "angered" is a stronger  22 word than can be supported by the use of that  23 particular word, but it's certainly the basis of  24 the -- of considerable contention, as I read it, in  25 context throughout all the depositions.</p> <p style="text-align: right;">Page 70</p>	<p>1 BY MR. SEARCY:  2 Q. In preparing your expert report did  3 you look at the terms of the employment agreement  4 between Jim Cotter, Jr., and Reading?  5 A. No.  6 Q. Okay. Were you ever aware that  7 Mr. Cotter, Jr., had an employment agreement with  8 Reading --  9 A. It was --  10 Q. -- prior to submission of your expert  11 report?  12 A. It was -- yes. It was referred to in  13 the depositions.  14 Q. Did you ever ask to see that  15 employment agreement?  16 A. No.  17 Q. Okay. Would the employment agreement  18 have affected your analysis in this case?  19 A. My analysis of the standard of review  20 that would apply, whether or not entire fairness  21 would apply to the decision-making, and whether the  22 process for his termination was arguably consistent  23 or inconsistent with a breach of fiduciary duty? It  24 would not.  25 Q. Why not?</p> <p style="text-align: right;">Page 72</p>
<p>1 Q. It's fair to say, though, that when  2 you went through the drafts of the expert reports,  3 you weren't cite-checking the deposition  4 testimony --  5 A. That's correct.  6 Q. -- that was cited; correct?  7 A. That's correct. I used the associate  8 much as -- much as I used a law clerk. They know  9 their job. I can rely upon it until I learn  10 differently, and I do rely upon it.  11 Q. For purposes of your expert report,  12 did you also have the associate conduct the initial  13 legal research?  14 A. No. We had discussions about the  15 research. That came -- that came from me. What  16 general principles of law applied and how we should  17 approach the opinion, that came from me.  18 Q. But in terms of asking for particular  19 cases that were consistent with those general  20 principles of law, did you ask the associate to  21 research those cases?  22 A. Yes.  23 MR. KRUM: Object.  24 THE WITNESS: Sorry.  25 MR. KRUM: That's okay.</p> <p style="text-align: right;">Page 71</p>	<p>1 A. Because from what I understood from  2 the depositions, he was continuing to be employed as  3 the CEO; and if he had a contract to terminate him  4 as of a date certain, it was after the date he was  5 terminated. You can infer nothing else from the --  6 from the depositions.  7 Q. Let me see if I can understand your  8 testimony somewhat about the -- the CEO contract.  9 When you said he was continuing to be employed as a  10 CEO, do you mean continuing to be employed under the  11 contract?  12 A. No. I didn't take the contract into  13 consideration other than the references to it that I  14 read in the deposition suggested that he had a year  15 of benefits if he were terminated under the  16 contract.  17 Q. If the contract stated that  18 Mr. Cotter, Jr., could be terminated without cause,  19 would that have impacted your analysis?  20 A. It would not have impacted my  21 analysis on whether the process for his termination  22 constituted a breach of fiduciary duty. It's an  23 issue when you initiate a process to terminate  24 somebody, that process -- if you owe a fiduciary  25 duty to the corporation and to the minority</p> <p style="text-align: right;">Page 73</p>



<p>1 stockholders as well as the controlling 2 stockholders, then the process should be entirely 3 fair. Mr. Cotter himself was a stockholder. 4 So it wouldn't have had any impact on 5 my analysis of independence, of disinterestedness, 6 and of the process for termination. There was no 7 pretension by -- on anybody's account that I could 8 read in the depositions that he was being terminated 9 under a terminable at will provision of the contract 10 or terminated with or without cause. 11 Q. If there was an expression at a 12 meeting that Mr. Cotter, Jr., was being terminated 13 without cause under the agreement, would that impact 14 your analysis? 15 A. It -- 16 MR. KRUM: Asked and answered. 17 THE WITNESS: If there was never any 18 process developed, by committee or 19 otherwise, for considering his termination 20 and there weren't the trappings of a fulsome 21 process with a vote from -- by 22 disinterested -- by a majority of 23 disinterested and independent directors, I 24 wouldn't have had a -- I wouldn't have had a 25 fiduciary duty issue.</p> <p style="text-align: right;">Page 74</p>	<p>1 Go ahead. 2 THE WITNESS: There would be a 3 different analysis which would not involve 4 process, which would be important in 5 determining that his termination were 6 entirely fair. 7 BY MR. SEARCY: 8 Q. And how would that analysis be 9 different? 10 MR. KRUM: Same objections. 11 THE WITNESS: They would be acting 12 more administratively than they would be in 13 their role as formulators of a committee 14 process to be followed up by a full board 15 agenda where there was an agenda item and 16 they were acting as fiduciaries. 17 BY MR. SEARCY: 18 Q. Is the -- the hiring and firing of 19 executives something that you would characterize as 20 an administrative duty? 21 MR. KRUM: Objection; incomplete 22 hypothetical. 23 THE WITNESS: Yeah. Under -- under 24 Delaware law directors have the power to 25 hire and fire executives, that's correct.</p> <p style="text-align: right;">Page 76</p>
<p>1 But they initiated the process as a 2 transaction and then that implicates their 3 fiduciary duties. They didn't act as 4 officers monitoring a contract. 5 BY MR. SEARCY: 6 Q. Well, let me make sure that I can 7 unpack some of these concepts. 8 If it had been the case that 9 Mr. Cotter, Jr., had been terminated without there 10 being any process, under his employment agreement 11 which provides assuming for purposes of this 12 question that he can be terminated without -- let me 13 start again because I've already messed up my 14 question. 15 Is it your opinion that if 16 Mr. Cotter, Jr., had a contract that provided that 17 he could be terminated without cause, that if the 18 directors then simply fired him without undertaking 19 any process, then there would be no issues of 20 fiduciary duty that would arise from that? 21 MR. KRUM: Objection. 22 THE WITNESS: If -- 23 MR. KRUM: Wait a minute. It 24 contradicts the testimony, incomplete 25 hypothetical.</p> <p style="text-align: right;">Page 75</p>	<p>1 BY MR. SEARCY: 2 Q. And under Delaware law, when 3 directors hire and fire executives, that doesn't 4 necessarily raise issues of fiduciary duty; is that 5 correct? 6 A. Not necessarily. It depends -- 7 everything in Delaware depends on context. The 8 context that was arranged here implicated fiduciary 9 duties by the process that they instigated. 10 That's really the best response. 11 Q. Well, for purposes of your opinion, 12 it sounds like the issue that you're looking at is 13 the process that was undertaken by the directors in 14 their decision to terminate Mr. Cotter, Jr.; correct? 15 A. Yes, it's always an issue of process. 16 Q. But if no process had been 17 undertaken, then in your understanding under 18 Delaware law, then likely there would be no issue of 19 fiduciary duty with respect to the termination of 20 Mr. Cotter, Jr.; correct? 21 MR. KRUM: Objection; 22 mischaracterizes -- 23 THE WITNESS: It -- 24 MR. KRUM: -- mischaracterizes the 25 testimony, asked and answered.</p> <p style="text-align: right;">Page 77</p>

<p>1 THE WITNESS: Unless the action was a 2 sham, it has to be examined in the context 3 of what and why they were trying to achieve 4 the termination of Cotter, Jr., I'll call 5 him, for lack, JJC, however -- 6 BY MR. SEARCY: 7 Q. Sure. 8 A. -- however he's referred to in the 9 depositions, I think often as JJC. But, in any 10 event, it depends upon the context. 11 Q. With respect to your analysis in this 12 case, did you try to obtain any information about 13 any accomplishments that Mr. Cotter, Jr., had while 14 he was the CEO? 15 A. Other than reading the depositions 16 and the positions that the different directors took 17 on whether at a given point in time he was doing a 18 good job or he wasn't doing a good job or whether 19 the family feud was interfering with his ability to 20 do a good job and the references to -- I don't 21 remember the exact words, but something like 22 disruption of the sea sweep, all of these 23 references, there are good and bad statements made 24 about the quality of the work that he was doing 25 depending on --</p> <p style="text-align: right;">Page 78</p>	<p>1 review or consider any information that had to do 2 with any of his accomplishments as a CEO? 3 MR. KRUM: Asked and answered. 4 Go ahead. 5 THE WITNESS: The only review that I 6 did of Mr. Cotter's performance was to read 7 the depositions where there were various 8 views at different points in time commenting 9 on the quality or lack thereof of his 10 performance as CEO. 11 BY MR. SEARCY: 12 Q. As you sit here, are you able to 13 identify any of his accomplishments as a CEO? 14 A. No. 15 Q. So with respect to implications to 16 minority shareholders, are you able to identify any 17 accomplishments or benefits that would be lost to 18 minority -- minority shareholders but through 19 termination of Mr. Cotter, Jr.? 20 A. No. My focus would be more on the 21 process that replaced him and with whom he was 22 replaced. 23 Q. With respect to Mr. Cotter, Jr.'s, 24 termination, did you look at the bylaws of RDI? 25 A. No.</p> <p style="text-align: right;">Page 80</p>
<p>1 Q. Do you -- 2 A. -- depending on who was speaking. 3 Q. Okay. Do you recall any of the good 4 statements about the quality of the work that he was 5 doing? 6 A. Well, I understand Mr. Kane thought 7 he was doing a good job up to a certain point. The 8 real -- the real contextual issue here is the extent 9 to which the family feud interfered with the 10 exercise of fiduciary duty by the directors, were 11 they trying to solve the family feud here, focused 12 on that, were they ever focused on the implications 13 for the minority stockholders on the -- on the 14 actions -- with the actions they took. That -- 15 that's what I was looking at because that's what a 16 Delaware judge is concerned about. 17 The fiduciary duty is owed not just 18 to the controlling stockholders and the corporation 19 itself but also to the minority stockholders. 20 There's not a word of concern in any of the 21 depositions or your other expert reports about the 22 effect on the minority stockholders. 23 Q. Turning back to the -- the question 24 that I asked you, though, with respect to 25 Mr. Cotter, Jr.'s, performance as CEO, did you</p> <p style="text-align: right;">Page 79</p>	<p>1 Q. And did you undertake any 2 consideration as to what the bylaws said about the 3 discretion of the board of directors in hiring or 4 firing a CEO? 5 A. Not having read them, I couldn't have 6 done. 7 Q. Fair point. 8 Would those bylaws have impacted your 9 analysis at all if you had -- if you had reviewed 10 them? 11 A. Not the narrow scope of my analysis, 12 which was on the process they used, no. 13 Q. So, in other words, your review 14 wasn't about whether or not the board had the right 15 and the ability to terminate Mr. Cotter, Jr., but 16 just about the process that was used in terminating 17 him; is that correct? 18 A. Yes. And let me explain that answer. 19 Under Delaware law the fact that you have the 20 authority to act doesn't end the inquiry, 21 particularly in entire fairness review. Our law is 22 well-established that despite being authorized 23 either by the charter or the bylaws to take certain 24 action, when you take the action, it must be taken 25 equitably.</p> <p style="text-align: right;">Page 81</p>

<p>1 And the considerations within the 2 entire fairness review is whether or not that 3 hindsight review of what took place was entirely 4 fair, both as to the nature of the process and the 5 result. 6 So I would not have been impressed by 7 the fact that there was a bylaw authorizing them to 8 terminate officers because it's generally understood 9 under Delaware law you can. 10 Q. Is it -- 11 A. Or the directors can. I didn't mean 12 you. I apologize. 13 Q. Right. No. I understand. Thank 14 you. 15 Now, just returning to your -- your 16 process point again for a moment -- 17 A. Sure. 18 Q. -- if -- is it your -- is it your 19 testimony, is it your opinion, that under Delaware 20 law, if no process had been undertaken, then there 21 would be no entire fairness analysis or even 22 business judgment analysis that would have to be 23 undertaken at all in this case? 24 A. No, because even if a contract 25 provided, hypothetically, that he could be</p> <p style="text-align: right;">Page 82</p>	<p>1 there found that the termination of a CEO did not 2 give rise to any damages; correct? 3 A. The case says that, yeah, in its 4 context. And nothing in my report assessed or 5 attempted to assess a damage remedy, except for 6 reinstatement. 7 Q. Are you aware of any Delaware case 8 where a terminated CEO has been reinstated? 9 A. No. 10 Q. And in the opinion that you provide 11 in your report, is it your opinion that Delaware law 12 would provide for the reinstatement of a CEO who's 13 been terminated? 14 A. If the termination resulted from a 15 breach of fiduciary duty and after, in the case of a 16 controller context, as we have here, after entire 17 fairness review, what Delaware law would say is that 18 the chancellor or the vice chancellor, whoever was 19 sitting, one of the vice chancellors, has the 20 authority from English common law to craft a remedy 21 and there are no limits on the remedy that can be 22 crafted except that that court cannot award -- award 23 punitive damages. 24 So the object in equity is to craft a 25 remedy. There is the phrase that's often repeated</p> <p style="text-align: right;">Page 84</p>
<p>1 terminated at will or terminated without cause, 2 however you want to characterize it, if the people 3 making that decision who ultimately selected someone 4 from the controller to replace him who had -- who 5 has an ongoing familial dispute, it would be 6 analyzed to determine whether that process was 7 entirely fair to the corporation and all of the 8 stockholders, the minority as well as the 9 controlling stockholders. 10 If the decision were made solely by, 11 let's say, an independent, disinterested chairman of 12 the board that's authorized by the contract and the 13 bylaws, it may be a different issue. That's why I 14 keep repeating that it's entirely contextual. There 15 are no bright-line rules in Delaware. 16 Q. In your understanding of Delaware 17 law, are you aware of any case where a corporation 18 has been found to have been injured or damaged by 19 the termination of a CEO? 20 A. Not off the top of my head, no. 21 Q. And I believe you've cited to a case 22 called Carlson in your expert report; isn't that 23 right? 24 A. Uh-huh. 25 Q. And in the Carlson case, the court</p> <p style="text-align: right;">Page 83</p>	<p>1 "every wrong has a remedy." And you're supposed, 2 when you sit on that court, to fashion the 3 appropriate one. That is an alternative, void the 4 act and order the reinstatement. 5 Q. So your opinion on reinstatement is 6 based on general equitable principles as applied by 7 Delaware law? 8 A. Yes. 9 Q. Is that correct? 10 A. That's correct. 11 Q. But in terms of case precedent, 12 you're not aware of any Delaware court ever ordering 13 the reinstatement of a terminated CEO; correct? 14 A. That's correct. Sadly, there's -- 15 despite the -- what's sometimes referred to as the 16 rich body of Delaware law, every context doesn't 17 have a precedent. 18 Q. Are you aware of cases that hold the 19 converse, that a terminated employee should not be 20 reinstated? 21 MR. KRUM: Objection; incomplete 22 hypothetical. 23 THE WITNESS: I have no idea how to 24 answer that because I don't know what the 25 context would have been. Do I know of a</p> <p style="text-align: right;">Page 85</p>

<p>1 case under these circumstances that are in 2 issue if -- depending on how the facts are 3 resolved ultimately that has ever resulted 4 under Delaware law as a reinstatement of a 5 terminated CEO? I cannot point to a 6 particular case. It's a -- it's an 7 extraordinarily unusual fact situation.</p> <p>8 BY MR. SEARCY:</p> <p>9 Q. In terms of the process that was used 10 to terminate Mr. Cotter, Jr., in your opinion, what 11 are the deficiencies in the process that was used?</p> <p>12 A. Well, the vote, as I recall it, was 13 not a majority of independent and disinterested 14 directors. The buildup to the event that caused the 15 termination had been preceded by a committee that 16 was with Mr. Storey acting as an ombudsman to help 17 resolve issues within the family to improve 18 performance. It had its suggested final review date 19 of June 30th, as I remember.</p> <p>20 There was an accelerated process to 21 review the performance and to put on the agenda for 22 a directors meeting the status, as I recall the 23 phraseology, of the CEO, meaning Mr. Cotter.</p> <p>24 There are ample suggestions of facts 25 from which the inferences can be drawn, alleged</p> <p style="text-align: right;">Page 86</p>	<p>1 explain, at least under the Delaware analytical 2 system, it's not a determination that's made until 3 after trial, that as a matter of fact the court 4 concludes that one was not independent and the other 5 was interested and not disinterested.</p> <p>6 Q. Now, you mentioned familial ties of 7 Mr. Kane.</p> <p>8 A. Yeah.</p> <p>9 Q. Mr. Kane has those familial ties with 10 Mr. Cotter, Jr., as well; correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And Mr. Cotter, Jr., has 13 referred to him as Uncle Ed; correct?</p> <p>14 A. Yes, there are references to that, 15 for sure.</p> <p>16 Q. Mr. Kane was a friend of Mr. Cotter, 17 Sr., for many years; correct?</p> <p>18 A. 50, as I recall. He went to law 19 school with him, if I have my facts correct.</p> <p>20 Q. Other than those familial ties, are 21 you aware of any other familial ties that you 22 believe might show that he's not independent?</p> <p>23 A. Well, the way in which the process 24 took place, Mr. Kane's, in my assessments, focus on 25 trying to remedy the feud within the family, to</p> <p style="text-align: right;">Page 88</p>
<p>1 facts depending on what's ultimately concluded to be 2 true, that there had been people already made up 3 their mind and that the purpose of that agenda item 4 was to terminate him. It wasn't to explore 5 alternatives.</p> <p>6 There was no succession plan in 7 place. But, most importantly, the ties, both 8 financial in Mr. Adams' case and familial in 9 Mr. Kane's case, deprived the recommended vote of a 10 majority of disinterested, independent directors.</p> <p>11 Q. All right. Let's, if we can, unpack 12 that a little bit.</p> <p>13 You made mention of there not being a 14 majority of independent directors. For purposes of 15 your expert analysis, you assumed that Mr. Kane and 16 Mr. Adams were not independent; is that right?</p> <p>17 A. Yeah. My expert opinion suggests 18 that there are facts in the record which could 19 result in a fact-finder determining that Mr. Adams 20 was not disinterested and Mr. Kane was not 21 independent.</p> <p>22 Q. But you personally didn't come to any 23 factual conclusions about that; correct? You -- 24 instead you assumed the facts?</p> <p>25 A. That's correct. As I've tried to</p> <p style="text-align: right;">Page 87</p>	<p>1 characterize it, the disputes within the family, to 2 reconcile the family, inferentially largely out of 3 his respect for Mr. Cotter, Sr., and his 4 long-standing friendship, it's clear that a 5 reasonable judge could conclude that he was more 6 interested in resolving the dispute within the 7 family and reconciling the family than he was 8 addressing the impact of this family and its members 9 continuing to be -- despite their controlling 10 shares, continuing to be operational officers within 11 the corporation than he was with the impact of this 12 continuing process of family feuding on the minority 13 stockholders, meaning the value of their shares.</p> <p>14 There's no analysis or discussion of 15 analysis about that impact. He's all driven by what 16 Mr. Cotter, Sr., would have wanted and his distress 17 at the family's inability to work together.</p> <p>18 Q. In preparing your expert report, did 19 you see any testimony by Mr. Cotter, Sr., that -- 20 I'm sorry; let me strike -- let me try that again.</p> <p>21 In preparing your expert report, did 22 you see any testimony by Mr. Cotter, Jr., that his 23 inability to get along with his sisters was 24 impacting the company?</p> <p>25 MR. KRUM: Objection; vague.</p> <p style="text-align: right;">Page 89</p>

<p>1 THE WITNESS: I'm not sure what you 2 mean by the testimony from him. There's 3 testimony rife through all the depositions 4 that the sea sweep was in distress because 5 of their inability to get along and their -- 6 their disagreements, people within the sea 7 sweep taking sides, that's throughout the 8 depositions. 9 BY MR. SEARCY: 10 Q. And one way to resolve that conflict 11 between Mr. Cotter, Jr., on one side, and his 12 sisters, on the other, would be to terminate one or 13 all of them; correct? 14 A. Yes; and -- yes, there are references 15 to that in -- by some of the directors, in 16 particular I think the two independent and 17 disinterested directors. 18 Q. And in terms -- you made reference to 19 that consideration by the disinterested directors. 20 Now, in your opinion is there anything in and of 21 itself about terminating one or all of the Cotter 22 family that would give rise to a breach of fiduciary 23 duty? 24 MR. KRUM: Objection; vague, 25 incomplete hypothetical.</p> <p style="text-align: right;">Page 90</p>	<p>1 evident passion in that regard when you read his 2 deposition is should that be his focus as a 3 fiduciary, preserving the family's interest, or 4 should he be looking at the broader picture of the 5 minority stockholders, the corporation itself, as 6 well as the interest of the controlling 7 stockholders, and that's what the ultimate finder of 8 fact will have to resolve. I can't -- I can't opine 9 on that. 10 All I can say is it's an issue that 11 would be of significant concern to a Delaware judge 12 in determining, once it's raised by the pleadings 13 under entire fairness, whether he can demonstrate 14 that his attention to the family concerns was 15 consistent with attention to the minority 16 stockholders and corporation itself benefit. 17 Q. Other than his friendship with Jim 18 Cotter, Sr., and other than his efforts to resolve 19 the family feud between Jim Cotter, Jr., and his 20 sisters, can you point to anything else that 21 indicates that Mr. Kane -- 22 A. Just -- 23 Q. -- might not be independent? 24 A. The interfamilial interaction, not 25 just the Memorial Day weekend when Jim Cotter came,</p> <p style="text-align: right;">Page 92</p>
<p>1 Go ahead. 2 THE WITNESS: No, I don't -- I don't 3 think there's anything that would suggest if 4 all three were terminated, it would be a 5 breach of fiduciary duty if a process was in 6 place and that was decided by disinterested, 7 independent directors. 8 In fact, I recall the discussion that 9 one of the alternatives might be -- and 10 Delaware law would support this -- that all 11 of the directors resign. When forced with a 12 breach of their fiduciary duty or 13 resignation, resignation is the alternative. 14 BY MR. SEARCY: 15 Q. So you've identified Mr. Kane's 16 efforts to resolve the family feud between 17 Mr. Cotter, Jr., and the Cotter sisters as an 18 indication of his familial interest; is that right? 19 A. Yes. 20 Q. Wouldn't resolution of that feud also 21 assist in the performance of the company? 22 A. It could. That's why it's important 23 to hear him testify and his credibility about his 24 motivation. What the issue that's raised by his 25 efforts and his, I think it's fair to characterize,</p> <p style="text-align: right;">Page 91</p>	<p>1 but the phone calls and everything else, can't be 2 read out of context. It can't be the predominant 3 set of facts, but it can't be ignored either. 4 Delaware law makes it clear that mere friendship is 5 not a disqualifier. So you have to read it in 6 context. 7 But that's additional -- those are 8 additional facts which one might conclude is 9 something extraordinary for an independent director. 10 But independent of anything else, it wouldn't be 11 significant. But drawn in with everything else in 12 context, it is significant. 13 Q. Now, you just mentioned a visit by 14 Jim Cotter, Jr., to Mr. Kane. 15 A. Yeah. 16 Q. Do you see that as being potentially 17 significant in considering Mr. Kane's independence 18 in terms of terminating Jim Cotter, Jr.? 19 A. Not necessarily with the act of 20 termination, but it's an indication of his concern 21 about the family. And the finder of fact will have 22 to weigh that significance in context with whether 23 it meets his duty as a fiduciary to the minority 24 stockholders and the corporation itself. What's 25 overriding what here? Is he focused on the object</p> <p style="text-align: right;">Page 93</p>

<p>1 of his exercise of his fiduciary responsibility or  2 is he swayed by his concern about the family?  3 You -- you can't reach that conclusion just on  4 pleaded facts and depositions.  5 Q. Other than Mr. Kane and Mr. Adams,  6 did you reach any conclusions or opinions about  7 whether any of the other directors in this case are  8 independent?  9 A. Well, I think it's clear, Ellen and  10 Margaret Cotter are not independent.  11 Q. Anyone else?  12 A. No.  13 Q. Okay. Now, in terms of  14 Mr. McEachern, you don't have any opinion on whether  15 or not --  16 A. No.  17 Q. -- he's independent?  18 A. And, remember, when I say "opinion,"  19 I mean have I seen pleaded facts that would suggest  20 either a lack of independence or disinterestedness  21 or the ab -- interestedness, I should say.  22 Q. Right.  23 A. Sorry; I misspoke. The answer to  24 Gould and to McEachern -- how do you pronounce his  25 last name?</p> <p style="text-align: right;">Page 94</p>	<p>1 I -- I only know what the pleadings and the  2 depositions suggest. And it appears it  3 would raise an issue in my mind as a  4 Delaware judge because it seems despite a  5 controller's ultimate decision and a vote on  6 directors at the annual meeting, that it's  7 sort of extraordinary to have people without  8 significant credentials come on largely  9 because they are related to the -- in some  10 way to the Cotter family.  11 BY MR. SEARCY:  12 Q. Let me -- let me just make sure that  13 I understand what your opinion is. Do you have an  14 opinion one way or the other as to whether or not  15 Mr. Wrotniak or Ms. Codding are independent?  16 A. No, I can't reach that conclusion.  17 As I've stated over and over, that would have to be  18 determined by the finder of fact.  19 Q. Are you offering any opinion in this  20 case as to whether they are independent directors or  21 not?  22 A. No.  23 MR. KRUM: Asked and answered.  24 THE WITNESS: The only opinion I've  25 offered is that examining the pleadings and</p> <p style="text-align: right;">Page 96</p>
<p>1 Q. McEachern.  2 A. -- McEachern -- God, I'm part Scott,  3 I should get that right -- and Storey, no.  4 Q. Okay. With respect to Judy Codding  5 or Michael Wrotniak, have you formed any opinion as  6 to whether they're independent?  7 MR. KRUM: Objection; incomplete  8 hypothetical.  9 THE WITNESS: Again, I haven't formed  10 an independent -- I haven't formed an  11 opinion that they are independent or not.  12 All I can say there are the circumstances of  13 their relationship relative to their  14 experience, training, and expertise to be a  15 director of that company would raise an  16 eyebrow in Delaware and it would be exam --  17 examined carefully.  18 BY MR. SEARCY:  19 Q. But as you sit here and having  20 reviewed the materials that you have reviewed, you  21 don't have an opinion one way or the other in terms  22 of whether Mr. Codding -- I'm sorry -- Ms. Codding  23 or Mr. Wrotniak are independent; correct?  24 MR. KRUM: Asked and answered.  25 THE WITNESS: I can't resolve that.</p> <p style="text-align: right;">Page 95</p>	<p>1 the circumstances here raises a reasonable  2 doubt about their independence and would  3 have to be resolved by the finder of fact.  4 BY MR. SEARCY:  5 Q. Do you know what date Mr. Cotter  6 was -- Mr. Cotter, Jr., was terminated on?  7 A. My -- exact date? It's in May of  8 2015.  9 Q. Okay.  10 A. 27 sticks in my mind, but I'm not  11 positive.  12 Q. Do you know whether it might have  13 been as late as June 12th?  14 A. It could have been.  15 Q. Okay. In your opinion, is there any  16 breach of fiduciary duty by terminating Mr. Cotter,  17 Jr., on June 12th as opposed to June 30th?  18 MR. KRUM: Objection; incomplete  19 hypothetical.  20 THE WITNESS: I don't see the  21 significance of that.  22 BY MR. SEARCY:  23 Q. Okay. You don't see the significance  24 of it -- just so I can clarify, you don't see the  25 significance of it from a fiduciary duty</p> <p style="text-align: right;">Page 97</p>

<p>1 perspective?</p> <p>2 A. The process is the same whether it's</p> <p>3 June 12th or June 30th.</p> <p>4 Q. Then it doesn't make any difference;</p> <p>5 correct?</p> <p>6 A. Well, there was an -- there was an</p> <p>7 established -- at least in the minds of some of the</p> <p>8 witnesses -- and there's some testimony inconsistent</p> <p>9 with that and that's why I can't resolve it</p> <p>10 finally -- that he would be given until June 30th</p> <p>11 under the arrangement that had been made with</p> <p>12 Mr. Storey as the ombudsman and the two-person</p> <p>13 independent committee that was basically acting to</p> <p>14 supervise him in a -- in a way.</p> <p>15 Then the executive committee comes</p> <p>16 into existence. The process that results in</p> <p>17 terminating him doesn't go to June 30. That's --</p> <p>18 that's all I can recall. And so there's still the</p> <p>19 process implications, yeah.</p> <p>20 Q. And let me -- let me just, if I can,</p> <p>21 narrow the issue here, though. In terms of the</p> <p>22 decision whether to fire him on June 12th or to fire</p> <p>23 him on June 30th, the difference in those dates</p> <p>24 doesn't have any significance from a fiduciary duty</p> <p>25 perspective in your understanding; correct?</p> <p style="text-align: right;">Page 98</p>	<p>1 MR. KRUM: Same objections.</p> <p>2 THE WITNESS: Well, it depends on how</p> <p>3 you resolve the facts. There was already</p> <p>4 put -- it had already been put in place a</p> <p>5 plan to go to June 30th. The circumstances</p> <p>6 that would cause them to move from June 30th</p> <p>7 to June 12th are important. Everything is</p> <p>8 context.</p> <p>9 I -- I can't make that determination</p> <p>10 or opine on whether there's magic in</p> <p>11 June 12th or June 30th. It does affect the</p> <p>12 analysis of the process.</p> <p>13 BY MR. SEARCY:</p> <p>14 Q. And when you say there was a plan, I</p> <p>15 think you've testified to this earlier, there is</p> <p>16 disagreement as to whether or not there was a plan</p> <p>17 on whether to go to June 30th; correct?</p> <p>18 A. There is.</p> <p>19 Q. Okay. Do you know how many meetings</p> <p>20 the board of directors held before terminating</p> <p>21 Mr. Cotter, Jr.?</p> <p>22 A. Well, that's difficult to say. From</p> <p>23 the start of time or within what time frame?</p> <p>24 Q. With respect to deciding whether or</p> <p>25 not to terminate Mr. Cotter, Jr.</p> <p style="text-align: right;">Page 100</p>
<p>1 MR. KRUM: Objection; vague and</p> <p>2 ambiguous, asked and answered, may</p> <p>3 contradict the testimony.</p> <p>4 THE WITNESS: It's -- it's possible</p> <p>5 for the person reviewing the process to</p> <p>6 decide either way on that. They could</p> <p>7 decide that it was important that it didn't</p> <p>8 play out to June 30th and that the decision</p> <p>9 to change from the June 30th original plan,</p> <p>10 if that indeed she concludes was the</p> <p>11 original plan, was a breach of fiduciary</p> <p>12 duty.</p> <p>13 So firing on June 12th would be</p> <p>14 different than firing by coming back to a</p> <p>15 meeting and saying we've exhausted all of</p> <p>16 our efforts acting as ombudsman, the</p> <p>17 difficulties continue, we have to make a</p> <p>18 decision about what to do about it, one of</p> <p>19 those alternatives is to terminate</p> <p>20 Mr. Cotter, Jr. That could -- that could</p> <p>21 influence a judge.</p> <p>22 BY MR. SEARCY:</p> <p>23 Q. If the board had concluded that it</p> <p>24 exhausted all of its efforts by June 12th, is there</p> <p>25 any breach there?</p> <p style="text-align: right;">Page 99</p>	<p>1 A. Do you mean meetings where that was a</p> <p>2 subject on the agenda?</p> <p>3 Q. Correct.</p> <p>4 A. No, I don't know how many there were.</p> <p>5 Q. Okay.</p> <p>6 A. The best I can tell from the</p> <p>7 deposition, there was the one.</p> <p>8 Q. Okay. If there was more than one</p> <p>9 meeting where Mr. Cotter, Jr.'s, termination was</p> <p>10 discussed, would that impact your analysis?</p> <p>11 MR. KRUM: Objection; incomplete</p> <p>12 hypothetical.</p> <p>13 THE WITNESS: I don't know how to</p> <p>14 answer that. It depends on notice of the</p> <p>15 meeting; who appeared; who participated in</p> <p>16 the process; were they all independent,</p> <p>17 disinterested directors or were they Cotter</p> <p>18 directors as well as truly independent</p> <p>19 directors or those that were tainted in some</p> <p>20 way by their -- their interestedness and</p> <p>21 their lack of independence. There's too --</p> <p>22 too many variables.</p> <p>23 BY MR. SEARCY:</p> <p>24 Q. You can't say one way or the other --</p> <p>25 A. I cannot.</p> <p style="text-align: right;">Page 101</p>

<p>1 Q. -- as you sit here?</p> <p>2 A. I cannot.</p> <p>3 Q. If -- if all of the directors were</p> <p>4 present for multiple meetings where a discussion of</p> <p>5 Mr. Cotter, Jr., was on the agenda, would that</p> <p>6 impact your analysis?</p> <p>7 MR. KRUM: Same objections.</p> <p>8 THE WITNESS: Not really because I</p> <p>9 can appreciate the fact that there would be</p> <p>10 a discussion of a CEO's performance at a</p> <p>11 board meeting. Whether it focused on</p> <p>12 termination or not is the issue.</p> <p>13 BY MR. SEARCY:</p> <p>14 Q. In preparing your opinion did you</p> <p>15 review any of the meeting minutes from any of the</p> <p>16 board meetings where Mr. Cotter, Jr.'s, termination</p> <p>17 was discussed?</p> <p>18 A. No.</p> <p>19 Q. Okay. In review -- in preparing your</p> <p>20 opinion did you review any of the notes of any of</p> <p>21 the directors who participated in the meetings where</p> <p>22 Mr. Cotter, Jr.'s, termination was discussed?</p> <p>23 MR. KRUM: Assumes facts.</p> <p>24 THE WITNESS: No.</p> <p>25 MR. SEARCY: Why don't we take our</p> <p style="text-align: right;">Page 102</p>	<p>1 A. No.</p> <p>2 Q. And you don't have any knowledge as</p> <p>3 to the statutes governing the -- the use of</p> <p>4 executive committee -- committees under Nevada law?</p> <p>5 A. Not -- no, I have no -- no idea.</p> <p>6 Q. You provided an opinion about the</p> <p>7 executive committee of Reading in this case;</p> <p>8 correct?</p> <p>9 A. I -- I spoke to its formation, yes.</p> <p>10 Q. And were you aware when you</p> <p>11 formulated your opinion that an executive committee</p> <p>12 existed before plaintiff was terminated?</p> <p>13 A. That an executive committee?</p> <p>14 Q. Yeah.</p> <p>15 A. Yes, it did. There was one.</p> <p>16 Q. Okay. And you are aware that</p> <p>17 plaintiff was the chairman of that executive</p> <p>18 committee?</p> <p>19 A. I remember reading that in the</p> <p>20 deposition; yes.</p> <p>21 Q. Are you aware of any change to the</p> <p>22 delegation of authority that was given to the</p> <p>23 executive committee after plaintiff's termination?</p> <p>24 A. No.</p> <p>25 Q. And with respect to the executive</p> <p style="text-align: right;">Page 104</p>
<p>1 lunch -- do you want to take a lunch break</p> <p>2 now, Mark?</p> <p>3 MR. KRUM: Sure.</p> <p>4 MR. SEARCY: Okay.</p> <p>5 THE VIDEOGRAPHER: Off the record at</p> <p>6 12:41. This will end Disc No. 2.</p> <p>7 ---</p> <p>8 (Whereupon there was a luncheon</p> <p>9 recess in the proceedings.)</p> <p>10 ---</p> <p>11 THE VIDEOGRAPHER: The time now is</p> <p>12 1:54. Back on the record, beginning of Disc</p> <p>13 No. 3.</p> <p>14 BY MR. SEARCY:</p> <p>15 Q. Welcome back from lunch.</p> <p>16 A. Good afternoon.</p> <p>17 Q. Let me turn for a moment to the issue</p> <p>18 of executive committees.</p> <p>19 In your understanding and experience</p> <p>20 executive committees are permitted under Delaware</p> <p>21 law; is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And do you have any knowledge</p> <p>24 as to whether executive committees are permitted</p> <p>25 under Nevada law?</p> <p style="text-align: right;">Page 103</p>	<p>1 committee instituted at RDI, are you aware of any</p> <p>2 actions taken by that committee?</p> <p>3 A. Any actions taken by them?</p> <p>4 Q. Yeah.</p> <p>5 A. I'm not sure I understand what you</p> <p>6 mean.</p> <p>7 Q. Are you aware of any -- well, maybe</p> <p>8 we can break it down.</p> <p>9 Are you aware of any -- anything that</p> <p>10 the executive committee ever did?</p> <p>11 A. Suddenly my -- my mind is not clear.</p> <p>12 I'm trying to -- are you talking about formal</p> <p>13 actions that they took?</p> <p>14 Q. Correct.</p> <p>15 A. I -- my focus was on how it was</p> <p>16 reformulated and populated in such a way that it did</p> <p>17 not have a majority of independent and disinterested</p> <p>18 directors.</p> <p>19 Q. Well, let me have you turn to Page 29</p> <p>20 of your report.</p> <p>21 A. Yes.</p> <p>22 Q. And this is your opinion on the</p> <p>23 creation of the executive committee; is that right?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And you're -- to the extent</p> <p style="text-align: right;">Page 105</p>



<p>1 that you express any concerns about the executive 2 committee, in your opinion it's because of the 3 exclusion of directors; is that right? 4 A. Yes. 5 MR. KRUM: Object. 6 THE WITNESS: Sorry. Yes. 7 BY MR. SEARCY: 8 Q. Not about any action that any -- 9 A. No. 10 Q. -- of the members of this committee 11 ever took? 12 A. No. 13 Q. Okay. Were you aware that Bill Gould 14 was asked to be a member of the executive committee? 15 A. I don't recall that. 16 Q. Okay. You never saw any testimony 17 about that? 18 A. I may have. I just -- it didn't 19 stick in my mind. 20 Q. Okay. And if he -- in your opinion, 21 if he were asked to be a member of the executive 22 committee, then he certainly wasn't being excluded 23 from it; correct? 24 MR. KRUM: Objection; assumes facts, 25 incomplete hypothetical.</p> <p style="text-align: right;">Page 106</p>	<p>1 Q. You didn't consider them to be 2 relevant? 3 A. It's -- it's relevant that you have 4 the authority to form an executive committee. 5 What's more important is did you implement that 6 authority in a way that was equitable and one that 7 didn't exclude directors who had equal 8 responsibility when an executive committee assumes 9 virtually all of the duties of the regular board. 10 That's when the factual question 11 comes up about whether or not it was fairly 12 organized in a way to either promote efficiency or 13 to exclude certain directors from the ultimate 14 decision-making process, and that's a contextual, 15 factual decision that has to be made by a finder of 16 fact. 17 Q. Okay. And in the context of what 18 you've just described, just to be clear, you didn't 19 review Mr. Gould's testimony about being asked to be 20 on the board; correct? 21 A. I didn't recall it. 22 Q. Okay. And you didn't look at what 23 the bylaws of RDI provided for? 24 A. I did not because it would make no 25 difference.</p> <p style="text-align: right;">Page 108</p>
<p>1 THE WITNESS: If he were asked and he 2 declined for his own personal reasons, then 3 it would be very difficult to argue that he 4 was excluded. 5 BY MR. SEARCY: 6 Q. Okay. Other than Mr. Gould, is there 7 anyone else you believe may have been excluded from 8 the executive committee? 9 A. Well, Mr. Storey was not on the 10 executive committee. 11 Q. Anyone else? 12 A. Not -- not that I recall. 13 Q. And Mr. Storey, in your 14 understanding, has resigned from RDI; correct? 15 A. He's no longer there, yes. I 16 don't know -- I don't recall the circumstances. 17 Q. Okay. In formulating your opinion 18 about RDI's executive committees, did you consider 19 RDI's bylaws? 20 A. No. 21 Q. Did you examine what the bylaws have 22 to say about the formation of an executive 23 committee? 24 A. No. But for the same reason I 25 explained earlier.</p> <p style="text-align: right;">Page 107</p>	<p>1 Q. Okay. And you didn't look to see 2 what actions, if any, the executive committee had 3 ever taken; is that right? 4 A. In that form? No. 5 Q. Okay. When you say "in that form"? 6 A. As repopulated. 7 Q. Okay. Did you ever take a look to 8 see what actions the executive committee took when 9 Jim Cotter, Jr., was chair of the executive 10 committee? 11 A. I -- I did not. 12 Q. So to be clear then, you didn't look 13 to see what actions the executive committee took 14 either before or after Mr. Cotter, Jr.'s, 15 termination; correct? 16 A. Well, the question becomes whether it 17 was the executive committee or the full board that 18 made the appointments that came after the 19 repopulation, so to speak, or the reconstitution of 20 the executive committee. 21 Q. Are you talking about the 22 executive -- well, let me backtrack. 23 When you're talking about the 24 appointments, which appointments are you referring 25 to?</p> <p style="text-align: right;">Page 109</p>

<p>1 A. The CEO and the title that was given 2 to Margaret Cotter. 3 Q. All right. With respect to the CEO 4 and the title given to Margaret Cotter -- 5 A. The succession is what I'm talking 6 about. 7 Q. Yeah -- neither of those actions were 8 taken by the executive committee; correct? 9 A. Not to my knowledge. That's why I 10 didn't explore it. 11 Q. Okay. Well, when you say that's why 12 you didn't explore it, can you explain what you 13 mean? 14 A. I didn't have any actual actions of 15 the executive committee to touch upon other than the 16 fact it was constituted in such a way that it had 17 the same powers as the board and it didn't have a 18 majority of independent directors. 19 Q. Okay. 20 A. But I'm not speaking to any 21 particular action it took. 22 Q. Okay. Well, I just want to clarify, 23 when you brought up the appointment of the CEO, when 24 you brought up the appointment of Margaret Cotter, 25 neither of those were actions that were taken by the</p> <p style="text-align: right;">Page 110</p>	<p>1 Q. Now, as you sit here, you don't have 2 any knowledge of what the terms of Mr. Heth's letter 3 provided for; correct? 4 A. I do not. 5 Q. Okay. And with respect to any 6 discussion undertaken by the board concerning 7 Mr. Heth's letter, you don't have any knowledge 8 other than what's set forth in the Complaint; is 9 that right? 10 A. Just from the pleadings. 11 Q. Okay. Now, when you say "the 12 pleadings," you mean the Amended Complaint; right? 13 A. Well, that's where the allegation 14 occurs; yeah. 15 Q. You haven't looked at any underlying 16 documents? 17 A. No. 18 MR. KRUM: That were produced on or 19 about the 15th of September, I should note. 20 MR. SEARCY: All right. 21 BY MR. SEARCY: 22 Q. With counsel's speaking objection in 23 mind, have you reviewed any documents since then? 24 A. No. At the point in time of my 25 opinion, I had some conversation at some point with</p> <p style="text-align: right;">Page 112</p>
<p>1 executive committee in your understanding; correct? 2 A. Yes. 3 Q. Okay. Has, to your knowledge, the 4 executive committee had any involvement in either of 5 those actions? 6 A. As an executive committee, no. 7 Q. And do you know who constitutes the 8 executive committee at RDI? 9 A. Right now? 10 Q. Yeah. 11 A. No. 12 Q. Okay. Let me ask you about an 13 expression of interest letter sent by a fellow named 14 Paul Heth to the company. Does that sound familiar 15 to you? 16 A. I don't remember the name Heth, but I 17 remember an expression of interest letter. 18 Q. Okay. Have you reviewed the 19 expression of interest letter submitted or -- I'm 20 sorry -- signed by Mr. Heth? 21 A. No. 22 Q. Okay. With respect to the expression 23 of interest, have you reviewed anything other than 24 plaintiff's Amended Complaint? 25 A. No.</p> <p style="text-align: right;">Page 111</p>	<p>1 Mr. Krum saying that there had been developments 2 since then. But I -- it wasn't the focus of my 3 opinion and it wasn't a focus of my attention as a 4 result. 5 Q. In formulating your opinion, did you 6 look at all at Nevada Revised Statute 78.138 4.(d)? 7 A. I did not. 8 Q. Do you have any knowledge as to 9 whether the board responded to Mr. Heth's letter? 10 A. From what I read in the materials 11 that were available to me, the board rejected any 12 further inquiries. But now I understand there have 13 been further solicitation by a prospective buyer and 14 there -- there's some action that might be taken as 15 a result of that. But I -- I'm not familiar with 16 it. 17 Q. Okay. Do you have any opinion on it, 18 on the currently undergoing discussions? 19 A. Well, I don't know what they are so I 20 couldn't have an opinion on them. But I -- if 21 there's more than what I saw, then that's a good 22 thing because, as you know from my report, the 23 concern I had at least from a Delaware perspective 24 was while there's the famous phrase "just say no," 25 it assumes a good-faith investigation, which doesn't</p> <p style="text-align: right;">Page 113</p>

<p>1 require necessarily lawyers and financial advisors,  2 but it does require a business plan to be reviewed  3 and thoughtful, good-faith entertaining of the  4 prospects of the -- of the inquiry. And that was --  5 that was my express concern.  6 Q. Now, let me make -- let me make sure  7 I understand your -- your formulation of Delaware  8 law.  9 A. Sure.  10 Q. Under Delaware law the members of the  11 board of directors were not required to seek out an  12 independent investment banker; correct?  13 MR. KRUM: Object to the incomplete  14 hypothetical.  15 THE WITNESS: It's correct the law  16 does not mandate that they do so.  17 BY MR. SEARCY:  18 Q. Okay. Under Delaware law -- well,  19 let me ask you first: Do you know whether under  20 Nevada law directors are entitled to rely on  21 financial information presented to them by the CEO  22 and chairman of the board?  23 A. I don't know under Nevada law whether  24 they are or not.  25 Q. Are you aware that a valuation was</p> <p style="text-align: right;">Page 114</p>	<p>1 business plan, you weren't referring to a  2 requirement under Delaware law; is that right?  3 A. That's correct. It would just be one  4 fact in an analysis of whether there was a  5 good-faith response.  6 Or I should say a response made in  7 good faith.  8 Q. Were you shown the presentation made  9 to the board by Ellen Cotter?  10 A. I was not.  11 Q. Okay. So do you have any opinion as  12 you sit here as to --  13 A. No. I wouldn't have made a factual  14 judgment on its quality or its significance or what  15 it should have been to the board.  16 Q. In preparing your expert opinion were  17 you ever shown a document called "The Mission,  18 Vision, and Strategy, 2015 Performance Results, 2016  19 Budget and Strategy"?  20 A. I was not.  21 Q. Okay. In your role as a legal expert  22 would you be able to offer an opinion one way or the  23 other as to whether a particular document is a  24 business plan or not?  25 A. No.</p> <p style="text-align: right;">Page 116</p>
<p>1 presented to the board by the CEO --  2 A. I know --  3 Q. -- in connection with the unsolicited  4 offer?  5 A. I'm sorry.  6 THE WITNESS: And I apologize to the  7 court reporter.  8 THE COURT REPORTER: Thank you.  9 THE WITNESS: I know that there was a  10 presentation made. The depositions reflect  11 that by the then CEO Ellen Cotter.  12 I don't know what was presented. I  13 do know it was presented in the absence of a  14 business plan which was supposed to be  15 produced but didn't exist apparently. But I  16 don't know the quality of the information or  17 the source of it.  18 BY MR. SEARCY:  19 Q. Is there a law or statute that you're  20 referencing under Delaware law that would require a  21 written business plan be in place?  22 A. No. Delaware law, as I've said  23 before, is highly contextual, doesn't require  24 lockstep check-the-box steps, no.  25 Q. So when you referred to the lack of a</p> <p style="text-align: right;">Page 115</p>	<p>1 Q. So if I showed you "The Mission,  2 Vision, and Strategy" document, you wouldn't be able  3 to opine one way or the other as to whether that was  4 a business plan?  5 A. Well, I have seen business plans. If  6 you showed me one specific to this corporation,  7 could I give you an opinion based on my experience  8 and expertise on whether it is a bona fide business  9 plan? The answer is no.  10 Q. Have you sent any bills to plaintiff  11 in this case or plaintiff's counsel?  12 A. My office probably has.  13 Q. All right.  14 A. I don't -- it may sound strange to  15 you as a practicing lawyer, but I don't pay much  16 attention to billing.  17 MR. RHOW: You're lucky. That's all  18 I pay attention to.  19 THE WITNESS: That comes -- all comes  20 from being temporary.  21 BY MR. SEARCY:  22 Q. Do you know if those bills were  23 collected for production in this case?  24 A. I have no idea. I don't even know  25 that there was a request -- a request for production</p> <p style="text-align: right;">Page 117</p>

<p>1 of the bills.</p> <p>2 Q. Now, in terms of the documents that</p> <p>3 were produced by you in this case, were there any</p> <p>4 documents that you withheld?</p> <p>5 A. No.</p> <p>6 Q. Okay. No documents withheld on the</p> <p>7 ground of work product?</p> <p>8 A. No.</p> <p>9 Q. Okay. On Page 26 of your expert</p> <p>10 report, if you would take a look at that.</p> <p>11 A. Yes.</p> <p>12 Q. The last sentence in the very first</p> <p>13 paragraph there that begins with "Neither Kane's nor</p> <p>14 Adams' ties to EC and MC were disclosed to the</p> <p>15 Company's stockholders."</p> <p>16 A. I'm sorry; I couldn't hear you.</p> <p>17 Q. Sure. I'll speak up. I apologize.</p> <p>18 A. No. It's my fault. I was reading</p> <p>19 while you were trying to point me to the place you</p> <p>20 want me to read.</p> <p>21 Q. If you look at that last sentence of</p> <p>22 the first partial paragraph, it's the concluding</p> <p>23 sentence of the first -- first paragraph there --</p> <p>24 A. Yes.</p> <p>25 Q. -- about Kane's and Adams' ties --</p> <p style="text-align: right;">Page 118</p>	<p>1 one way or the other?</p> <p>2 A. No.</p> <p>3 Q. Why not?</p> <p>4 A. Because I was not approaching this</p> <p>5 from listing standards or from what representations</p> <p>6 were made to the SEC about independence or</p> <p>7 disinterestedness. I was approaching it solely from</p> <p>8 the analytical framework that a Delaware court might</p> <p>9 apply in this situation.</p> <p>10 Q. So that in terms of the disclosures</p> <p>11 to the company's stockholders that's referenced</p> <p>12 there, how does that factor into the analytical</p> <p>13 framework?</p> <p>14 A. It's a question of whether or not</p> <p>15 the -- it's an action that would result in</p> <p>16 stockholder -- a need for stockholder approval or</p> <p>17 not. It's -- it's a question of the duty of what is</p> <p>18 called disclosure. If you make a disclosure, it</p> <p>19 should be accurate. That's all.</p> <p>20 Q. And to your knowledge, when plaintiff</p> <p>21 certified that Kane and Adams were independent, was</p> <p>22 he inaccurate?</p> <p>23 MR. KRUM: Same objection.</p> <p>24 THE WITNESS: I don't know what</p> <p>25 standard he was using so I can't answer</p> <p style="text-align: right;">Page 120</p>
<p>1 A. Yes.</p> <p>2 Q. -- did you review any filings by the</p> <p>3 company in rendering your opinion that neither</p> <p>4 Kane's nor Adams' ties were disclosed to the</p> <p>5 company's stockholders?</p> <p>6 A. Just the one footnote, 190.</p> <p>7 Q. You didn't review any other</p> <p>8 disclosures?</p> <p>9 A. No.</p> <p>10 Q. Okay. Did you review any SEC filings</p> <p>11 filed -- signed by plaintiff?</p> <p>12 A. No.</p> <p>13 Q. So you didn't see any SEC filings</p> <p>14 signed by plaintiff where he certified that Kane and</p> <p>15 Adams were independent?</p> <p>16 A. I read about it --</p> <p>17 MR. KRUM: Object --</p> <p>18 THE WITNESS: -- in the depositions.</p> <p>19 MR. KRUM: Objection.</p> <p>20 THE WITNESS: But I didn't review the</p> <p>21 actual filing.</p> <p>22 MR. KRUM: Vague and big as to</p> <p>23 "independent."</p> <p>24 BY MR. SEARCY:</p> <p>25 Q. Would it have changed your opinion</p> <p style="text-align: right;">Page 119</p>	<p>1 that. I suspect he wasn't using the</p> <p>2 Delaware legal standard. He may have been</p> <p>3 using simply the NASDAQ listing</p> <p>4 requirements. I don't know, just as I don't</p> <p>5 know that -- until the finder of fact makes</p> <p>6 the decision, whether there should have been</p> <p>7 a disclosure, and I don't opine there should</p> <p>8 or shouldn't have been about Kane or Adam</p> <p>9 either -- Adams either.</p> <p>10 BY MR. SEARCY:</p> <p>11 Q. Okay. Earlier I think you mentioned</p> <p>12 in connection with the termination of Jim Cotter,</p> <p>13 Jr., that the board had put a plan in place to give</p> <p>14 him until June 30th; is that right?</p> <p>15 A. There are facts that -- yes, I did</p> <p>16 say that, and there are facts in the depositions</p> <p>17 that suggested that.</p> <p>18 Q. Do you know what that plan was?</p> <p>19 A. Only to the extent that it was a plan</p> <p>20 to continuing the -- to continue the ombudsman</p> <p>21 review by Mr. Storey and the two-person committee,</p> <p>22 as I recall, at the time of Gould and Storey that</p> <p>23 were charged with trying to improve his stewardship</p> <p>24 of the corporation; and there was at least the view</p> <p>25 on the part of Mr. Storey that that review would</p> <p style="text-align: right;">Page 121</p>

<p>1 continue until June 30. As I recall the deposition, 2 that fact was disputed by Mr. Kane. 3 Q. And others; correct? 4 A. Mr. Kane's is what I remember -- 5 Q. Okay. 6 A. -- because I spent so much time 7 reading Mr. Kane's depositions. 8 Q. Other than continuing the ombudsman 9 role until June 30, do you remember any other aspect 10 of the plan? 11 A. No. 12 Q. Do you know if there was any other 13 aspect of the plan? 14 A. No. 15 Q. Okay. And in your -- in your view, 16 in your opinion, was continuing the ombudsman role 17 until June 30 itself sufficient to satisfy fiduciary 18 duties? 19 A. It would still -- 20 MR. KRUM: Objection; incomplete 21 hypothetical. 22 THE WITNESS: It would still depend 23 upon the entire context. It would be more 24 beneficial to the view that things had 25 played out with an idea of the interest of</p> <p style="text-align: right;">Page 122</p>	<p>1 minority stockholders. The question is whether the 2 decision was influenced by the controlling 3 stockholders or whether it was an independent, 4 objective decision made by directors who were both 5 independent and disinterested. 6 Q. Other -- 7 A. It calls -- it calls into question a 8 review of the -- and an examination of their 9 reasoning for structuring a process why they did and 10 changing a process that at least some of them 11 believed was in place. 12 Q. Other than giving until -- 13 Mr. Cotter, Jr., until June 30th to improve his 14 performance, would there be any other benefit to 15 minority shareholders? 16 A. Well, the benefits would be the 17 confidence that the directors, who owe them a 18 fiduciary duty, were carrying out those duties with 19 the interest of the corporation and all of the 20 shareholders in mind and not just the interests of 21 the controlling stockholders and the feuding family. 22 Q. Anything else? 23 A. That's it. 24 Q. Okay. So to summarize, it would give 25 Mr. Cotter, Jr., until June 30th to improve his</p> <p style="text-align: right;">Page 124</p>
<p>1 the minority stockholders in the corporation 2 itself in mind as well as those of the 3 controllers. 4 Ending it earlier, before that had 5 completely played out, raises the specter of 6 the controlling stockholders who sought to 7 benefit if Mr. Cotter, Jr., were terminated 8 to be influencing the decision of the 9 fiduciaries. And, again, it's the lack of 10 focus on the minority stockholders that's 11 troubling throughout the entire process. 12 BY MR. SEARCY: 13 Q. With respect to the minority 14 stockholders, in your opinion how would continuing 15 Mr. Storey as ombudsman assist the minority 16 stockholders? 17 A. It would demonstrate that the 18 fiduciaries were letting the situation play out to 19 the very end to see if even those who did not 20 believe that Mr. Cotter, Jr., was doing the job of 21 CEO as they would have him do it, it would at least 22 give them the option to let it play out and see if 23 it -- if he was able to improve his performance. 24 And whether or not the CEO's 25 performance is favorable is clearly important to the</p> <p style="text-align: right;">Page 123</p>	<p>1 performance and it would potentially improve 2 confidence in the minority shareholders; correct? 3 MR. KRUM: Object to the 4 characterization of the testimony. 5 THE WITNESS: It could be the first. 6 I don't know the answer to that, the extent 7 to which another two weeks or so -- 8 BY MR. SEARCY: 9 Q. Right. 10 A. -- would have allowed him to improve 11 his performance to the satisfaction of an 12 independent disinterested fiduciary. But it's very 13 important that the fiduciaries demonstrate to the 14 minority stockholders, particularly in a controlled 15 situation, that they have all of the stockholders' 16 interests in mind and they're not being guided by a 17 bias or the controlling stockholders or concerned 18 that the controlling stockholders may remove them 19 from office at the next annual meeting if they don't 20 do -- if they don't act consistently with the 21 controlling stockholders' wishes. All minority 22 stockholders are concerned about that despite the 23 fact that they know they're buying into a controlled 24 company. 25 Q. And when you say controlling</p> <p style="text-align: right;">Page 125</p>

<p>1 stockholders may remove them from office at the next 2 annual meeting, are you referring to about officers 3 being removed? 4 A. No, no. I'm talking about not 5 reelecting the director. 6 Q. Okay. 7 A. That's an omnipresent concern under 8 Delaware law, that the directors aren't slavishly 9 following the controlling stockholders because 10 they're concerned about their director position. 11 Q. All right. With respect to 12 Mr. Cotter, Jr., he's actually still a director; 13 right? 14 A. Yeah. 15 Q. Okay. So he hasn't been removed from 16 that position, to your understanding; correct? 17 A. To my understanding, no. 18 Q. Okay. Are you aware of any minority 19 stockholder of RDI who was ever asked -- strike 20 that. 21 Are you aware of any minority 22 stockholder of RDI who is currently seeking to have 23 Mr. Cotter, Jr., reinstated as CEO? 24 A. I am not. 25 Q. Okay. And just to -- just to follow</p> <p style="text-align: right;">Page 126</p>	<p>1 that the process that cut it short raises 2 questions about whether those who cut the 3 process short, knowing that plan was already 4 in place and there may still have been hope 5 at least in the minds of two independent 6 directors that it could work, at least 7 should wait until June 30 to play out. It 8 was interrupted, and the concern of anyone 9 reviewing it would be why. 10 BY MR. SEARCY: 11 Q. So -- 12 A. And if the burden shifts, as my 13 opinion suggests it should, the defendant directors 14 should demonstrate that it was fair to cut it off 15 then. 16 Q. Hypothetically speaking, if the plan 17 had stayed in place until June 30th -- 18 A. Yeah. 19 Q. -- and I think I asked you this 20 before, but I'll ask it again for clarity's sake -- 21 would that plan -- even though there are directors 22 who dispute that that plan was in place, would that 23 plan have satisfied fiduciary duties? 24 A. Not alone, no. It would still be an 25 inquiry into the process. It would be one factor</p> <p style="text-align: right;">Page 128</p>
<p>1 up on this, other than Mr. Storey continuing his 2 ombudsman role until June 30th, is there any other 3 aspect of the plan that you believed satisfied 4 fiduciary duties? 5 MR. KRUM: Objection; vague and 6 ambiguous, don't know what it means, asked 7 and answered. 8 THE WITNESS: I am not sure what you 9 mean by am I aware of any other aspect of 10 the plan that satisfies -- 11 BY MR. SEARCY: 12 Q. Well, I think you -- 13 A. -- the fiduciary duties. 14 Q. You testified earlier that there was 15 a plan that was put in place and I think your 16 opinion was that that plan should have stayed in 17 place with re -- with respect to the termination of 18 Mr. Cotter, Jr., on June 30th. 19 MR. KRUM: I'm going to object to the 20 characterization of the testimony. Is that 21 a question you want him to respond? 22 MR. SEARCY: If he can. 23 THE WITNESS: Yeah. I'm not offering 24 an opinion that it should or should not have 25 stayed in place. I'm offering the opinion</p> <p style="text-align: right;">Page 127</p>	<p>1 removed that looked unfavorable at the time to the 2 directors who have been accused of breaching their 3 fiduciary duty by the Complaint. 4 Q. So in your opinion Mr. Cotter, Jr., 5 could have been fired on June 30th, after the 6 completion of the plan, and that still might be a 7 breach of fiduciary duties; is that right? 8 MR. KRUM: Objection; incomplete 9 hypothetical, asked and answered. 10 THE WITNESS: Depending on how the 11 facts developed at a hearing about the 12 context of the process and why people voted 13 the way they did and an exploration of their 14 objectivity by testing their independence 15 and their economic interest aligned with the 16 Cotter directors, it might have been. 17 BY MR. SEARCY: 18 Q. Let me ask you to turn to Page 29 of 19 your expert report. 20 A. Okay. 21 Q. And this portion of the expert report 22 concerns the CEO search and the decision to appoint 23 Ellen Cotter -- 24 A. Yes. 25 Q. -- as CEO; correct?</p> <p style="text-align: right;">Page 129</p>

<p>1 A. Yes. You're talking about Paragraph 2 C. on Page 29? 3 Q. That's right, Section C. 4 And I think you reiterated a point in 5 the first portion of that paragraph that you said 6 earlier, that there is no case -- or you're aware of 7 no case law that discusses the fiduciary duties and 8 standards applicable to the appointment of officers; 9 correct? 10 MR. KRUM: Objection. That misstates 11 the testimony, incomplete hypothetical. 12 THE WITNESS: That's what the report 13 says, yes, and that's what I think. 14 BY MR. SEARCY: 15 Q. You don't disagree with that 16 statement. 17 A. No. Well, I hope not. 18 Q. And in providing your opinion you 19 talk or you make mention of the CEO search 20 committee? 21 A. Yes. 22 Q. Are you aware of who the members of 23 the CEO search committee were? 24 A. I was. At this particular moment in 25 life I don't remember their names.</p> <p style="text-align: right;">Page 130</p>	<p>1 Gould. 2 Q. Yeah, there it is in the report, yes. 3 A. That just refreshed my recollection, 4 if I'm allowed to do that. 5 Q. You are. 6 And do you have any reason to believe 7 that either Mr. Gould or Mr. McEachern didn't carry 8 out their fiduciary duties in performing their 9 duties on the -- on the CEO search committee? 10 A. Well, I -- 11 MR. KRUM: Objection; foundation. 12 THE WITNESS: To be consistent with 13 what I testified to earlier, I'd start with 14 the proposition that I didn't see 15 information pleaded sufficient to raise a 16 question that there was a reasonable doubt 17 about their independence or their 18 disinterestedness. I make no judgment about 19 whether in fact someone breached their 20 fiduciary duty. 21 BY MR. SEARCY: 22 Q. Okay. And in your review of the 23 materials in this case did you see anything to 24 indicate that Mr. Gould or Mr. McEachern acted in an 25 interested way in conducting their services on the</p> <p style="text-align: right;">Page 132</p>
<p>1 Q. Okay. You're aware that Mr. Gould 2 was a member of the CEO search committee; correct? 3 A. I don't independently recall that 4 now. 5 Q. Okay. 6 A. But I don't dispute it. 7 Q. And you don't have any opinion on 8 Mr. Gould and whether he's an independent or 9 interested director? 10 A. I -- I didn't see facts alleged in 11 the Complaint that would give me reason to -- to 12 believe there was a reasonable doubt about his 13 independence or his disinterestedness. 14 Q. And do you recall that Mr. McEachern 15 was also a member of the CEO search committee? 16 A. As -- as I -- no, I don't recall. I 17 don't dispute it. 18 Q. Okay. And Ellen Cotter was on the 19 CEO search committee but recused herself. Do you 20 recall that? 21 A. I do recall that. 22 Q. Okay. And Margaret Cotter was also 23 on the committee. Do you recall that? 24 A. Yeah. I see that I had reported that 25 and cited to Footnote 211 was EC, MC, McEachern, and</p> <p style="text-align: right;">Page 131</p>	<p>1 CEO search committee? 2 MR. KRUM: Objection. 3 THE WITNESS: I'm not sure what you 4 mean by that. Interestedness is a term of 5 art for my culture. 6 BY MR. SEARCY: 7 Q. Okay. Let me see if I can ask it a 8 better way. 9 In terms of Mr. Gould's service on 10 the CEO search committee -- 11 A. Right. 12 Q. -- did you see anything that 13 indicated that he was acting in a way that was not 14 independent? 15 A. No. 16 MR. KRUM: Same objection. 17 BY MR. SEARCY: 18 Q. In respect to Mr. McEachern's service 19 on the CEO search committee, did you see anything 20 that indicated that he wasn't acting in an 21 independent fashion? 22 MR. KRUM: Same objection. 23 THE WITNESS: No. 24 BY MR. SEARCY: 25 Q. Okay. If you'll turn to Page 31 of</p> <p style="text-align: right;">Page 133</p>

<p>1 your expert report.  2 A. (Witness complies.)  3 Q. On the second paragraph, the -- the  4 last sentence, it's actually the first full  5 paragraph but second paragraph on the page, where it  6 starts out: "Moreover, a finder of fact" --  7 A. Yes.  8 Q. -- "could find that these actions  9 constituted intentional misconduct..."  10 A. Yes.  11 Q. Is that a reference to intentional  12 misconduct under Nevada law?  13 A. Yes.  14 Q. Okay.  15 A. It -- I -- I don't know with  16 certainty what the case law in Nevada has stated  17 about how one defines in context intentional  18 misconduct. I'm taking it at its dictionary  19 meaning, which to me, since it doesn't parrot  20 violation of the law, which is in the statute, that  21 it must mean someone intentionally breached their  22 duty of loyalty knowing, when they did so, they were  23 doing so.  24 Q. Well, let me unpack a couple items on  25 that. I think you testified previously that the</p> <p style="text-align: right;">Page 134</p>	<p>1 sought and obtained as a result of a breach of  2 fiduciary duty. It simply means the directors can't  3 be held personally liable for their breach of  4 fiduciary duty in monetary terms.  5 Q. I want to focus on the Nevada law  6 aspect --  7 A. Sure.  8 Q. -- here fro -- for our purposes,  9 because I think you said on Page 31, where you make  10 reference to intentional misconduct, you were -- you  11 were doing that with respect to Nevada law; correct?  12 A. I -- I had that phrase in mind. But  13 when I say with respect to Nevada law, in no way am  14 I suggesting that my interpretation of intentional  15 misconduct is my formulation of Nevada law.  16 It's -- I'm just taking two  17 dictionary words, putting them together, and  18 interpreting them consistent with my, I guess now,  19 46 years of practice and 25 years on the bench, they  20 must have some meaning and that's the meaning that I  21 give them.  22 Q. All right. Now, with respect to your  23 reference to the Nevada statute, I believe you said  24 when you prepared this sentence, were you referring  25 to it by memory, you didn't go --</p> <p style="text-align: right;">Page 136</p>
<p>1 exculpatory statute in Nevada is exculpatory also  2 with respect to alleged breaches of duties of  3 loyalty; correct?  4 A. Yes.  5 Q. Okay. In providing your opinion on  6 intentional misconduct on Page 31, just to be clear,  7 you didn't consult the Nevada statute?  8 A. I wouldn't -- well, I was aware of  9 the statute's reference to the exculpation for  10 breach of the duty of loyalty and two exceptions,  11 intentional misconduct and violation of the law. So  12 I was aware and consulted the statute to that  13 degree.  14 And what I represent here is while I  15 don't know if there is Nevada case law, taken out of  16 specific context, like there often is in Delaware,  17 where the term "intentional misconduct" is  18 interpreted, so I gave it the ordinary meaning that  19 I think a judge would give it, which is a knowing,  20 willful, dereliction of duty.  21 And I interpret it to be an  22 intentional breach of the duty of loyalty would be  23 an exception to exculpation, which, after all, at  24 least in Delaware, only means exculpation from money  25 damages; not from other remedies that could be</p> <p style="text-align: right;">Page 135</p>	<p>1 A. Yes.  2 Q. Okay. You didn't go and look it up,  3 you just remembered.  4 A. Yes. That's a fair comment. That's  5 correct.  6 Q. And in formulating this opinion about  7 intentional misconduct, is it also true that you  8 didn't consult with any Nevada case law?  9 A. I did not, no.  10 Q. Looking to the sentence above, is it  11 correct that the intentional misconduct that you're  12 opining about here concerns what you describe as  13 manipulation of the search for a new CEO?  14 A. Yes.  15 Q. And the -- first of all, is there any  16 other area in all of these expert reports where you  17 make reference to any intentional misconduct by  18 indi -- the individual defendants?  19 A. No.  20 MR. KRUM: Objection. These  21 documents speak for themselves.  22 BY MR. SEARCY:  23 Q. And you're not offering any opinion  24 on any other area of conduct as to whether that was  25 intentional misconduct by the individual defendants;</p> <p style="text-align: right;">Page 137</p>



<p>1 correct?</p> <p>2 A. Correct.</p> <p>3 Q. It's strictly limited to what we're</p> <p>4 looking at on Page 31.</p> <p>5 A. Correct.</p> <p>6 Q. Okay. Now, what you identify as</p> <p>7 potentially intentional misconduct is what exactly?</p> <p>8 A. Well, if this is viewed through the</p> <p>9 prism of entire fairness, then the defendants will</p> <p>10 have to establish that the process was fair.</p> <p>11 It's very difficult to reach a</p> <p>12 conclusion without trial about whether, once there</p> <p>13 is a process in place for hiring a CEO, to have it</p> <p>14 disrupted and suddenly the person that becomes the</p> <p>15 primary candidate is one of the controlling</p> <p>16 stockholders, without raising the concerns of at</p> <p>17 least the thoughtful judge in Delaware about why did</p> <p>18 the process play out the way it did in favor of a</p> <p>19 controlling stockholder when the board had taken</p> <p>20 pains to hire experts, to craft qualifications for</p> <p>21 the person they were seeking as the CEO, and then</p> <p>22 suddenly the process breaks down and the ideal</p> <p>23 candidate just happens to be one of the</p> <p>24 beneficiaries of a 70% trust or a trust holding 70%</p> <p>25 of the voting shares. I mean, that's just too</p> <p style="text-align: right;">Page 138</p>	<p>1 Delaware law?</p> <p>2 MR. KRUM: Objection; incomplete</p> <p>3 hypothetical.</p> <p>4 THE WITNESS: It would have raised</p> <p>5 the issue first, they would have had the</p> <p>6 authority to do that. So the question would</p> <p>7 be whether there were facts to establish</p> <p>8 that that was to the detriment of the</p> <p>9 corporation or the minority stockholders</p> <p>10 because it appeared to favor the controlling</p> <p>11 stockholder and whether or not the vote that</p> <p>12 was taken to make that happen was one that</p> <p>13 was carried by a majority of independent,</p> <p>14 disinterested directors.</p> <p>15 In the absence of a majority of</p> <p>16 independent, disinterested directors making</p> <p>17 that decision, it would have raised issues.</p> <p>18 BY MR. SEARCY:</p> <p>19 Q. Okay. If there was a -- let me ask</p> <p>20 you now -- and again it's a hypothetical -- if a</p> <p>21 majority of disinterested, independent directors</p> <p>22 voted to simply make Ellen Cotter CEO without</p> <p>23 undertaking any process, would that have raised any</p> <p>24 issue under Delaware law?</p> <p>25 MR. KRUM: Same objection.</p> <p style="text-align: right;">Page 140</p>
<p>1 extraordinary a coincidence not to be looked into.</p> <p>2 I don't know what the result should</p> <p>3 be and my opinion is not suggesting what the result</p> <p>4 should be. It all depends upon a test of the facts</p> <p>5 that are developed in context and looking and</p> <p>6 listening to witnesses who testify about their</p> <p>7 motivation and their actions to be able to judge</p> <p>8 their credibility. I'm in no position to do that.</p> <p>9 But it's an extraordinary set of</p> <p>10 circumstances that at least in my jurisdiction would</p> <p>11 be of concern to a judge sitting in equity</p> <p>12 understanding that the ultimate fiduciary is a</p> <p>13 member of the bench looking out after all of the</p> <p>14 interests, the shareholders, the controlling</p> <p>15 shareholders -- I should say the minority</p> <p>16 stockholders, the controlling stockholders, and the</p> <p>17 corporation itself.</p> <p>18 Q. Let me ask you this question</p> <p>19 hypothetically: At the time that the CEO search was</p> <p>20 conducted, you are aware that Ellen Cotter was the</p> <p>21 interim CEO; correct?</p> <p>22 A. Yes.</p> <p>23 Q. If the board of directors had simply</p> <p>24 appointed her as the CEO without undertaking any</p> <p>25 process, would that have raised any issue under</p> <p style="text-align: right;">Page 139</p>	<p>1 THE WITNESS: It would have raised</p> <p>2 the same issue I just articulated.</p> <p>3 BY MR. SEARCY:</p> <p>4 Q. What --</p> <p>5 A. There would have been a different</p> <p>6 context. There would have been no veil presented to</p> <p>7 the minority stockholders suggesting that there was</p> <p>8 a formal process. There wouldn't have been one in</p> <p>9 place that was disrupted. So it would have a</p> <p>10 bearing on what the outcome would be. But the issue</p> <p>11 would still be there.</p> <p>12 Q. Well, let me -- let me see if we can</p> <p>13 break this down a little bit, and maybe you can help</p> <p>14 me with this hypothetical.</p> <p>15 For purposes of appointing a CEO,</p> <p>16 Delaware law doesn't require any process; correct?</p> <p>17 A. That's correct.</p> <p>18 Q. Okay. And in this instance, if a</p> <p>19 majority of independent directors on the board</p> <p>20 simply appointed Ellen Cotter as CEO after she had</p> <p>21 been interim CEO without undertaking any process,</p> <p>22 that wouldn't raise any issues under Delaware law;</p> <p>23 correct?</p> <p>24 A. You qualified that by saying a</p> <p>25 majority of independent, disinterested directors;</p> <p style="text-align: right;">Page 141</p>

<p>1 right?</p> <p>2 Q. I did.</p> <p>3 A. Yes.</p> <p>4 Q. My statement was correct?</p> <p>5 A. Yeah, that would be correct.</p> <p>6 Q. Okay. And with respect to now taking</p> <p>7 it down to the CEO search committee, if a majority</p> <p>8 of independent and disinterested directors on the</p> <p>9 CEO search committee decided to recommend Ellen</p> <p>10 Cotter to the full board, that wouldn't raise any</p> <p>11 issues under Delaware law; correct?</p> <p>12 A. If it was a majority, it would not.</p> <p>13 Q. Okay. Now, let me just follow up</p> <p>14 with one more question. Under Delaware law, is</p> <p>15 there any provision in Delaware law that would</p> <p>16 require a CEO search committee to complete the use</p> <p>17 of an executive -- strike that. Let me see if I can</p> <p>18 ask this in a way that's actually in English.</p> <p>19 A. I know -- I know where you're going.</p> <p>20 Q. Okay.</p> <p>21 A. Don't worry about how you phrase it.</p> <p>22 I know where you're going.</p> <p>23 Q. Okay.</p> <p>24 MR. KRUM: Okay. Well, it may make a</p> <p>25 difference in how the testimony ultimately</p> <p style="text-align: right;">Page 142</p>	<p>1 BY MR. SEARCY:</p> <p>2 Q. On Page 31 of your expert report,</p> <p>3 towards the bottom there's a reference to the</p> <p>4 compensation committee --</p> <p>5 A. Yes.</p> <p>6 Q. -- that was asked to revise executive</p> <p>7 compensation.</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what steps the</p> <p>10 compensation committee took in undertaking their</p> <p>11 review?</p> <p>12 A. No.</p> <p>13 Q. Do you know if they looked at any</p> <p>14 compensation studies?</p> <p>15 A. There -- there are references in the</p> <p>16 depositions to old and new valuations based upon</p> <p>17 comparable businesses and there's a discussion about</p> <p>18 whether some older ones actually were comparable</p> <p>19 businesses and they -- they took another look at</p> <p>20 businesses' valuation process for -- for</p> <p>21 compensation that they believed were more closer in</p> <p>22 kind to Reading.</p> <p>23 Q. And did you -- did you look at any of</p> <p>24 the compensation studies that the comp committee</p> <p>25 looked at?</p> <p style="text-align: right;">Page 144</p>
<p>1 is used, however.</p> <p>2 MR. RHOW: Just tell us what's in</p> <p>3 your mind right now. Go for it.</p> <p>4 THE WITNESS: I'm just trying to be</p> <p>5 helpful; that's all.</p> <p>6 BY MR. SEARCY:</p> <p>7 Q. Yeah, I appreciate that.</p> <p>8 Now, your understanding is that there</p> <p>9 was a -- a recruiting firm, an executive recruiting</p> <p>10 firm, that was used here?</p> <p>11 A. Yeah; Korn Ferry, if I recall.</p> <p>12 Q. And Korn Ferry started a search</p> <p>13 process?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Under Delaware law is there</p> <p>16 anything that requires that a CEO search committee</p> <p>17 complete the usage of a recruiting firm for a search</p> <p>18 process?</p> <p>19 A. That would not --</p> <p>20 MR. KRUM: Objection; incomplete</p> <p>21 hypothetical.</p> <p>22 Go ahead.</p> <p>23 THE WITNESS: There is no stricture,</p> <p>24 no mandate, no case law that says that's</p> <p>25 required.</p> <p style="text-align: right;">Page 143</p>	<p>1 A. I didn't look at the studies, but I</p> <p>2 knew that there were studies that they considered.</p> <p>3 Q. But you don't have any opinion as to</p> <p>4 the validity or invalidity of any of the studies, do</p> <p>5 you?</p> <p>6 A. No.</p> <p>7 Q. Okay. And you don't have any reason</p> <p>8 to believe that the committee didn't review those</p> <p>9 studies; correct?</p> <p>10 A. I -- I've seen no facts that</p> <p>11 suggested that they did not. I've seen facts that</p> <p>12 suggested they probably did. But I don't know.</p> <p>13 MR. SEARCY: All right. Why don't we</p> <p>14 take a quick break? I'm going to be trying</p> <p>15 to wrap this up on my end.</p> <p>16 MR. KRUM: Okay.</p> <p>17 THE VIDEOGRAPHER: Off the record at</p> <p>18 2:48. This will end Disc No. 3.</p> <p>19 ---</p> <p>20 (Whereupon there was a recess in the</p> <p>21 proceedings.)</p> <p>22 ---</p> <p>23 THE VIDEOGRAPHER: Back on the record</p> <p>24 at 2:57, beginning of Disc No. 4.</p> <p>25 MR. SEARCY: All right. I have no</p> <p style="text-align: right;">Page 145</p>

<p>1 further questions at this time. I reserve  2 all rights in the event that there are any  3 issues with outstanding document requests,  4 but I have no further questions for now.  5 BY MR. RHOW:  6 Q. Your Honor, Justice Steele, nice to  7 meet you. My name is Ekwan Rhow. I represent Bill  8 Gould and only Bill Gould and so I have some  9 questions for you --  10 A. Sure.  11 Q. -- about your opinions.  12 First of all, in terms of your  13 background, clearly you are -- you've been a judge  14 for many years, but have you ever served on the  15 board of a company?  16 A. On the board of a regional hospital;  17 yes.  18 Q. Was that a publicly traded company?  19 A. It was not.  20 Q. All right. So in your career you've  21 never served on -- as a board member of a publicly  22 traded company; correct?  23 A. That -- that's correct; only non --  24 nonprofits.  25 Q. All right. The judge in this case,</p> <p style="text-align: right;">Page 146</p>	<p>1 question is: Did you read Mr. Gould's deposition?  2 A. Yes.  3 Q. And I want to be clear, I'm not  4 implying otherwise. Did you read it or did your  5 associate read it?  6 A. Both.  7 Q. All right. And you said in your  8 testimony with Mr. Searcy that in some parts of the  9 depositions you would skim it and other parts you  10 read more carefully.  11 A. Right.  12 Q. And what happened with -- with your  13 review of Mr. Gould's deposition?  14 A. I skimmed the entire deposition.  15 Q. Okay. So there were no parts of  16 Mr. Gould's deposition that you read carefully?  17 A. That's correct.  18 Q. And I take it the fact that you  19 skimmed through it meant that for purposes of your  20 opinions you didn't view his testimony to be  21 important.  22 A. Well, I think his testimony is  23 important. I think all of the directors' testimony  24 is important. I looked at the pleading.  25 Having looked at the pleading and</p> <p style="text-align: right;">Page 148</p>
<p>1 her name is Judge Elizabeth Gonzalez. Do you have  2 any connection with her?  3 A. Not of which I'm aware.  4 Q. Never worked on committees with her?  5 I'm not implying you have, by the  6 way. I'm really asking it open-ended.  7 A. And -- and you -- you cause me pause  8 because my activity over the last 25 years with so  9 many judicial organizations makes me wonder because  10 I have served on committees, particularly those  11 focused on the formulation of business courts in  12 various states, and it could well be that she may  13 have been with me or me with her on a committee at  14 some point discussing business courts.  15 Q. And that's fine. I'm not -- that's  16 not -- the question is: Do you recall --  17 A. I do not recall.  18 Q. -- or do you have any connections --  19 A. No.  20 Q. -- with Judge Gonzalez?  21 A. No, none of which I'm aware of.  22 Q. And that's all that you're required  23 to testify to.  24 Now, as I told you, I represent Bill  25 Gould, not the rest of the directors. And my first</p> <p style="text-align: right;">Page 147</p>	<p>1 then skimming his deposition, I reached the  2 conclusion that I could find insufficient facts to  3 suggest to me there was a reasonable doubt about his  4 independence or his disinterestedness. So his  5 deposition as a result became less important to me.  6 Q. But separate and apart from  7 disinterestedness or a lack of independence, were  8 you or are you offering any opinion as to whether  9 Mr. Gould might have breached a fiduciary duty?  10 A. I am not.  11 Q. All right. And so that -- that's  12 what I wanted to get to next.  13 In terms of your report -- and I  14 first thought it was an oversight, but now from your  15 testimony, I'm beginning to think it was  16 intentional -- on Page 2, if you look at 441, you  17 define "defendants" to be the various individuals  18 stated there, but it doesn't include Mr. Gould.  19 A. It does not.  20 Q. And that was on purpose.  21 A. Yes.  22 Q. All right. And then in terms of each  23 of the opinions that you provided in this report,  24 those opinions only apply to the defendants as you  25 defined them and they do not apply to Mr. Gould.</p> <p style="text-align: right;">Page 149</p>

<p>1 A. That's correct.  2 Q. All right. This could be shorter  3 than I thought.  4 A. I knew I was answering that question  5 correctly.  6 Q. I thought -- I honestly did think it  7 might have been an oversight, but I'm glad you  8 corrected that for me.  9 Now, hang on.  10 And to be clear, and this is what  11 I -- I think you did cover this with Mr. Searcy --  12 that based on your review of the Complaint, based on  13 the various depositions you reviewed, you saw no  14 evidence that supports the conclusion that, in fact,  15 Mr. Gould was not independent and was interested?  16 A. Yeah. And -- and let --  17 Q. Is that true?  18 A. Well, the way you phrased it causes  19 me difficulty in answering it because what I've  20 tried to do both in the report and here today is  21 develop the Delaware two-step analysis.  22 In the first step, if there are no  23 facts sufficiently pleaded to suggest a lack of  24 independence and interest -- in -- interestedness,  25 then you get -- don't go to the next inquiry and</p> <p style="text-align: right;">Page 150</p>	<p>1 you recall that testimony.  2 A. Yes.  3 Q. If a -- if a director believes that a  4 familial dispute is disrupting operations, is that a  5 valid basis on which that director votes on a  6 particular issue?  7 MR. KRUM: Objection; incomplete  8 hypothetical, depending upon what's there,  9 it's asked and answered.  10 THE WITNESS: I'm not sure I  11 understand the question, to be honest.  12 BY MR. RHOW:  13 Q. Assuming that a director believes  14 that a familial dispute is disrupting operations --  15 A. Right, okay.  16 Q. -- would that be something a board  17 member can consider in deciding how to vote on a  18 particular issue?  19 A. Yes.  20 Q. Do you believe that a familial  21 dispute -- strike that.  22 Do you believe that resolving a  23 familial dispute that is disrupting operations is  24 something that is in the interest of all  25 shareholders?</p> <p style="text-align: right;">Page 152</p>
<p>1 reach any decision about whether there was a breach  2 of fiduciary duty because they get the benefit of  3 the business judgment rule.  4 So there's no reason for me to carry  5 the analysis of Mr. Gould any farther than that. So  6 I reached no opinion about whether he breached his  7 fiduciary duty or not. I just say the pleadings  8 don't support the second step.  9 Q. Okay. And so -- and when you say  10 "the pleadings," what you did is you accepted each  11 of the pleadings -- I'm sorry -- you accepted the  12 allegations of the pleadings as true in forming your  13 opinion about Mr. Gould.  14 MR. KRUM: Well, objection;  15 mischaracterizes the testimony.  16 THE WITNESS: I -- I don't accept the  17 pleadings as true or false. It's  18 sufficiency to give rise to whether or not  19 there is a reasonable doubt about an  20 individual's independence or  21 disinterestedness. That's all I say.  22 BY MR. RHOW:  23 Q. Okay. All right. Now, one of the  24 things that was mentioned earlier was this concept  25 of preventing familial disputes. I don't know if</p> <p style="text-align: right;">Page 151</p>	<p>1 MR. KRUM: Same objection.  2 THE WITNESS: In context it could be.  3 Equally so it may not be.  4 BY MR. RHOW:  5 Q. It depends on the facts.  6 A. It depends on -- the fiduciary's  7 focus should always be on the corporation and all of  8 the stockholders; not finding a cure solely in  9 solving familial disputes within a controller block.  10 Q. There are situations, however, where  11 a majority's -- strike that.  12 There are situations where the  13 controlling shareholders' interests are not  14 different than the minority shareholders' interests.  15 A. There can be, sure.  16 Q. And so in this situation here are you  17 assuming that there was a conflict?  18 A. There is evidence to support a bias  19 toward concerns about the family over concerns about  20 the entire stockholder body.  21 Q. All right. Did you review the  22 deposition of an entity called T2?  23 A. No.  24 Q. Do you know who T2 is?  25 A. No.</p> <p style="text-align: right;">Page 153</p>

<p>1 Q. Do you know the identities of any of 2 the minority shareholders? 3 A. No, although you could argue that 4 Cotter, Jr., is a minority stockholder. 5 Q. And you did review Cotter, Jr.'s -- 6 A. Yeah. 7 Q. -- deposition. 8 A. Yeah. So with that qualification. 9 It depends on whether you want to define him as one 10 or not because we don't know what the result's going 11 to be of the trust dispute. 12 Q. Okay. 13 A. At least I don't think so as of the 14 time of my reading of the documents. 15 Q. Another question about the interest 16 that a board member is supposed to be looking after 17 or -- or the variables that a board member has to 18 consider. Is board unity a valid consideration for 19 a board member when voting? 20 MR. KRUM: Objection; vague. 21 THE WITNESS: If the -- if the 22 context suggests to the thoughtful board 23 member that board unity is in the best 24 interest of the corporation and all of the 25 stockholders, it certainly can be. It's not</p> <p style="text-align: right;">Page 154</p>	<p>1 doubt about -- I say "about" rather than "as to," as 2 most lawyers -- an individual director's 3 independence or disinterestedness. That's where 4 that phrase comes into play. 5 Q. And to -- what you just said, is that 6 something you consider at the pleading stage? 7 A. Yes. 8 Q. Subsequent to the pleading stage is 9 that same standard of proof used? 10 A. And then it -- then you go to the 11 materiality standard. By way of example, you 12 examine, okay, there was a reasonable doubt on the 13 facts as pleaded about whether an individual 14 director had an economic interest so aligned with 15 controllers that it would dominate his or her 16 decision-making process and -- and so burden them 17 that they couldn't be objective. 18 Now, then there's a materiality 19 standard. You look at, well, okay, there's an 20 economic association there, how -- actual -- how 21 material would that really be to the director in 22 order to determine whether or not there is 23 interestedness. 24 Do you follow me? 25 Q. I do to a certain extent. It seems</p> <p style="text-align: right;">Page 156</p>
<p>1 an invalid consideration ab initio. 2 BY MR. RHOW: 3 Q. All right. I'm jumping around 4 because I'm moving around in the outline here. 5 You had mentioned reasonable doubt a 6 couple times. 7 A. Who? 8 Q. You had mentioned reasonable doubt? 9 A. Yes. 10 Q. Now, was that -- is that on purpose? 11 A. I'm sorry; I thought -- I really 12 didn't think it was somebody's name. I just didn't 13 hear you clearly. God, what a name. 14 Q. In expressing some of your opinions, 15 you said if there's a reasonable doubt about X, Y, 16 and Z. 17 A. Yeah. 18 Q. Is that the standard you're using for 19 your opinions? 20 A. That's what the Delaware -- yes. To 21 the extent the Delaware case law says when one is 22 reviewing the pleadings to determine whether or not 23 there is sufficient evidence to move to a standard 24 of a review other than business judgment, it is 25 whether the facts as pleaded create a reasonable</p> <p style="text-align: right;">Page 155</p>	<p>1 to me -- and maybe I'm -- you're the expert for sure 2 on Delaware law over me. But what I'm asking is 3 really what's the evidentiary standard, because it 4 seems like on a -- on a pleading attack you're 5 applying a reasonable doubt standard. On motions 6 subsequent to a pleading attack -- 7 A. Okay. 8 Q. -- what is the evidentiary standard? 9 A. Well, if -- if you've shifted the 10 burden to entire fairness, then it's preponderance 11 of the evidence that it's entirely fair or it's not. 12 Q. And so here you chose a reasonable 13 doubt standard because you were analyzing the 14 pleadings. 15 A. Because that's the first step that 16 the Delaware case law teaches you when you're 17 determining whether there should be a burden shift 18 or not. 19 Then when there's a determination 20 made about whether the defendants have carried their 21 burden, that takes place at trial where credibility 22 can be brought -- be brought into play, because 23 credibility can't be obviously brought into play 24 in pl -- in motion practice. 25 Q. Okay. In a situation where there</p> <p style="text-align: right;">Page 157</p>

<p>1 is -- in a situation where there is, in fact -- I'm  2 going back now -- in a situation where there is a  3 conflict between the interests of the majority  4 shareholder and the minority shareholder, what  5 should the board director do?  6 MR. KRUM: Incomplete hypothetical.  7 THE WITNESS: Let me try to -- that's  8 a kind of shift in analysis that I'm not  9 sure is in play here. A director owes  10 fiduciary duties to the entire stockholder  11 block and to the corporation itself.  12 The -- the test is whether that  13 director is capable of objectively  14 exercising that process. That director is  15 perfectly free to vote his or her conscience  16 so long as they're independent and  17 disinterested as they see the facts, whether  18 it favors the controller or whether it  19 favors the minority.  20 The importance is that the process  21 for reaching that decision be fair and that  22 the result be fair, and that's tested after  23 the burden shift, if there is one.  24 So I -- every director will face  25 decision-making processes at sometime during</p> <p style="text-align: right;">Page 158</p>	<p>1 BY MR. RHOW:  2 Q. Right. And --  3 A. I know that's a long answer, but I  4 couldn't give a shorter one and really fully, I  5 think, respond to your question.  6 Q. Because there's a lot of different  7 variables that might exist in that situation.  8 A. Yeah. It's all about context. It  9 always is.  10 Q. I take it that it would be reasonable  11 for two directors to disagree as to how much  12 discussion might be necessary on a particular issue.  13 A. Oh, I agree with that.  14 Q. Two directors might disagree as to  15 the proper process that should be followed leading  16 up to a final decision.  17 A. They could. Even two independent,  18 objective directors could disagree on that.  19 Q. And there's nothing wrong --  20 A. But that's the question.  21 Q. Whether --  22 A. Whether they're independent and  23 disinterested.  24 Q. The mere fact that people have voted  25 a certain way certainly is not dispositive on this</p> <p style="text-align: right;">Page 160</p>
<p>1 his or her directorship where if you're a  2 director for a controlled corporation, they  3 might have to vote against the interest of  4 the controller -- controlling stockholder  5 block or against the minority stockholders.  6 But, look, the test is are they doing  7 it in good conscience, in good faith, are  8 they doing it objectively because they can  9 act objectively.  10 They -- the court will not substitute  11 its judgment for an independent,  12 disinterested director who votes after a  13 process where there's facts that satisfy  14 gathering all the information reasonably  15 necessary that one would want before making  16 the decision that are material to that  17 decision and then minutes that reflect  18 contemplative time consistent with the  19 complexity of the problem and then a robust  20 discussion in the board room with other  21 directors who participate in the decision,  22 whether it's a majority consisting solely of  23 independent and disinterested directors or a  24 full board.  25</p> <p style="text-align: right;">Page 159</p>	<p>1 issue of breach of fiduciary duty.  2 A. Correct.  3 MR. KRUM: Objection; incomplete  4 hypothetical.  5 BY MR. RHOW:  6 Q. For example, on the CEO search  7 process -- we've talked about this a little bit --  8 A. Right.  9 Q. -- you agree that at least on that  10 committee there were two independent, noninterested  11 directors; right?  12 A. That's my recollection, yes.  13 Q. And to be clear, the business  14 judgment rule would then apply to that committee's  15 work?  16 MR. KRUM: Objection; incomplete  17 hypothetical.  18 THE WITNESS: Well, there's not a  19 majority of independent, disinterested  20 directors voting.  21 BY MR. RHOW:  22 Q. If both vote a certain way, there is  23 a majority.  24 A. If it can be carried by only two  25 votes; yeah, that's right.</p> <p style="text-align: right;">Page 161</p>

<p>1 Q. And so that the work of those</p> <p>2 direct -- two directors, assuming they vote the same</p> <p>3 way, is protected by the business judgment rule.</p> <p>4 A. It would be.</p> <p>5 MR. KRUM: Same objection.</p> <p>6 BY MR. RHOW:</p> <p>7 Q. It would be.</p> <p>8 A. Yeah. Yes. Sorry.</p> <p>9 Q. And so in that situation I just</p> <p>10 posited where you have two independent directors,</p> <p>11 both deciding that it's time to present a candidate,</p> <p>12 that would be perfectly fine.</p> <p>13 MR. KRUM: Same objection.</p> <p>14 THE WITNESS: Well, if they're --</p> <p>15 yes, if they're independent and</p> <p>16 disinterested.</p> <p>17 BY MR. RHOW:</p> <p>18 Q. Which, as far as you know, Doug</p> <p>19 McEachern and Bill Gould were.</p> <p>20 A. That's correct.</p> <p>21 Q. This is a small point. Page 6 of</p> <p>22 your report -- and we're back on 441 -- I'm looking</p> <p>23 at the first sentence of the last paragraph. And,</p> <p>24 again, I apologize for jumping around. I'm really</p> <p>25 trying to shorten things.</p> <p style="text-align: right;">Page 162</p>	<p>1 A. Well, I don't know the answer to that</p> <p>2 factually.</p> <p>3 Q. Fair enough.</p> <p>4 The ombudsman process that was set</p> <p>5 up, that's something that you agree could have been</p> <p>6 good for the company.</p> <p>7 A. I agree it could have been.</p> <p>8 Q. And why is that?</p> <p>9 A. Because there was difficulty that was</p> <p>10 perceived and there was rational action taken to</p> <p>11 deal with it.</p> <p>12 Q. The difficulty being the familial</p> <p>13 dispute.</p> <p>14 A. That's correct.</p> <p>15 Q. And resolving that dispute would be</p> <p>16 something that could be in the best interest of the</p> <p>17 company.</p> <p>18 MR. KRUM: Objection; incomplete</p> <p>19 hypothetical.</p> <p>20 THE WITNESS: Yeah. I'm not sure</p> <p>21 what resolving the dispute -- I think it</p> <p>22 would have a lot to do with how the dispute</p> <p>23 was resolved. But it could be good for the</p> <p>24 company, yeah. It certainly wasn't a breach</p> <p>25 of fiduciary duty to attempt to resolve it.</p> <p style="text-align: right;">Page 164</p>
<p>1 A. No. That's all right. At least</p> <p>2 you're jumping around in my report. I ought to be</p> <p>3 able to find it.</p> <p>4 Q. And what it reads, for the record, is</p> <p>5 it says: "In September 2014, a committee,</p> <p>6 comprising of McEachern, Storey, and the Cotters,</p> <p>7 was formed in order to resolve issues between the</p> <p>8 Cotters."</p> <p>9 You don't believe that the formation</p> <p>10 of the committee --</p> <p>11 MR. KRUM: Mark Ferrario?</p> <p>12 MR. FERRARIO: Yeah.</p> <p>13 MR. KRUM: You're making noise coming</p> <p>14 through the phone.</p> <p>15 MR. FERRARIO: Sorry, guys.</p> <p>16 BY MR. RHOW:</p> <p>17 Q. Your Honor, so you don't have any</p> <p>18 issue with the fact that the committee, this</p> <p>19 committee, was formed specifically to resolve issues</p> <p>20 between the Cotters.</p> <p>21 A. No.</p> <p>22 Q. That's something that was good for</p> <p>23 the company.</p> <p>24 A. It could have been.</p> <p>25 Q. Do you believe it was?</p> <p style="text-align: right;">Page 163</p>	<p>1 BY MR. RHOW:</p> <p>2 Q. I think you had said earlier -- and I</p> <p>3 have the term "extraordinary" in my notes -- that</p> <p>4 you thought it was perhaps extraordinary that the</p> <p>5 CEO search process started but then changed. I</p> <p>6 don't want to put words in your mouth. Do you</p> <p>7 recall that testimony?</p> <p>8 A. Yeah. The extraordinary nature of it</p> <p>9 was that it suddenly resulted in a controlling</p> <p>10 stockholder being the CEO.</p> <p>11 Q. What is your foundation for saying</p> <p>12 that's an extraordinary situation?</p> <p>13 A. My -- just my own experience in</p> <p>14 looking at cases, that if -- if you are the judge</p> <p>15 who is sitting there trying to determine whether or</p> <p>16 not a controller has directors in this case under</p> <p>17 her thumb doing her bidding resulting from a process</p> <p>18 that does not appear facially to be one that has</p> <p>19 been put together in the best interest of the</p> <p>20 corporation and all of the stockholders, yet you</p> <p>21 have a process in mind that could get an independent</p> <p>22 CEO, you end up with a controlling stockholder?</p> <p>23 That will always raise the hackles</p> <p>24 and suspicions of a Delaware judge about whether or</p> <p>25 not this was an independent, objective,</p> <p style="text-align: right;">Page 165</p>

<p>1 disinterested decision-making process that was fair 2 to the corporation and all of the stockholders. 3 Q. And, again, I'm not trying to cut too 4 fine a line, but in the cases you're talking about, 5 were those CEO search committee situations? 6 A. Well, it -- no. 7 Q. And I'm not saying -- I'm not 8 implying that's necessarily dispositive. I'm 9 just -- I'm really asking -- 10 A. No. 11 Q. -- foundationally, were any of those 12 a situation where a CEO search committee was set up? 13 A. No. 14 Q. All right. Were any of those 15 situations where -- that -- that involved a family 16 member of a controlling group attempting to become 17 the CEO? 18 A. If you -- if you want to count Lord 19 Black and The Jerusalem Post and The Sun Times, that 20 was certainly the leader of a family who was trying 21 to exert his will over the other stockholders and it 22 was -- his actions were voided. 23 Q. This is a case that was before you? 24 A. On appeal, yeah; not on trial. 25 Q. Do you recall if any of that or --</p> <p style="text-align: right;">Page 166</p>	<p>1 other two characteristics, those two are not 2 disqualifying for a CEO. 3 MR. KRUM: Same objections. 4 THE WITNESS: They're not 5 disqualifying, but the last one certainly 6 raises issues. How -- how do you measure in 7 terms of the abilities of the CEO to lead 8 those qualities when one of the factors is 9 major shareholdings in the company and 10 you've got comments in depositions and 11 you've got expert reports that talk in terms 12 of, well, they're the controller after all, 13 at the end of the day they're going to make 14 the decision. 15 That's what makes a Del -- would make 16 a Delaware judge look twice at the 17 situation. Having major shareholdings in 18 the company doesn't speak to your ability to 19 lead the company. 20 BY MR. RHOW: 21 Q. But -- 22 A. It speaks to your interest in 23 success, the company's success. 24 Q. And it doesn't disqualify you from -- 25 A. That's corr -- you're absolutely</p> <p style="text-align: right;">Page 168</p>
<p>1 that -- did that situation involve an interim CEO 2 trying to become CEO? 3 A. No. 4 Q. All right. On Page 15 of, I'm back 5 to your report, 441, and I'm looking at the last 6 sentence of the first paragraph, and for the record 7 it says: "The reasons the CEO Search Committee 8 chose EC" -- Ellen Cotter -- "as CEO included the 9 fact that she was well known to the Board, provided 10 continuity, and had major shareholdings in the 11 Company." Do you see that? 12 A. Yes. 13 Q. The fact that she was well known, is 14 that an invalid criteria for a CEO? 15 MR. KRUM: Objection; vague, 16 incomplete hypothetical. 17 THE WITNESS: No. As I -- as I 18 stated earlier, there are no check-the-box 19 guidelines from Delaware courts about what 20 are valid and invalid considerations. In 21 context the court will look with hindsight 22 on whether the process and the ultimate 23 result were fairly determined. 24 BY MR. RHOW: 25 Q. All right. And so I take it for the</p> <p style="text-align: right;">Page 167</p>	<p>1 right about that. Again, it's all -- everything 2 taken together in context. 3 Q. And you would agree that for a board 4 of director considering these variables, each board 5 member is allowed to weigh those variables 6 differently. 7 A. That's correct. 8 MR. RHOW: Actually, now I need five 9 minutes because I might be done as well. 10 MR. KRUM: Okay. 11 THE VIDEOGRAPHER: Off the record at 12 3:23. 13 --- 14 (Whereupon there was a recess in the 15 proceedings.) 16 --- 17 THE VIDEOGRAPHER: Back on the record 18 at 3:28. 19 BY MR. RHOW: 20 Q. Just some -- some final closeout 21 questions. 22 So between the testimony you've given 23 today, the expert reports you've submitted in this 24 case, does that constitute all the opinions that you 25 intend to give in this case?</p> <p style="text-align: right;">Page 169</p>



<p>1 A. To my knowledge, yes.  2 Q. Okay.  3 A. I haven't been asked to do anything  4 more.  5 Q. And are you planning on doing any  6 additional work?  7 A. I have no plans to do any additional  8 work.  9 Q. And you haven't been asked to do any  10 additional work.  11 A. I have not.  12 Q. Do you have a sense of the total  13 amount that you've invoiced for the work you've  14 done?  15 A. I -- I'd hate to say and be wrong.  16 I'd say in the neighborhood of \$25,000 including the  17 associate, less than 50 for sure.  18 Q. Okay.  19 A. But I'm not -- I'm not positive. As  20 ignorant as it sounds, I don't pay any attention to  21 the billing process.  22 Q. That's good. That is a luxury to  23 have, for sure.  24 MR. RHOW: That's all I have. I  25 don't know if --</p> <p style="text-align: right;">Page 170</p>	<p>1 associates come and they go. Do you remember that?  2 A. Yes.  3 Q. And despite your best efforts in the  4 interview process, sometimes you get an associate in  5 and they just don't work out; right?  6 A. That's certainly correct.  7 Q. Sometimes you -- you get someone in  8 that is a marginal player, they get in there and you  9 find out when they're in the trenches, they're  10 actually very good; right?  11 A. That's correct.  12 Q. And probably the best way to evaluate  13 someone's ability to handle a position is to see how  14 they perform. Would you agree with me on that?  15 MR. KRUM: Objection; incomplete  16 hypothetical.  17 THE WITNESS: It's certainly an  18 important consideration. I'm not sure I  19 could go along with it's the best way. But  20 it's certainly a very important one.  21 BY MR. FERRARIO:  22 Q. Why don't you tell me any other thing  23 you think would be better in terms of evaluating how  24 somebody could perform in a particular position than  25 seeing how they actually do the job?</p> <p style="text-align: right;">Page 172</p>
<p>1 MR. SEARCY: Mark Ferrario?  2 MR. FERRARIO: I just have a couple  3 questions.  4 BY MR. FERRARIO:  5 Q. I just want to go to something that  6 Ekwan touched on and it had to -- it related to the  7 selection of Ellen as the CEO. As you were speaking  8 in response to his questions, you mentioned  9 something about evaluating the ability of a person  10 to lead. Do you recall that testimony?  11 A. I'm not sure specifically what you're  12 talking about, but generally yes.  13 Q. Do you recall -- if you're on a board  14 of directors -- and I know you haven't been on a  15 board other than this hospital board -- if you're on  16 a board of directors, probably the most important  17 decision you're going to make is hiring the CEO;  18 correct?  19 A. There is certainly literature to  20 support that, yes.  21 Q. Okay. And -- and actually this  22 dovetails into something you said at the beginning  23 of your testimony that -- when you mentioned you  24 didn't -- you didn't know the name or you couldn't  25 recall the name of your associate, you said</p> <p style="text-align: right;">Page 171</p>	<p>1 MR. KRUM: Same objections.  2 THE WITNESS: Well, what's missing,  3 Mark, from your question is a time frame.  4 BY MR. FERRARIO:  5 Q. Let's say --  6 A. Wait. Let me finish, please.  7 Q. Okay.  8 A. And it depends on how long they're  9 performing in a job. As -- as Mr. Kane's own  10 deposition suggests, there was a time when he  11 thought Cotter, Jr., was doing a good job. Then  12 there became a time when he no longer thought so.  13 So, yes, I agree with you that if you  14 have a long period of time to observe someone who's  15 trained and who has experience and see performance,  16 that performance is a very important measure of a  17 CEO's ability and retention considerations. I don't  18 disagree with that at all.  19 Q. And I wasn't even speaking to -- to  20 Jim, Jr. I'm speaking to the board's decision to  21 hire Ellen as the CEO. How long did they have to  22 evaluate her performance in that position?  23 MR. KRUM: Same objection, incomplete  24 hypothetical.  25 THE WITNESS: I don't have a specific</p> <p style="text-align: right;">Page 173</p>

<p>1 recollection, but it wasn't long.  2 BY MR. FERRARIO:  3 Q. Well, when you say "wasn't long,"  4 what do you mean?  5 A. She wasn't CEO long.  6 Q. How -- how long was she in that  7 position before they hired her?  8 A. My recollection is not clear, but it  9 was a year or less.  10 Q. Okay. You don't think that's long  11 enough to evaluate somebody's ability to perform in  12 a position?  13 MR. KRUM: Same objection.  14 THE WITNESS: It wouldn't have  15 sufficed for the president and CEO of the  16 hospital I served.  17 BY MR. FERRARIO:  18 Q. It wouldn't have?  19 A. No, it would not have.  20 Q. Okay. And why is that?  21 A. Because it wasn't -- there's so many  22 variables and emergencies and crises that can occur,  23 you need to be able to observe somebody over a  24 substantial period of time to gauge their reactions,  25 their preparation. A strategic plan is important</p> <p style="text-align: right;">Page 174</p>	<p>1 A. Yes.  2 Q. Okay. And then the board, after  3 reviewing her performance and looking at candidates  4 who had never worked for the company, chose to go  5 with someone who they had seen in action, and you  6 think that decision was improper?  7 A. I didn't reach that conclusion. I  8 reached the conclusion that it would be examined for  9 the fairness of the process and the fairness of the  10 result and that in order to determine the motivation  11 for people who confirmed her position as CEO, one  12 would have to listen to them testify about their  13 decision-making process and their reasons for voting  14 the way they did; and that the fact that she was one  15 of the controlling stockholders and the fact that  16 there was at least one director there who was  17 concerned about the family would raise questions in  18 the mind of a judge, all of which can be resolved,  19 but only after hearing the testimony.  20 I don't -- I reached no conclusion  21 about whether it was the correct decision or not or  22 whether it was a breach of fiduciary duty. I only  23 say it raises the issues that need to be resolved by  24 the trier of fact. That's all.  25 Q. Okay. And -- and you didn't go --</p> <p style="text-align: right;">Page 176</p>
<p>1 more than just for one year. Whether it's been  2 fulfilled, setting the criteria for performance  3 evaluation. All of that's important and has to be  4 observed over a period of time, unless they've done  5 something demonstrably egregious that would cause  6 you to want to terminate them earlier.  7 But it's very difficult to say this  8 is the CEO, this is the chairman of the board, this  9 is the president, the chief executive officer,  10 however you want to characterize it, over a period  11 of time of a year or so.  12 Q. Do you know how long Ellen had been  13 with the company?  14 A. I know it had been many years.  15 Q. Okay.  16 A. In a -- in a much reduced form of  17 role.  18 Q. But when you say "much reduced," why  19 don't you tell mean how much reduced?  20 A. Well, she wasn't the chief of all of  21 the operations in effect as CEO. She had her own  22 slice of the business that she was responsible for  23 handling.  24 Q. Okay. And then she ran the company  25 as interim CEO; right?</p> <p style="text-align: right;">Page 175</p>	<p>1 you didn't do a deep dive through the depositions to  2 see what, you know, the directors were considering  3 when they decided to hire Ellen.  4 A. I did not.  5 Q. Okay. And -- and I don't want you to  6 take this question the wrong way. Okay? But I  7 really don't know how else to ask it.  8 You have basically given us a report  9 that from my perspective appears to be a memo on  10 Delaware law as it may apply to the, as you said,  11 unique facts of this case. That's essentially what  12 you've done; correct?  13 MR. KRUM: Well, objection;  14 mischaracterizes the day of testimony.  15 THE WITNESS: You can characterize it  16 any way you want to. I'm not going to  17 respond to that question.  18 BY MR. FERRARIO:  19 Q. Do you disagree --  20 A. That's a pejorative question.  21 Q. What?  22 A. That's a pejorative question.  23 Q. Well, it isn't, because I'm trying to  24 figure out, I've looked at probably hundreds of  25 expert reports during the course of my career and I</p> <p style="text-align: right;">Page 177</p>

<p>1 looked at your report and I listened to you today  2 and you said you are opining on Delaware law to the  3 extent it might apply here in the case we have in  4 Nevada; correct?  5 MR. KRUM: Objection;  6 mischaracterizes the testimony.  7 THE WITNESS: It is correct that I  8 have tried to describe an analytical  9 framework that would be used in Delaware  10 with the hope that it might be helpful to  11 the Nevada judge. It may or may not be.  12 BY MR. FERRARIO:  13 Q. Okay. And --  14 A. I wasn't asked to offer an opinion as  15 a corporate government expert on what is the  16 appropriate way to hire or terminate a CEO. That  17 wasn't what I was asked to do.  18 Q. Okay. That's what we can get at. So  19 your goal here would be to assist the Nevada judge  20 were she to decide that Delaware law might apply.  21 MR. KRUM: No. Objection; misstates  22 the day of testimony. Was your phone not  23 working earlier, Mark?  24 MR. FERRARIO: No. I just -- I think  25 I just paraphrased pretty accurately what he</p> <p style="text-align: right;">Page 178</p>	<p>1 say about it.  2 Q. Your target audience is the judge and  3 in the event she wants to use or thinks Delaware law  4 would apply, you're trying to assist her at least  5 with one person's view on how this case may play out  6 under Delaware law.  7 MR. KRUM: Objection.  8 BY MR. FERRARIO:  9 Q. Isn't that accurate?  10 MR. KRUM: No. That mischaracterizes  11 the testimony.  12 So if you want to -- if you want to  13 repeat your prior testimony or if you want  14 to refer to it or however else you see fit  15 to answer.  16 MR. FERRARIO: I think -- I think I  17 quoted him pretty accurately. The target  18 audience for his report was the judge.  19 BY MR. FERRARIO:  20 Q. Correct, Judge Steele?  21 A. I think you can look at my answer to  22 the previous questions and get it without me trying  23 to restate it for a third or fourth time.  24 Q. Well, that's a straightforward  25 question. Is your target audience of your report</p> <p style="text-align: right;">Page 180</p>
<p>1 said. I may not have. He can tell me if  2 I'm wrong.  3 THE WITNESS: Well, I -- I -- I think  4 you're off. I can either read back or try  5 to have -- or ask to have read back -- I  6 can't have it --  7 BY MR. FERRARIO:  8 Q. Well --  9 A. -- read back anymore. But what I  10 tried to describe was to offer an example of how a  11 Delaware court would approach it and the analytical  12 framework that the Delaware judge would use in the  13 event that might be helpful to the Nevada judge.  14 I'm not opining that Delaware law  15 applies or that the Nevada judge should find that  16 Delaware law applies. I'm simply trying to be  17 helpful because I understand that from time to time  18 Nevada, as many other jurisdictions, at least read  19 Delaware cases, understand Delaware law, and will  20 decide whether it's helpful in resolving their  21 dispute. That's all I'm trying to do.  22 Q. Right. I think that's what I just  23 said.  24 A. Well, then why are we arguing about  25 it? That's what I said, and I have nothing more to</p> <p style="text-align: right;">Page 179</p>	<p>1 Judge Gonzalez?  2 A. Yes.  3 Q. Okay. And it's to assist her in the  4 event that she determines Delaware law should apply;  5 correct?  6 MR. KRUM: No. That's not what he  7 said and you know it's not what he said.  8 If you have anything to add to your  9 prior answers, please do. And if you don't,  10 just say so.  11 MR. FERRARIO: I believe that's what  12 he said. If he disagrees, he can tell me  13 that's not true.  14 THE WITNESS: I have answered that  15 question several times.  16 MR. KRUM: Okay. Next question if  17 you have any.  18 MR. FERRARIO: I -- I don't think he  19 answered it, but I'm not sure it's worth  20 pursuing.  21 BY MR. FERRARIO:  22 Q. Justice Steele, and, again, you  23 mentioned that you had looked at some Nevada  24 statutes. Did you look at 78.140?  25 A. I don't connect the number to any</p> <p style="text-align: right;">Page 181</p>

1 particular statute; I'm sorry.  
2 Q. Okay. Then that's fair. It's the  
3 statute that deals with Restrictions on Transactions  
4 Involving Interested Directors or Officers.  
5 A. No, I didn't.  
6 MR. KRUM: I object to the  
7 characterization. That's inaccurate.  
8 MR. FERRARIO: I'm reading from the  
9 title, Mark.  
10 MR. KRUM: Yeah. But it's still  
11 inaccurate. It's the Nevada -- it's the  
12 Nevada carveout from the common law rule.  
13 So you can read the title, but if you read  
14 the rule and put it in context -- go ahead,  
15 next question. I spoke too much. Next  
16 question.  
17 MR. FERRARIO: Okay.  
18 BY MR. FERRARIO:  
19 Q. I just want to make it clear, you  
20 didn't look at that section; correct, Justice  
21 Steele?  
22 A. I don't know what section you're  
23 talking about so I can't answer your question.  
24 Q. It was 78.140 titled "Restrictions on  
25 Transactions Involving Interested Directors or

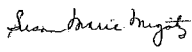
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1 Officers; Compensation of Directors."  
2 A. I -- I did not.  
3 Q. Okay. Thank you.  
4 Okay. Let me see here.  
5 No. I think that's it. Thank you  
6 very much.  
7 THE VIDEOGRAPHER: Any other  
8 questions? Concludes?  
9 The time now is 3:41. This concludes  
10 the deposition, end of Disc 4 of 4.  
11 ---  
12 (Witness excused.)  
13 ---  
14 (Whereupon the videotaped deposition  
15 adjourned at 3:41 p.m.)  
16 ---  
17  
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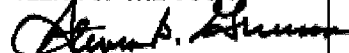
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1 I declare under penalty of perjury  
2 under the laws that the foregoing is  
3 true and correct.  
4  
5 Executed on \_\_\_\_\_, 20\_\_\_\_,  
6 at \_\_\_\_\_, \_\_\_\_\_.  
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12 MYRON STEELE  
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1 C E R T I F I C A T E  
2  
3 I do hereby certify that I am a Notary  
4 Public in good standing; that the aforesaid  
5 testimony was taken before me, pursuant to notice,  
6 at the time and place indicated; that said deponent  
7 was by me duly sworn to tell the truth, the whole  
8 truth, and nothing but the truth; that the testimony  
9 of said deponent was correctly recorded in machine  
10 shorthand by me and thereafter transcribed under my  
11 supervision with computer-aided transcription; that  
12 the deposition is a true and correct record of the  
13 testimony given by the witness; and that I am  
14 neither of counsel nor kin to any party in said  
15 action, nor interested in the outcome thereof.  
16  
17 WITNESS my hand and official seal this 2nd  
18 day of November, 2016.  
19  
20  
21   
22 \_\_\_\_\_  
23 Susan Marie Migatz  
24 Notary Public  
25

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**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

JAMES J. COTTER, JR.,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

**OPPOSITION TO PLAINTIFF'S  
MOTION FOR RECONSIDERATION  
OF RULING ON GOULD'S MOTION  
FOR SUMMARY JUDGMENT**

Date: December 28, 2017

Time: 9:00 A.M.

Ctrm.: 10A

Assigned to Hon. Elizabeth Gonzalez,  
Dept. XI

Trial Date: January 2, 2018

1  
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 There is nothing new about William Gould in Plaintiff's Motion for  
5 Reconsideration. Plaintiff has already made all of the same arguments attacking  
6 Mr. Gould's entitlement to the business judgment rule in four supplemental  
7 oppositions filed on December 1, 2017, and he made those same arguments again at  
8 the December 11, 2017 hearing. Plaintiff still does not—and cannot—demonstrate  
9 that Mr. Gould lacked independence or disinterestedness. Mr. Gould did not have  
10 a direct financial or close personal relationship with any of the Cotter siblings or  
11 personally benefit from any of the challenged decisions and Plaintiff does not claim  
12 otherwise. As a result, the Court properly concluded that Mr. Gould was entitled to  
13 the protection of the business judgment rule and granted summary judgment in his  
14 favor. Plaintiff's Motion for Reconsideration should be denied.

15 **II. ARGUMENT**

16 **A. Plaintiff was afforded an adequate opportunity to be heard on**  
17 **Mr. Gould's Motion for Summary Judgment, and he makes no new**  
18 **arguments in his Motion for Reconsideration.**

19 Plaintiff's argument that he did not have an adequate opportunity to defend  
20 himself because Mr. Gould's motion for summary judgment was set for January 8,  
21 2018, and "not fully briefed" rings hollow.<sup>1</sup> Plaintiff first filed an opposition brief  
22 to Mr. Gould's summary judgement motion in October 2016. He then filed another  
23 *four supplemental briefs* opposing Mr. Gould's motion for summary judgment on  
24 December 1, 2017. The four supplemental briefs included a brief addressing the

25  
26 <sup>1</sup> Plaintiff raised this argument during the December 11, 2017 hearing and the  
27 Court properly rejected it then. Ex. A (12.11.17 Hrg. Tr.) at p. 56-57. Plaintiff  
28 concedes that Mr. Gould properly moved for summary judgment as to all claims  
against him. Mot. for Reconsideration at 4.

1 specific grounds on which summary judgment was granted—Mr. Gould’s  
2 independence and disinterestedness and entitlement to the business judgment rule.  
3 See Suppl. Opp. to MSAs 1 & 2 and Gould’s Motion for Summary Judgment at 5-7,  
4 9-10. In that brief (and the other supplemental oppositions), Plaintiff made the *very*  
5 *same arguments* regarding Mr. Gould’s independence that he does in the Motion for  
6 Reconsideration—that Mr. Gould’s actions or lack of action in his capacity as  
7 a board member was sufficient to demonstrate a lack of independence. *Id.*<sup>2</sup> In fact,  
8 Plaintiff expressly concedes that he already made all of the arguments about Gould  
9 that appear in his motion for reconsideration, when he states “[r]ather than attempt  
10 to recite the record evidence contained in Plaintiff’s oppositions to the various  
11 motions addressing matters to which Gould was a party, Plaintiff respectfully refers  
12 to [sic] Court to the motions.” Mot. for Reconsideration at 23. ***Plaintiff does not***  
13 ***point to any new facts or arguments that Plaintiff was unable to raise before the***  
14 ***Court granted summary judgment.*** And the Court made clear that it *considered*  
15 those briefed arguments in deciding to grant summary judgment in favor of  
16 Mr. Gould. Ex. A (12.11.17 Hrg. Tr. at 56:13-15; 22-23) (“I included Mr. Gould  
17 because you briefed it relate[d] to all of the motions for summary judgment . . .  
18 I used it because it was included in your opposition, the supplement to those  
19 motions.”).

20 Plaintiff was afforded yet another opportunity to be heard on this matter at the  
21 December 11, 2017 hearing. Plaintiff again raised the same arguments—namely,  
22 that a lack of independence could be demonstrated merely by review of Mr. Gould’s  
23 actions as a board member—that he does in the Motion for Reconsideration. Ex. A  
24 (12.11.17 Hrg. Tr. at 57:22-59:25).

25 The Court correctly rejected these arguments. As the Court noted at the

26 <sup>2</sup> Gould addressed the merits of this argument in more detail in his Supplemental  
27 Reply in Support of Summary Judgment, and he incorporates that brief herein by  
28 reference.

1 hearing, to show a lack of independence and/or disinterestedness for purposes of  
2 rebutting the business judgment rule, Plaintiff must demonstrate that there is a direct  
3 financial relationship or very close personal relationship with the people who are  
4 interested in the transaction. *Id.* at 34:24-35:4. And here, Plaintiff does not contend  
5 that Mr. Gould had any financial relationship to any of the Cotter siblings or that  
6 Mr. Gould had a close personal relationship with any of the Cotter siblings. Mot.  
7 for Reconsideration at 23-24. That is why his own paid expert witness, a former  
8 justice on the Delaware Supreme Court, testified that there was no evidence that  
9 called into question Mr. Gould's independence or disinterestedness. *See* Gould's  
10 Supplemental Reply in Support of Summary Judgment at 3-4 (responding to  
11 Plaintiff's Supplemental Oppositions). As a result, Plaintiff's expert agreed with the  
12 Court and opined that Mr. Gould was entitled to the protections of the business  
13 judgment rule. *Id.*<sup>3</sup>

14 Simply put, the Court was correct to grant summary judgment in favor of  
15 Mr. Gould on the basis that he was entitled to the protections of the business  
16 judgment rule, and there is no basis to disturb the Court's decision. Plaintiff's  
17 Motion for Reconsideration should be denied.

### 18 **III. CONCLUSION**

19 For the reasons stated above, and in Gould's Motion for Summary Judgment,  
20 Reply in Support of Summary Judgment, and Supplemental Reply in Support of  
21 Summary Judgment, Plaintiff's Motion for Reconsideration should be denied.

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23 <sup>3</sup> To the extent that Plaintiff argues, based on Delaware law alone, that there are  
24 other ways to rebut the business judgment presumption and that he has done so with  
25 respect to Mr. Gould here, he fundamentally misunderstands and misapplies those  
26 cases, as evidenced by the fact that his own expert witness, a former justice on the  
27 Delaware Supreme Court who served on the Delaware Supreme Court when those  
28 cases were decided, opined that there was no evidence that Mr. Gould lacked  
protection of the business judgment rule.



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December 26, 2017

BIRD, MARELLA, BOXER, WOLPERT,  
NESSIM, DROOKS, LINCENBERG  
& RHOW, P.C.

By 

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14  
15 **EIGHTH JUDICIAL DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17  
18 **JAMES J. COTTER, JR.,**

19 Plaintiff,

20 vs.

21 **MARGARET COTTER, et al.,**

22 Defendant.

23 **READING INTERNATIONAL, INC.,**

24 Nominal Defendant.

CASE NO. A-15-719860-B

**DECLARATION OF SHOSHANA E.  
BANNETT IN SUPPORT OF  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR  
RECONSIDERATION OF RULING  
ON GOULD'S MOTION FOR  
SUMMARY JUDGMENT**

Date: December 28, 2017

Time: 9:00 A.M.

Ctrm.: 10A

Assigned to Hon. Elizabeth Gonzalez,  
Dept. XI

Trial Date: January 2, 2018

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DECLARATION OF SHOSHANA E. BANNETT IN SUPPORT OF GOULD'S OPPOSITION TO PLAINTIFF'S  
MOTION FOR RECONSIDERATION OF RULING ON GOULD'S MOTION FOR SUMMARY JUDGMENT

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# **EXHIBIT A**



TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

JAMES COTTER, JR.

Plaintiff

vs.

MARGARET COTTER, et al.

Defendants  
.....

CASE NO. A-15-719860-B  
A-16-735305-B  
P-14-082942-E

DEPT. NO. XI

**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.