

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

And)
READING INTERNATIONAL, INC., a)
Nevada corporation,)
Nominal Defendant.)

Supreme Court Case No. 75053

Case No. A-15-719860-B
Coordinated with:
Case No. P-14-0824-42-E

**APPELLANT JAMES COTTER
JR.'S MOTION TO DISMISS
CROSS-APPEALS**

Appellant James Cotter Jr. ("Cotter") hereby moves to dismiss the cross-appeals filed by respondents William Gould, Edward Kane, Michael Wrotniak, Douglas McEachern, and Judy Coddling (collectively the "Dismissed Directors"). The motion is based on the points and authorities that follow.

I. INTRODUCTION

The district court granted summary judgment in favor of the Dismissed Directors on all Cotter's fiduciary duty claims on the grounds that there were "no genuine issues of material fact related to the disinterestedness and/or independence of those directors." December 28, 2017 Order, Exhibit 1, at 4. The ruling was part of an omnibus order in response to a series of motions for partial summary judgment and motions *in limine*. *Id.* Cotter appeals from just that portion of the district court's order pertaining to the dismissal of the five Dismissed Directors, which portion was certified as final under NRCP 54(b). *See* Order on Rule 54(b) Motion, Exhibit 2 hereto.

The Dismissed Directors, however, have filed cross-appeals that challenge Cotter's standing as a derivative plaintiff, purportedly to "alter the rights of the parties" under the December 28 dismissal order. *See*

Gould Notice of Cross-Appeal at 2; Kane, McEachern, Coddington, and Wrotniak's ("Kane et al.") Notice of Cross-Appeal at 1.¹ The cross-appeals are without merit and procedurally inappropriate. They are an abuse of the appellate process because: (1) the Dismissed Directors are not "aggrieved parties" under the district court's dismissal order and thus lack standing to appeal under NRAP 4A(a); (2) Cotter's standing as a derivative plaintiff was neither addressed nor impliedly decided in the dismissal order but was addressed in three previous separate, non-appealable orders; and (3) the cross-appeals are a dissembling effort by the three remaining director defendants—who are represented by the same counsel as four of the Dismissed Directors—to obtain appellate review in this Court on three non-appealable orders denying motions to dismiss Cotter as a derivative plaintiff.

These improper and unmeritorious cross-appeals should be dismissed.

¹ Although Gould filed a separate Notice of Cross-Appeal, his Notice, as well as his Case Appeal Statement tracks almost *verbatim* that of the other four Dismissed Directors.

II. ARGUMENT

A. The Court Lacks Jurisdiction Over the Cross-Appeals.

1. The Dismissed Defendants Are Not Aggrieved Parties.

Only a party "aggrieved by an appealable judgment or order" has standing to appeal. NRAP 3A(a). Where, as here, the respondents who filed a cross-appeal "prevailed in the district court on [their] motion for summary judgment," they are not "aggrieved" parties and the Court "lack[s] jurisdiction to entertain [the] cross-appeal" *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994); *see also, e.g., Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 601-02, 879 P.2d 1180, 1193 (1994) ("because Tarkanian received full relief initially, he was not an aggrieved party and could not have appealed from the original judgment")(citing cases); *Farnham v. Farnham*, 80 Nev. 180, 184, 391 P.2d 26, 28 (1964) (holding that parties "who won the case below" are not aggrieved parties and lack standing to appeal). In such case, the cross-appeal is properly dismissed. *Ford*, 110 Nev. at 755, 877 P.2d at 548 (dismissing the cross-appeal of the prevailing party on its motion for summary judgment); *Farnham*, 80 Nev. at 184, 391 P.2d at 28 (dismissing the cross-appeal).

Here, the Dismissed Directors filed a cross-appeal from the December 28, 2017 order that granted them complete relief on their

motions for summary judgment. The district court dismissed all claims against them; they are out of the case altogether. *See* December 28, 2017 Order, Ex. 1. Thus, there is no basis for the Dismissed Directors to "alter the rights of the parties" in a case from which they were dismissed, and for this reason alone their cross-appeals are frivolous and should be dismissed.

2. The Dismissed Directors' Cross-Appeals Are from Three Non-Final Orders.

An order that is not final is not appealable. NRAP 3(A)(b)(1).

An order is final if it "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

The Dismissed Directors admit in their Case Appeal Statements that Cotter's standing and adequacy to sue derivatively on behalf of the shareholders of the nominal defendant, Reading International, was decided against them *and* the three remaining defendants in three *separate* orders dated October 15, 2015, December 20, 2016, and November 20, 2017, respectively. *See* Gould's Case Appeal Statement ("CAS") at 4:21-22; *id.* at 5:4-7; *id.* at 5:25-28; Kane, et al. CAS at 3:16-17; *id.* at 3:25-28; *id.* at 4:10-14; *see also* Gould Notice of Cross-Appeal at 2; Kane, et al. Notice of Cross-

Appeal at 1. None of these three orders is or was appealable, and the Dismissed Directors concede as much.² Thus, their "cross-appeal on standing issues" does not arise out of an order from the district court certifying standing for appellate review of the three orders denying dismissal of Cotter as a derivative plaintiff.

To avoid this result, the Dismissed Directors argue—without basis or explanation whatsoever— that these three orders were "made final" by the December 28, 2017 dismissal order that is the subject of Cotter's appeal. *See* Kane, et al. CAS at 5:9-14; Gould CAS at 6:27-7:4. This is nonsense: the dismissal order does not even address Cotter's derivative standing, decide it by implication, or moot the issue of his standing in the case below that is proceeding against the three remaining defendants— Ellen Cotter, Margaret Cotter, and Guy Adams. For this second reason, the Court lacks jurisdiction over the cross-appeals and should dismiss them.

B. The Cross-Appeals Misuse the Appellate Process.

The cross-appeals are nothing less than a procedural maneuver by the three remaining director defendants, through their common counsel,

² Moreover, the November 20, 2017 minute order is "ineffective for any purpose and cannot be appealed." *Rust v. Clark County School Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987).

to take another shot—but now in this Court—at Cotter's derivative standing before a final judgment is rendered in the case that is proceeding against them in the district court. The Dismissed Directors make the specious argument that if Cotter has standing to bring a derivative suit on behalf of RDI's stockholders and obtains relief in the form of reinstatement as the company's president and CEO, that relief "would not benefit any stockholder other than him" Gould Notice of Cross-Appeal at 2:14; Kane, et al., Notice of Cross-Appeal at 1:10-13. The Dismissed Directors, however, fail to explain what harm *they*—as opposed to the three remaining defendant directors—will suffer if Cotter is allowed to proceed to trial as a derivative plaintiff. In fact, these Dismissed Directors do not care about harm to the Company's shareholders or about the relief sought by Cotter (which includes equitable and monetary relief with respect to actionable conduct unrelated to his termination, which was the start of the defendants' self-dealing and entrenchment scheme). The only shareholders who care about Cotter's derivative standing and equitable relief voiding his termination and resulting in his reinstatement as president and CEO are the remaining defendants and majority shareholders Ellen Cotter (current president and CEO) and Margaret Cotter (Executive Vice President-Real Estate Management and

Development-NYC). They are not involved in this Rule 54(b) appellate proceeding.

The Dismissed Directors disclose the real purpose of their cross-appeals in their conclusion: if this Court were to ignore their unsuccessful efforts in the district court challenging Cotter's standing as a derivative plaintiff, "a successful cross-appeal on standing issues would resolve all claims remaining before the District Court and be case dispositive [sic]." Gould Notice of Cross-Appeal at 3:1-2; Kane, et al. Notice of Cross-Appeal at 2:5-7. Why would these Dismissed Directors care what happens to the claims against the three remaining defendants?

What these frivolous³ and disingenuous cross-appeals demonstrate is what Cotter has argued all along, which is the subject of this appeal: these Dismissed Directors are not disinterested and independent; they are subservient to the interests of remaining defendants Ellen and Margaret Cotter. For that reason, the district court should not have dismissed them.

³ Rule 38, NRAP, addresses consequences of filing frivolous appeals by allowing monetary sanctions when "an appeal has frivolously been taken" or "whenever the appellate processes of the court have otherwise been misused," both of which have occurred here.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the cross-appeals filed by Gould, Kane, Coddington, McEachern, and Wrotniak.

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CERTIFICATE OF SERVICE

I certify that on the 6TH day of March, 2018, I served a copy of APPELLANT JAMES COTTER JR.'S MOTION TO DISMISS CROSS-APPEALS upon all counsel of record:

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es); via email and/or through the court's efilings service:

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EXHIBIT 1

DECEMBER 28, 2017 ORDER



ORDER
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

MARGARET COTTER, *et al.*,
Defendants.

AND

READING INTERNATIONAL, INC., a Nevada
corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

BUSINESS COURT

**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;

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

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

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

25 IT IS FURTHER ORDERED THAT the Individual Defendants'
26 Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims
27 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 28th day of December, 2017.

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

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