fiduciaries are entitled to determine the vote. There is no dispute that Ellen Cotter and Margaret Cotter are co-trustees of the James J. Cotter Living Trust, and thus represent the majority of the trustees, even if Cotter, Jr. is also a trustee. Indeed, in denying the T2 Plaintiffs request for a preliminary injunction, this Court essentially acknowledged that Ellen Cotter and Margaret Cotter together have the right to vote the 696,080 shares held by the James J. Cotter Living Trust. ***See* Ex. L, Transcript on T2 Plaintiffs Motion for Preliminary Injunction, May 26, 2016, pp. 15-16.** Leaving aside any Class B voting shares personally held by Ellen Cotter or Margaret Cotter, the combined total from the Estate and the Trust constitute a majority of the voting power for RDI.

Ellen and Margaret Cotter each voted in favor of the termination of Cotter, Jr. As they control the majority of the voting power in the corporation, that action constituted a ratification of the termination. This is true even if the Court determines that Ellen Cotter and Margaret Cotter were "interested" in the issue of termination, because, under Nevada law, the shares of "interested directors" must be counted in a stockholder vote. NRS 78.140(2)(b).

ii. The Termination Was Fair To RDI.

There is no basis for asserting that the termination was unfair to RDI. Nevada's statutory scheme recognizes that a transaction can be fair to the corporation, even if directors voting for it are "interested." Accordingly, a decision cannot be deemed unfair simply because of the purported interest. Instead, some harm to the corporation must be shown to have resulted for the transaction to be unfair.

Generally, fairness issues involve an aspect of financial injury to the corporation, such as inadequate consideration paid for stock or other assets; *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd,* 663 A.2d 1156 (Del. 1995); a transaction constitutes waste of corporate funds, s*ee In re INFOUSA, Inc. Shareholders Litig.*, 953 A.2d 963, 997 (Del. Ch. 2007); or a corporation is precluded from an opportunity that should have been its. See *Leavitt v. Leisure Sports Incorporation*, 103 Nev. 81, 87, 734 P.2d 1221, 1225 (1987), citing *Klinicki v. Lundgren,* 298 Or. 662, 695 P.2d 906, 910 (1985). None of those situations exist

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EXHIBIT 10

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant	Case No. A-15-719860-B Coordinated with: Case No. P-14-082942-E

VIDEOTAPED DEPOSITION OF WILLIAM GOULD

TAKEN ON JUNE 8, 2016

VOLUME 1

JOB NUMBER 315485

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

A. Yes.

Q. Do you recall when you first heard or learned that?

A. Early in 2015, my recollection.

Q. Did you ever hear or learn or were you ever told that Margaret Cotter wanted to become an employee of RDI?

A. Yes.

Q. When did you first hear or learn that?

A. Same period.

Q. And did you also hear or learn that she wanted to have an employment contract with RDI?

A. Yes.

Q. Did you understand whether that was a point of contention between Margaret on one hand and Jim Cotter, Jr., on the other hand?

MR. SWANIS: Objection. Form.

THE WITNESS: I'm not so sure it was a point of contention. I think it was something that was under consideration.

Jim, Jr. And I talked about it. I had my own views on it. I couldn't understand why any Cotter family member needed to have an employment contract.

But I did see it could be -- on the

other side why, given the fact of the factions, that they were -- they felt their job may have been in jeopardy.

BY MR. KRUM:

Q. And the "they" is Ellen and Margaret?

A. Ellen and Margaret. Pardon me.

Q. Did either or both of them ever communicate to you in words or substance that either or both thought their jobs were or might be in jeopardy?

A. Yes.

Q. What did Ellen communicate to you?

A. She felt that the relationship was such with her brother that -- and since he was the C.E.O., that he would take steps to have her terminated.

Q. When did she communicate that to you?

A. The same time frame, early 2015.

Q. Was that in person or --

A. Both -- it was in person, it was a meeting at my office, where she expressed that, and I think over the telephone, as well.

Q. Did Margaret Cotter communicate to you that she was concerned that Jim Cotter, Jr., might terminate her whether as an RDI employee if she

became one or as the third-party contractor she was at the time?

A. Yes, she did.

Q. And when did she advise you that? When did she communicate that to you?

A. I can't recall exactly when. It was during the same time frame as I mentioned, early 2015.

Q. How did she communicate that to you?

A. I can't remember.

Q. Whether in words or substance, what did she communicate?

A. That she felt her job was in jeopardy because of the -- the fighting going on between the two factions.

Q. And by the fighting, was she referring to the trust and estates dispute, to interpersonal dynamic --

MR. SWANIS: Objection. Form.

THE WITNESS: I think -- I think she referred --

MR. HELPERN: Join.

THE WITNESS: I think she referred to both.

///

EXHIBIT 11

Confidential – Filed Under Seal

EXHIBIT 12

From:	Kane <ekane@searurr.com>
Sent:	Monday, May 18, 2015 10:18 PM
To:	Guy Adami

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

EXH 81
DATE
WIT
PATRICIA HUBBARD

81

[redacted]

EXHIBIT 13

Confidential – Filed Under Seal

EXHIBIT 14

Confidential – Filed Under Seal

EXHIBIT 15

Confidential – Filed Under Seal

EXHIBIT 16

Confidential – Filed Under Seal

EXHIBIT 17

From: Kane <ekane@san.rr.com>
Sent: Thursday, June 11, 2015 1:43 PM
To: Cotter Jr. James

This morning, without the wine I was drinking last night during and after talking with your mother, I'm thinking more about your call to me last night and our conversation. I can see that from your point of view having Guy in on the meetings with your sisters could be a problem and doesn't solve the need to be able to work with them cohesively going forward. If you explain that to them they may be willing to accommodate you.
But, the main question is what are you going to do to accommodate them?
1. For now, I think you have to concede that Margaret will vote the B stock. As I said, your dad told me that giving Margaret the vote was his way of "forcing" the three of you to work together. Asking to change that is a *nonstarter*. Again, you need to compromise your "wants" as they have been willing to do. If you can work together than it becomes a non-issue and eventually your and her kids will have the vote. What's wrong with that?
2. For now you need ASAP to agree on the nominees for the Board going forward. As I told you months ago, changes are necessary and you need some quality people with expertise in fields where it is needed and lacking. You also need to get rid of divisive persons.
3. I do believe that if you give up what you consider "control" for now to work cooperatively with your sisters, you will find that you will have a lot more commonality than you think. You all want the same things: a vibrant growing business. After trust is established you can all go back to where you want to be.
4. I think if you make the proper and needed concessions, they might well relent on having Guy in the meetings as they can easily see there is great animosity between the two of you.
5. Bottom line: recognize you are not dealing from strength right now and be willing to compromise as they are rational and reasonable people who have been hurt and demeaned and you need to help heal the family. Otherwise you will be sorry for the rest of your life, they and your mother will be hurt and your children will lose a golden opportunity.
6. I am willing to help but I'd much prefer that you bend a bit and work it out between you to build the trust that is necessary so that you don't lose control of the company, as you presently have.

EXH 304
DATE 6-9-16
WIT
PATRICIA HUBBARD

[redacted]

EXHIBIT 18

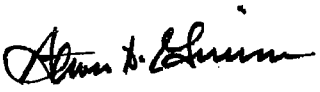
Message

From: Kane [elkane@san.rr.com]
Sent: 5/22/2015 7:36:11 PM
To: James Cotter JR [james.j.cotter@readingrdi.com]
Subject: Re:
Flag: Follow up

Without question I would like to help bring back unity and respect. Margaret certainly was trying when she suggested you take what the Board offered and held out the possibility that after a few years of working together you could again be considered for the role of CEO. It would be similar to Dev, hiring an experienced CEO the same age as Dev. Further, there would be no need for any negative announcement and if everyone's attorneys are so instructed, perhaps it could lead to a global settlement. Unfortunately you rejected that out of hand. You might think about it on the drive down here. Two immediate suggestions: (1) don't threaten or list faults, like your e-mail to me that "we will have war" and the tentative employment agreement sent to Margaret preceded by a list of her supposed faults; (2) "Aunt" Maddy suggests you invite your mother and sisters to your house for a family get-together with no business to be discussed but only some adoration of your kids and, if present, their aunt Margaret's kids.
If you are not opposed to driving down here, a good time to get together would be for lunch on Monday.We could meet at La Jolla Country Club around 1:00 pm. I have committed to your dad's personal urologist and friend, Warren Kessler, to play golf in the morning at 7:30 so we should be finished by 11:30-12:00. Meeting at 1:00 will insure I will be done and have paid off my bets. If I'm in a pissy mood it will not be because of you but because I lost my usual $5 bet with Warren.

-----Original Message-----
From: James Cotter JR
Sent: Friday, May 22, 2015 9:32 AM
To: 'Kane (elkane@san.rr.com)'

Thank you for not pulling trigger yesterday. I know I have lost your support. You are most thoughtful director and one with most heart and emotion. I have made mistakes with my sisters and mother. They have made mistakes. It is now time for us to try to heal and I need your help. Last words my father said to me were, "your mother is good woman...be good to her." I know I have not been. I realize we have passed breaking point. We will not have another chance. I would like to sit down with you in SD for breakfast, lunch or dinner Saturday, Sunday, Monday...whatever works. You are only one I have now who can broker peace with company and family's interests in mind respecting what my Dad would have wanted. There is a balance. If not, we will have war and our company and family will be forever destroyed over the next week. I know I have one last shot and would like your help and thoughts.



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Attorneys for Plaintiff
James J. Cotter, Jr.

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation;

Nominal Defendant.

AND ALL RELATED CLAIMS.

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

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

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

I. INTRODUCTION[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RESPONSE TO FACTUAL ASSERTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. ARGUMENT

A. Director Defendants' Fiduciary Duties.

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

1. The Duty of Care

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

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

2. The Duty of Loyalty

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

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

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

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

3. The Duty of Disclosure

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

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

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

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

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

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

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

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

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

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

1. Individual Defendants' Lack of Disinterestedness

With respect to disinterestedness, because the business judgment rule presumes that directors have no conflict of interest, the business judgment rule does not apply where "directors have an interest other than as directors of the corporation." *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 769 (2d Cir. 1980). This is because "[d]irectorial interest exists whenever divided loyalties are present . . ." *Rales v. Blasband*, 634 A. 2d 927, 933 (Del. 1993) (internal citations and quotations omitted). Thus, a director must be disinterested in the challenged conduct in particular and, as a general matter, otherwise independent. *Beam*, 845 A.2d at 1049.

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

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

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

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

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

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

2. Individual Defendants' Lack of Independence

Independence, as used in the context of an element of the business judgment rule, requires a director to engage in decision-making "based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Gilbert v. El Paso, Co.*, 575 A.2d 1131, 1147 (Del. 1990); *Rales*, 634 A.2d at 936. "Directors must not only be independent, [they also] must act independently." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2003). Assessing directorial independence "focus[es] on impartiality and objectiveness." *In Re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920, 938 (Del. Ch. 2003) (*quoting Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001), *rev'd in part on other grounds,* 817 A.2d 149 (Del. 2002); *see Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("We have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations") *modified in part on other grounds,* 636 A.2d 956 (Del. 1994).

"Independence is a fact-specific determination made in the context of a particular case. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam*, 845 A.2d at 1049-50.

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

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

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

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

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

3. Individual Defendants' Lack of Good Faith

The element of good faith requires the director to act with a "loyal state of mind." *Hampshire Group, Ltd., v. Kuttner*, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). The concept of good faith is particularly relevant in cases in which there is a "controlling shareholder with a supine or passive board." *In Re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 761 n.487 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). In such cases, "[g]ood faith may serve to fill [the] gap [between a fiduciary duties of care and loyalty] and insure that the persons entrusted *by shareholders* to govern [the] corporations do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *Id.*

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

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

4. Individual Defendants Failed To Exercise Due Care

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

C. Defendants Must and Cannot Satisfy the Entire Fairness Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Erroneous, as a Matter of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

DATED this 13th day of October, 2016.

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CERTIFICATE OF SERVICE

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

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation;

Nominal Defendant.

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

Plaintiffs,

vs.

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

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

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

TOMPKINS, and DOES 1 through 100, inclusive,

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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Rules

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

I. INTRODUCTION

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

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

II. FACTUAL CLARIFICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q.: What was your understanding at the time?

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

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

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

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

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

Q.: Anything else?

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

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

Kane: Yes.

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

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

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

Kane: Yes.

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

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

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

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

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

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

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

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

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

Kane: He rejected it, yes.

Q.: And he got himself terminated, right?

Kane: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NASDAQ Independence Issue

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

III. ARGUMENT

A. Summary Judgment Standard

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

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

B. RDI Improperly Seeks Summary Judgment of Contested Factual Issues

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

The Delaware Supreme Court has been clear that director "independence is a fact-specific determination made in the context of a particular case." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004); *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 468 (S.D.N.Y. 2013) (same); *In re Finisar Corp. Derivative Litig.*, 542 F. Supp. 2d 980, 988 (N.D. Cal. 2008) (same). "Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry . . . ." *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015).

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

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

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

Similarly, a director's disinterestedness is a clear-cut question of fact. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) ("Whether a director is 'interested' is a question of fact.") "Whether a director is 'interested' or 'independent' is generally regarded as a question of fact, depending on the circumstances of the case."*Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 880 (S.D.N.Y. 1986); *Patrick v. Allen*, 355 F. Supp. 2d 704, 712 (S.D.N.Y. 2005) (same).

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

C. Legal Analysis Applicable Here

1. Director Defendants' Fiduciary Duties.

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

a. The Duty of Care

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

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

b. The Duty Of Loyalty

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

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

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

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

c. The Duty of Good faith

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

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Hampshire Group, Ltd., v. Kuttner, 2010 WL 2739995, at *12 (Del. Ch. July 12, 2010). The concept of good faith is particularly relevant in cases in which there is a "controlling shareholder with a supine or passive board." *In Re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 761 n.487 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). In such cases, "[g]ood faith may serve to fill [the] gap [between a fiduciary duties of care and loyalty] and insure that the persons entrusted *by shareholders* to govern [the] corporation do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *Id.*

d. The Duty of Disclosure

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

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

Directors owe all stockholders, not just the stockholders who appointed them, "an uncompromising duty of loyalty." *In re Trados Inc. S'Holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013). Under some circumstances, it is a breach of loyalty for directors not to act to protect the minority stockholders from a controlling stockholder. *Louisiana Mun. Police Emp. Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009) (finding that the failure to act in the face of a controlling stockholder's threat to the corporation and its minority stockholders supported a reasonable inference that the board of directors breached its duty of loyalty by deciding not to cross the controlling stockholder); *see also McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000) (finding that directors are required to make informed, good faith decisions about whether to the sale of a corporation to a third party that had been proposed and negotiated by a controlling stockholder would maximize the value for minority stockholders).

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

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

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

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

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

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

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

a. Individual Defendants' Lack of Disinterestedness

With respect to disinterestedness, because the business judgment rule presumes that directors have no conflict of interest, the business judgment rule does not apply where "directors have an interest other than as directors of the corporation." *Lewis v. S.L. & E., Inc.*, 629 F.2d 764, 769 (2d Cir. 1980). This is because "[d]irectorial interest exists whenever divided loyalties are present." *Rales v. Blasband*, 634 A. 2d 927, 933 (Del. 1993) (citations and quotations omitted). Thus, a director must be disinterested in the challenged conduct in particular and, as a general matter, otherwise independent. *Beam*, 845 A.2d at 1049.

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

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

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

b. Individual Defendants' Lack of Independence

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

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

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merits of the subject before the board rather than extraneous considerations or influences." *Gilbert v. El Paso, Co.*, 575 A.2d 1131, 1147 (Del. 1990); *Rales*, 634 A.2d at 936. "Directors must not only be independent, [they also] must act independently." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2003). Assessing directorial independence therefore "focus[es] on impartiality and objectiveness." *In Re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 920, 938 (Del. Ch. 2003) (*quoting Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211, 1232 (Del. Ch. 2001), *rev'd in part on other grounds,* 817 A.2d 149 (Del. 2002), *cert. denied,* 538 U.S. 1032 (2003). *See, also, Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993) ("We have generally defined a director as being independent only when the director's decision is based entirely on the corporate merits of the transaction and is not influenced by personal or extraneous considerations.") *modified in part on other grounds,* 636 A.2d 956 (Del. 1994).

"Independence is a fact-specific determination made in the context of a particular case. The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Beam*, 845 A.2d at 1049-50.

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

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

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

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

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

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

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

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

3. Defendants Must and Cannot Satisfy the Entire Fairness Standard

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

DATED this 13th day of October, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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

CERTIFICATE OF SERVICE

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

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

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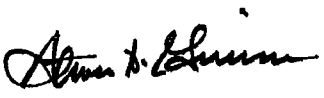

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

BUSINESS COURT

INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF JAMES J. COTTER JR.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: November 1, 2016
Time of Hearing: 8:30 a.m.

Reading International, Inc., a Nevada corporation ("**RDI**"), by and through its attorneys of record, the law firm of Greenberg Traurig, LLP, respectfully joins in the Individual Defendants' Opposition to the Motion for Partial Summary Judgment ("**Motion**") filed by Plaintiff James J. Cotter ("**Plaintiff**" and/or "**Cotter, Jr.**"). RDI joins in the arguments made by the Individual Defendants, and supplements those arguments as set forth in the following Memorandum of Points and Authorities, the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing of this Motion.

DATED this 13th day of October, 2016.

GREENBERG TRAURIG, LLP

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MEMORANDUM AND POINTS OF AUTHORITY

Cotter, Jr.'s Motion for Partial Summary Judgment must be denied, as he has failed to show there is an absence of material disputed fact with respect to his theory for relief, and has failed to show that he is entitled to judgment as a matter of law. Indeed, Cotter, Jr.'s motion is premised on his theory that he was terminated as President and CEO of RDI in retaliation for his failure to settle a law suit with his sisters. However, the evidence shows that the reason for the termination was his ineffective performance in the position of CEO.

Cotter Jr.' motion is flawed. First, it is not supported by any Nevada authority. Second, it is not supported by the Delaware authority he cites. Third, it is not supported by the facts of the case. Simply put, his motion must be denied.

I. MATERIAL FACTS IN SUPPORT OF OPPOSITION

RDI joins and adopts as though set forth in their entirety the Statement of Facts contained in the Individual Defendants' Opposition to the Motion for Summary Judgment. RDI supplements those facts as set forth below.

1. Ellen Cotter has been employed by RDI or its predecessor since 1997. **Ex. A, Depo. of Ellen Cotter, 16:24**

2. Ellen Cotter has run the day-to-day operations of the Company's domestic cinema operations since 2002. ***Id.* at 34:2-20.**

3. Margaret Cotter has been working with RDI since 1998. **Ex. B, Deposition of Margaret Cotter, 14:18-15:8.**

4. While not an employee of RDI itself, Margaret Cotter was an employee of what is now known as Liberty Theaters, which is owned by RDI. *Id.* at **15:9-13; 39: 20-25.**

5. In that capacity, Margaret Cotter oversaw RDI's live-theater operations for 13 years; including management of four properties, management of the staff, booking of shows, overseeing regulatory licensing, and prior efforts at redevelopment of one of the properties in the face of risks of historical designation. Id. at **21:7-24:4.**

6. Cotter, Jr. was appointed to RDI's board in 2000, Vice Chairman of the Board in 2007, and President of RDI in 2013. The position of President had been vacant for many years and was reactivated solely for Cotter, Jr. **Ex. C, Deposition of J.J. Cotter, Jr. 133:21-25; 151:20-22; 162:7- 9.**

7. Cotter, Jr. has called Edward Kane "Uncle Ed." ***Id.*. 83:6-12**

II. OBJECTION TO COTTER, JR's CLAIMS UNCONTESTED FACTS

NRCP 56(c) requires that the party seeking summary judgment set forth a "concise statement of each fact material to the disposition of the Motion," with citations to the evidence that supports the fact. In the introductory section of his Motion, Cotter, Jr. did provide a bullet point list of "facts" he claims are uncontested. Motion, pp. 1-2. However, he did not provide the Court with citations to the evidence he claims supports these purportedly undisputed facts. RDI

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objects to Cotter, Jr.'s bullet pointed list of facts as follows:

Cotter, Jr.'s Second Bullet Point – Plaintiff contends that in January of 2015 there was a resolution that required the majority of outside directors to vote in favor of terminating him as President and CEO. To the extent the resolution purported to require that only certain directors could vote to determine RDI's CEO, the resolution conflicted with RDI's bylaws and was therefore void. RDI's bylaws provide:

> The officers of the Corporation shall hold office at the pleasure of the Board of Directors. Any officer elected or appointed by the Board of Directors, or any member of a committee, may be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof or by written consent. Any vacancy occurring in any office of the Corporation by death, resignation, removal or otherwise shall be filled by the Board of Directors for the unexpired portion of the term.

Ex. D, RDI Bylaws, Art IV, § 10.

Cotter, Jr.'s Third Bullet Point- Contrary to Plaintiff's assertion, the evidence does *not* reflect that Cotter, Jr. was told that he needed only to resolve certain disputes with his sisters to avoid termination. The minutes of the May 21, 2015 meeting show that four members of the Board of Directors favored the termination of Cotter, Jr. as CEO, due to observed deficiencies in his "leadership, understanding of the Company's business, temperament, managerial skills, decision-making, and other attributes in the role of Chief Executive Officer." **Ex. E, RDI Minutes, May 21, 2015, p. 3**. Additionally, following an executive session among the non-Cotter directors, Director Gould –who had not advocated for Cotter, Jr.'s termination– proposed that Cotter, Jr. continue as President, and the Company appoint a new CEO; Cotter, Jr. "twice refused to continue in the role of President under a new Chief Executive Officer." *Id.* at 3. The board then determined to delay the decision. Subsequent to the May 21, 2015 meeting, a proposal outlining the terms under which Ellen Cotter and Margaret Cotter would agree to Cotter, Jr.'s continuation as CEO was provided to Cotter, Jr. However, the proposal contained the following relevant language:

> The proposal outlined below set forth the basis on which Ellen Cotter ("EMC") and Margaret Cotter ("AMC") would be willing to proceed towards a negotiated settlement, but, with respect to the items related to the Company's management

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structure only, is subject to the ultimate approval of the independent directors, in the exercise of their fiduciary duties and obligations. Nothing herein is intended to interfere with the appropriate exercise by the directors of their fiduciary duties and obligations.

Ex. F, Confidential Settlement memo of Understanding, p 1. While the proposal included terms that addressed the litigation between the siblings, and the employment of Ellen Cotter and Margaret Cotter by RDI, it also proposed means to remedy the risk to the company arising from Cotter, Jr.'s deficient performance, by curtailing the authority of the CEO and President, as follows:

> JJC would continue to serve as CEO and President under the terms of his existing contract, but in the overall management structure and subject to the limitation set forth below:
>
> *Executive Committee Structure*
>
> The existing Executive Committee would be renewed as a standing committee of the Board of Directors, as follows:
>
> - Members: MC, AMC, JJC, and Guy Adams (Chairman)
> - Delegated Authority to the Executive Committee to be determined by the Board of Directors, but would include, at a minimum, the following:
> - (i) Approval over the Hiring/Firing/Compensation of all senior level consultants/employees;
> - (ii) Review and approval/disapproval of all contracts/commitments have an overall exposure to the Company in excess of $1 million; and
> - (iii) Review and approval of annual Budget and Business Plan.
>
> Meetings would be held on a regularly scheduled basis weekly. Executive Committee member would naturally be free to attend and participate in internal meetings called by the CEO, and would endeavor to make themselves reasonably available to attend such meetings as to which they may be invited by the CEO.
>
> Unless approved in advance by the Executive Committee, all investor relations would be handled by CFO in consultation with the GC, and CEO. App press releases and public filings would be subject to review by the Executive Committee and the GC.

***Id.*, at pp. 1-2.**

The May 29, 2016 Minutes reflect that counsel for Cotter, Jr. had previously indicated an intent to file suit against the Company and its directors. **Ex. G, RDI Minutes, May 29, 2016, p. 1**. The proposal accordingly, also included the following term: "Immediate Release and Waiver signed by JJC with respect to all litigation, included any matters covered by the specified

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litigation." The specified litigation included not only the California trust litigation and the Nevada probate litigation filed by JJC, but also:

* * *

3. All threats against Directors

4. All threats of Company Derivative Action;

5. Agreement that Reading International, Inc. can drop the interpleader action in Nevada and recognize the Estate as the owner of Class B Shares and Option;

6. JJC further agrees not to sue Company over these matters or participate in any lawsuit related to the Company.

Ex. C, p. 2. Another condition that would result in benefit to RDI was the following:

> AMC, JJC, and EMC will engage in professional counseling to determine to work cooperatively together and with respect.

Id. at p. 3.

Furthermore, Cotter, Jr. fails to disclose to the court that he also proposed treatment of the trust and estate litigation as an element of an agreement that would allow him to remain as CEO. **Ex. H, Email Exchange, May 27, 2015**. Cotter, Jr. asked Kane to broker the agreement, which included numerous other elements, including professional counseling, employment of a "CEO consultant," limitations on reports to him, and monitoring of his performance. Cotter asked that everyone consider what Cotter, Sr. would have wanted, as this was best for the corporation. *Id.*

Cotter Jr.'s Seventh Bullet Point – In his seventh bullet point, Cotter, Jr. uses the term "recurring income" with respect to Guy Adams' in an attempt to show Adam's purported dependence on income received from Cotter related entities. This is apparently an attempt to disguise the existence of other assets held by Mr. Adams. In fact, testimony shows that in 2015, Mr. Adams had income from the sale of real property and stock in an amount that exceeded the entirety of his "recurring income." **Ex. I, Depo. Of Adams, 13:17-14:12.** Furthermore, Cotter, Jr. has presented no evidence to show that either Ellen Cotter or Margaret Cotter have actual discretionary control over the income received by Mr. Adams, which is derived from contractual

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arrangements made during the lifetime of Cotter, Sr.

III. LEGAL ARGUMENT

The Motion for Partial Summary Judgment must be denied. The entire premise of Cotter, Jr.'s claim that his termination constituted a breach of fiduciary duty relies on an analysis that simply has no application to a corporation's decision to fire an officer. Even though this Court gave Cotter, Jr. ample opportunity to flesh out his claim that the Board of Directors' decision to terminate him as CEO constituted a breach of the duty of loyalty, Cotter, Jr. has failed to show that his termination was the result of anything other than his own poor performance. Here, Cotter, Jr.'s termination was the result of the Board of Directors making an informed decision that RDI would benefit more without Cotter Jr. than with him.

A summary judgment motion may be granted only when the evidence shows both that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The substantive law controls which factual disputes are material, and a factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. *Id.* In determining whether there are material issues of fact, all of the non-movant's statements must be accepted as true and all reasonable inferences that can be drawn from the evidence must be admitted *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002). If there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury. *Broussard v. Hill*, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984).

When the moving party bears the burden of proof at trial, that party must present evidence sufficient to entitle it to judgment as a matter of law. *Cuzze v. Univ. and Comm. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). If the moving party fails to meet its burden, the nonmoving party has no obligation to produce rebuttal evidence. *Tom v. Innovative Home Sys., LLC*, 132 Nev. Adv. Op. 15, 368 P.3d 1219, 1225 (Nev. App. 2016).

Here, it is statutorily presumed that the Board of Director's decision to terminate Cotter,

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Jr. was made "in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Cotter, Jr.'s Motion for Partial Summary Judgment may not be granted unless this Court determines that the evidence he has presented is such that reasonable minds "would necessarily agree" that it is more probable than not that the decision was not made with a *subjective* good faith belief that it was in the best interests of RDI. *See* NRS 47.200(1); NRS 78.138. The evidence presented by Cotter, Jr. is not even sufficient to present the question to a jury, let alone to decide the issue as a matter of law.

Furthermore, even if the evidence presented could somehow satisfy Cotter, Jr.'s burden with respect to the statutory presumption, he would then need to show that there is no material dispute over whether the termination decision was fair to RDI, or whether the decision was ratified by persons holding the majority of the stockholder voting power. *See* NRS 78.140. Cotter, cannot satisfy this burden. Indeed, as a matter of law, the termination decision was so ratified. Accordingly, even if Cotter, Jr. could overcome the business judgment rule, his Motion would still fail on this basis alone.

Cotter, Jr. did not present sufficient evidence to even raise an inference that the business judgment presumption has been rebutted, let alone establish a lack of good faith as a matter of law. Indeed, his entire claim is based on the incorrect notion that an employment decision is a "transaction" in which the directors could have an improper personal interest. Furthermore, he fails to present sufficient evidence of the purported improper personal interest, or show that any director was "beholden" to an interested director. Because Cotter, Jr. has failed to satisfy his burden to show entitlement to judgment as a matter of law, his Motion must be denied.

A. COTTER, JR.'S TERMINATION IS NEITHER VOID NOR VOIDABLE.

As shown in greater detail below, Cotter, Jr. has failed to show that the decision to terminate him was the product of interested director action. However, even if he had made such a showing, he still could not obtain his requested relief. This is true because, under Nevada law, actions involving interested directors cannot be voided when a majority of the voting stockholders have ratified the action, or when the challenged action is fair to the corporation. As

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set forth in **NRS 78.140:**

> 1. A contract or other transaction is not void or voidable solely because:
>
> * * *
>
> (c) The vote or votes of a common or interested director are counted for the purpose of authorizing or approving the contract or transaction,
>
> → if one of the circumstances specified in subsection 2 exists.
>
> 2. The circumstances in which a contract or other transaction is not void or voidable pursuant to subsection 1 are:
>
> * * *
>
> (b) The fact of the common directorship, office or financial interest is known to the stockholders, and stockholders holding a majority of the voting power approve or ratify the contract or transaction in good faith. ***The votes of the common or interested directors or officers must be counted in any such vote of stockholders.***
>
> * * *
>
> (d) The contract or transaction is fair as to the corporation at the time it is authorized or approved.
>
> * * *

NRS 78.138(1) and (2). Here, *both* circumstances exist. Accordingly, Cotter, Jr. cannot receive the relief he requests.

i. The Votes of Ellen and Margaret Cotter in Favor of Termination Constituted Ratification by Majority Voting Shareholders.

On June 12, 2015, there were approximately 1,580,590 shares of RDI Class B voting stock outstanding. [1] As executors of the estate of Cotter, Sr., Ellen and Margaret Cotter jointly held the right to vote 327,080 shares, a fact that this court has acknowledged. ***See* Ex. J, Transcript, July 22, 2015, 4:9-5:5, Minute Order, September 18, 2015, Ex. K, Order on JJC Jr.'s Amended Petition for Decree of Partial Distribution.** Similarly, pursuant to NRS 78.352(3)(b), where there are multiple fiduciaries entitled to vote shares, a majority of said

[1] In June, 2015, the Estate had not yet exercised its option for 100,000 shares of Class B stock, and therefore, there were 100,000 shares fewer outstanding than at the November 2015 Annual Meeting.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As set forth in the Individual Defendants' Motion for Partial Summary Judgment No. 1, the material undisputed facts require judgment in favor of the Individual Defendants on Plaintiff's claims arising from the Board of Directors' of Reading International, Inc. ("RDI" or "the Company") termination of him as the Company's CEO and President on June 12, 2015. Plaintiff has filed a cross-motion for partial summary judgment in his favor on the same aspect of his claims. The Individual Defendants' motion should be granted, and Plaintiff's motion denied.

As a matter of law, Plaintiff's arguments challenging his termination and seeking reinstatement are meritless. He cannot identify a single case in which a board's decision to terminate an officer was subjected to *any* "fairness" review (be it fairness to the corporation on behalf of which Plaintiff purports to sue, or anyone else). Nor does he cite any case in which the firing of an officer was determined to be a breach of fiduciary duty. And he has located no case in which a former CEO was *reinstated* as a remedy for a purported breach of fiduciary duty.

Plaintiff ignores both the operative bylaws and Nevada law. RDI's Bylaws specifically provide that the CEO may be terminated *at any time, for any reason, by a majority of the entire Board* (not just the "non-Cotter" or "independent" Directors). That alone dooms his claim. Moreover, Plaintiff disregards the heightened standard for director liability that under NRS 78.138(7), requiring that he establish "intentional misconduct, fraud, or a knowing violation of the law" to prevail. Indeed, Plaintiff only once cites to *any* of the governing Nevada statutes at issue (NRS 78.138(3), the business judgment rule, cited at Pl's Mem. at 22), which he proceeds to rewrite based on inapplicable Delaware law. Consequently, Plaintiff's entire motion is premised on a requirement that does not exist in Nevada law—that the decision of a corporate board to terminate an executive is ever subject to an "entire fairness" test.

Factually, Plaintiff casts aside the most relevant facts by attempting to confine the record to the period between May 19, 2015 and June 12, 2015. In so doing, he seeks to avoid the many months in which the Board tried to ameliorate the deficiencies of a young, inexperienced CEO who rose to power on an emergency basis, could not work well with key executives, was abusive

to fellow employees and Board members, and displayed a lack of understanding of important aspects of RDI's businesses. That the Board began to openly consider Plaintiff's removal on May 21, 2015 was neither surprising nor improper.

Plaintiff's description of the reasoned review process by which the Board evaluated his continued employment, which took place over three meetings, lasted over 13 hours, and provided Plaintiff with ample opportunities to defend his tenure (and continue as President and/or CEO under certain circumstances), is also woefully incomplete. So too is Plaintiff's skewed description of a potential settlement between him and his sisters, Ellen and Margaret Cotter, that was considered by the Board prior to its termination vote. Indeed, Plaintiff hides from the Court that he specifically sought assistance from Director Kane in "brokering" that "agreement-in-principle." The complete undisputed facts show that the potential negotiated resolution between Plaintiff and his sisters was an appropriate business consideration by the RDI Board because it (1) alleviated the "dysfunction" and "thermonuclear hostility" between Plaintiff and his sisters, who were *all* Board members and key executives, and (2) circumscribed Plaintiff's authority as CEO. Once that agreement fell through, the Board was left with the same intractable problems as before, and properly acted to protect the interests of RDI by ending Plaintiff's brief, ineffective, and divisive tenure.

Ultimately, Plaintiff's motion should be denied, and summary judgment granted in favor of the Individual Defendants, in light of the following flaws in Plaintiff's termination and reinstatement claims, each of which is independently fatal:

First, the Board's termination of Plaintiff cannot support a breach of fiduciary claim as a matter of law. Courts regularly reject attempts by former officers to utilize fiduciary duty law to challenge the propriety of their removals, especially where (as here) a bylaw authorized a majority of the entire Board to fire him "at any time, with or without cause." Plaintiff's attempted expansion of fiduciary duty law to cover purely managerial decisions by a board is bad policy and contrary to settled precedent.

Second, Plaintiff lacks standing to serve as a derivative plaintiff. Economic antagonisms exist between Plaintiff and other stockholders. In fact, the remedy of reinstatement sought by

Plaintiff is *entirely personal*; neither RDI nor its stockholders share Plaintiff's interest in regaining his positions. Other litigation is pending regarding Plaintiff's firing and ultimate control of the Company, and Plaintiff's conduct—both before and after the filing of this suit—indicates that he is simply using his purported derivative claims as vindictive leverage to obtain a favorable global settlement. Not surprisingly, stockholders unrelated to the Cotters have stated that they would not "reinstate" Plaintiff and that he is not "the best adequate representative."

Third, even if the termination of an employee could *theoretically* constitute a breach of a fiduciary duty under RDI's bylaws and Nevada law (which it cannot) *and* Plaintiff had derivative standing (which he does not), Plaintiff's claims still fail. In his motion, Plaintiff has not argued, let alone established, any damages *to RDI* resulting from his termination—an essential element of breach of fiduciary duty. Further, Plaintiff does not contest that, if the business judgment rule were applied, it would be fatal to his action. And here, it clearly does. Under Nevada law, the business judgment rule *always applies* in the context of an employee termination.

Even if Nevada allowed the possibility of a "fairness" review in the context of an officer's removal (which it does not), here it would not be appropriate since no non-Cotter director derived any financial benefit from it "in the sense of self-dealing" or was so "beholden" to Ellen and Margaret Cotter that their discretion was sterilized. Plaintiff has provided no evidence that the RDI Board—which had appointed him as CEO previously—was not vested with the same discretion to terminate him and replace him with another. Indeed, the months-long process in which the Board attempted to train Plaintiff, provided him with an "ombudsman," creatively thought of ways to continue his employment while rectifying his inadequacies, and gave him notice and opportunity to defend his tenure was unquestionably fair as to the Company (and even to Plaintiff, which would be irrelevant in any event since he sues derivatively on behalf of RDI and not in his personal capacity).

Fourth, the relief demanded by Plaintiff—reinstatement—is not available. Equity jurisdiction does not lie where that Plaintiff was removable without cause under both RDI's Bylaws and his own Employment Contract (which Plaintiff is not suing upon in this case in any event). Further, there are strong practical impediments and policy reasons against compelling

the Board to reinstate Plaintiff (and fire Ellen Cotter as CEO) against its wishes. Plaintiff had no vested right to remain President and CEO and, even if reinstated, could simply be terminated again. More time has elapsed since Plaintiff's termination than he served as CEO, and the Company has moved on, which also counsels against reinstatement. Finally, in light of the "irreparable animosity" between Plaintiff and other directors, reinstatement would do nothing more than harm RDI's business.

II. FACTUAL BACKGROUND

A. Plaintiff Had Glaring Deficiencies in His Temperament, Managerial Skills, and Knowledge of RDI's Corporate Affairs

In construing the events leading up to his June 12, 2015 termination as CEO and President of RDI, Plaintiff starts the clock on May 19, 2015—just prior to the first meeting at which the Board formally debated his employment status. (*See* Pl.'s Mem. at 5-8.) Plaintiff has attempted to divert the Court's focus from the events of the previous eight months for good reason; during that time, major problems in Plaintiff's temperament, managerial skills, and knowledge of RDI's business became obvious, forcing RDI's Board to spend innumerable hours trying to rectify his inadequacies through coaching, the use of an ombudsman, and additional training. (Ind. Defs.' MSJ No. 1 at 5-9.)[1] As Director McEachern testified, Plaintiff "knew that his position as CEO was in jeopardy for a longer period of time than just May 21." (HD#1 Ex. 7 at 176:1-9.) Plaintiff avoids the following facts, each of which invalidates his motion:

- Plaintiff Could Be Removed at Any Time, For Any Reason: Plaintiff was elected as CEO pursuant to the RDI's Amended and Restated Bylaws, which provide, *inter alia*, that, as an officer, Plaintiff served "at the pleasure of the Board of Directors," and could "be removed at any

[1] Given the exact overlap between Plaintiff's Motion for Partial Summary Judgment and the Individual Defendants' Motions for Summary Judgment (No. 1) on Plaintiff's Termination and Reinstatement Claims and (No. 2) on the Issue of Director Independence, the Individual Defendants will refer to the applicable pages (and exhibits cited) in their September 23, 2016 motions where appropriate. Citations to "HD#1" will refer to exhibits attached to the Declaration of Noah S. Helpern in Support of the Individual Defendants' Motion for Summary Judgment No. 1, and citations to "HD#2" will likewise refer to exhibits attached to the Helpern Declaration in Support of the Individual Defendants' Motion for Summary Judgment No. 2. Citations to "HDO" will refer to any new exhibits attached in support of this opposition.

time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof." (HD#1, Ex. 19; *see also* Ind. Defs.' MSJ No. 1 at 4-5.)[2] Plaintiff's Employment Contract, signed in 2013 when he became the Company's President, similarly contemplated that he could be terminated without cause, in which case he was entitled to receive his usual compensation and benefits for 12 months, or "for cause," in which case he would receive nothing. (HD#1 Ex. 20 § 10; *see also* Ind. Defs.' MSJ No. 1 at 4.)

- Plaintiff Was Elected Only Because of an Emergency Vacancy, and Lacked Significant Experience in Areas Critical to RDI: Plaintiff was elected as CEO on August 7, 2014 to fill an emergency vacancy caused by the health-related resignation of his father. (*Id.*) The Board hoped that Plaintiff would develop on the job. (*Id.* at 5.) As Director Adams noted, Plaintiff "was young" and "didn't have that much experience." (HD#1 Ex. 4 at 462:14-25.) Director McEachern similarly recognized that Plaintiff "had no real estate experience, no international experience, no management experience, no cinema experience and no live theater experience" (HD#1 Ex. 7 at 49:25-50:7), while Director Storey believed that "if his last name wasn't Cotter, he wouldn't be CEO." (HD#1 Ex. 4 at 460:12-24.) Given that Storey and others recognized "holes in" Plaintiff's "expertise or ability to function as CEO and where he needed further handling" (HD#1 Ex. 7 at 177:5-11; HD#1 Ex. 32 at 2), RDI's Board—as Plaintiff has conceded—began discussing "the possibility of getting an interim CEO . . . as early as October 2014" to ameliorate his shortcomings. (HD#1 Ex. 11 at 528:9-529:20.)

- Teamwork and Morale Was Poor Under Plaintiff's Abusive Leadership: By early February 2015, Director Storey recognized that under Plaintiff, "morale" within RDI was "poor and needs to be improved," Plaintiff "need[ed] to establish teamwork," and required even more

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[2] Plaintiff's focus on the Board's January 15, 2015 resolution—in which all five non-Cotter directors agreed that in order to terminate "the CEO" (and/or Ellen and Margaret Cotter), a majority of the non-Cotter directors would be required to vote in favor of doing so (Pl.'s Mem. at 1, 4-5)—is misguided. Not only it is black-letter law that bylaws trump board resolutions, *see* 18A Am. Jur. 2d *Corporations* § 253 (2016), a majority of the non-Cotter directors—all of whom were independent and disinterested—ultimately voted to remove Plaintiff as RDI's CEO and President.

"help to lead/develop leadership role." (HD#1 Ex. 33 at 3.) Plaintiff's management style was perceived as "closed door" and unengaged, and the Board saw Plaintiff as being "very reluctant and slow to make decisions." (HD#1 Ex. 3 at 451:25-454:25; HD#1 Ex. 7 at 52:2-5, 285:23-286:11.) Moreover, as Plaintiff admitted, the Board was aware of a "perception at Reading by employees" that he had "a volatile temper" and "an anger management problem." (HD#1 Ex. 11 at 481:24-483:5.) The Board was troubled by Plaintiff's "behavior," "temperament," and "anger issues" (HD#1 Ex. 15 at 55:21-57:5), because Plaintiff's outbursts had caused several female employees or outside workers to be "physically afraid" of Plaintiff and concerned for their "actual physical safety" around him, such that at least one was "carrying mace to the office." (HD#1 Ex. 3 at 419:17-421:23; HD#1 Ex. 5 at 134:1-135:22, 137:12-140:15; HD#1 Ex. 7 at 112:18-113:24, 114:6-15.) As a result, some Board members considered sending Plaintiff to a "psychologist or psychiatrist" or to anger management classes in early 2015. (HD#1 Ex. 6 at 529:22-530:2; HD#1 Ex. 35 at 3.)

- Plaintiff Lacked an Understanding of Key Components of RDI's Business: As CEO, Plaintiff also demonstrated a lack of understanding with respect to costs and margins highly critical to RDI's cinema business. (Ind. Defs.' MSJ No. 1 at 7.) For instance, in a presentation to the Board on which he had worked "for months," Plaintiff failed to adjust his analysis to account for lower film rentals in Australia and New Zealand when comparing margins in those territories to U.S. theaters. (HD#1 Ex. 2 at 84:20-86:1.) Moreover, Plaintiff failed to comprehend the different treatment used in each region when accounting for labor cost allocations. (*Id.* at 86:1-87:23.) As a result, Director Adams and others questioned Plaintiff's "knowledge about the business," whether he "properly investigated" claimed issues in the Company before bringing them before the Board, and whether he was "really learning the business" and "leading us forward." (*Id.*) As CEO, Plaintiff admittedly never presented a business plan before the Board (HD#1 at 198:19-21, 205:19-206:6, 235:18-21), even after it was placed on the agenda (at his request) when the Board began discussing his potential termination. (HD#1 Ex. 29 at 1.) And, during his time as CEO, Plaintiff chose not to visit RDI's operations in Australia and New Zealand, despite their importance (HD#1 Ex. 7 at 292:6-24), preferring

instead to conduct a wasteful trip in which he went incognito to a few cinemas in Hawaii in an effort to embarrass his sister, Ellen Cotter, who was the long-standing executive responsible for that aspect of the business. (HD#1 Ex. 7 at 50:19-51:152:1.)

B. Plaintiff Could Not Work With Key RDI Executives

While Plaintiff in his motion ignores these problems with his managerial skills and temperament as CEO, he recognizes that during his entire tenure he was "at odds with" and had difficulties working alongside his sisters, Ellen and Margaret Cotter. (Pl.'s Mem. at 8-14.) Ellen and Margaret Cotter were key executives at or contractors with RDI, and each were members of the Company's Board. (Ind. Defs.' MSJ No. 2 at 4-5.) During this period, Ellen Cotter served as RDI's Chairman of the Board, had been a RDI employee since March 1998, and had run the day-to-day operations of the Company's domestic cinema operations since 2002. (*Id.*) Margaret Cotter served as the Board's Vice Chairman and, while an outside consultant at the time of Plaintiff's firing, had run RDI's live-theater operations for at least 13 years, managed the underlying real estate issues relating to those theaters (and certain cinemas) for the same period, and was actively involved in the Company's redevelopment of its New York properties for the previous five years. (*Id.*; *see also* Ind. Defs.' MSJ No. 6 at 3-4.)

Almost immediately after becoming CEO, Plaintiff became mired in a dispute with, and ultimately litigation against, Ellen and Margaret Cotter over an amendment to the James J. Cotter Living Trust, purportedly executed on their father's deathbed, which affected whether Margaret alone or Margaret and Plaintiff together controlled a trust into which the majority of RDI's voting shares would ultimately pour. (Pl.'s Mem. at 9-10; Ind. Defs.' MSJ No. 1 at 7.) Plaintiff further alienated the Board when he tried to undermine Ellen Cotter by conducting a secret one-man examination of RDI's cinema operations in the fall of 2014, without any input from or the knowledge of Ellen Cotter (or any other member of RDI's management), and later when he unilaterally tried to hire a food and beverage manager without involving her (despite the fact that he had no experience in food or beverage matters). (Ind. Defs.' MSJ No. 1 at 6.) In addition to these steps, which engendered criticism from the Board both for Plaintiff's duplicity and wasteful spending of his time on matters best left to consultants (HD#1 Ex. 7 at 50:19-51:12),

Plaintiff became further estranged from Margaret Cotter when, rather than work productively with her once the producers of STOMP threatened to vacate RDI's Orpheum Theater, he "attack[ed]" Margaret and attempted to use the dispute to "embarrass" her before the Board—a step that Director Kane felt was "not what a CEO should do when you have two experienced executives." (HD#1 Ex. 4 at 161:4-162:11; HD#1 Ex. 9 at 304:5-23.) Similarly, Director McEachern believed that Plaintiff refused to "mend fences and move forward" with Margaret Cotter, and instead "thr[ew] hand grenades" into their relationship, when he advocated against making Margaret a full RDI employee (HD#1 Ex. 7 at 288:19-289:8), despite the fact that she had long been performing the responsibilities for which she would be hired. (Ind. Defs.' MSJ No. 6 at 3-7.)[3]

As a result of Plaintiff's inability to cooperatively work with these individuals, who were integral to RDI's success, Director Gould and others determined that RDI was faced with "a dysfunctional management team" in which there was "'thermonuclear' hostility" between the Cotters. (HD#1 Ex. 35 at 2-3.) Plaintiff did not disagree; as he testified, the tensions between

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[3] In his motion, Plaintiff makes a host of factual allegations regarding Ellen and Margaret Cotter that are utterly irrelevant to the legal merits of his termination dispute. (Pl.'s Mem. at 10-14.) Not only is this attempt to color the record improper, Plaintiff's half-truths and distortions are undermined by the record. For instance, while Plaintiff notes that his sisters "sought to report to an executive committee of RDI's Board of Directors rather than to" him (*id.* at 10), he omits that this was because they "were having issues with" Plaintiff and "wanted to figure out a way to have a structure in place that would be almost transitional that would help us work together so we could work through any issues we would have." (HDO Ex. 8 at 65:7-13.) The sisters also shared the valid concern that Plaintiff, based on his pattern of conduct, "would color [their] reporting and would put [them] in a bad light." (*Id.* at 92:18-21.) Similarly, while Plaintiff criticizes Ellen Cotter for wanting a new job title, he ignores that her present title did "not reflect" her actual responsibilities, and the "nominal" president was actually just a "senior advisor." (HDO Ex. 11 at 2; HDO Ex. 2 at 14:21-15:13.) In fact, Plaintiff "agreed in principal" that Ellen Cotter should be given the revised title. (HD#1 Ex. 37 at 2.) Nor does he identify why it was improper that Ellen and Margaret Cotter sought employment contracts. Plaintiff had one, and Director Gould recognized that, "given the fact of the factions" in RDI's management, each rightfully "felt their jobs may have been in jeopardy" and that absent such a contract Plaintiff may "take steps to have [them] terminated" irrespective of performance. (HDO Ex. 10 at 79:21-81:3.) And the request by Ellen and Margaret Cotter to have their below-market compensation rectified was consistent with the recommendation of an external industry expert and was subsequently approved by RDI's Compensation Committee. (*See* Ind. Defs.' MSJ No. 6 at 6-9.)

Plaintiff and his sisters had become so intense that RDI was unable to function, such that drastic reform in behavior or potential termination(s) were required to get beyond the current paralysis. (HD#1 Ex. 12 at 696:22-700:3, 704:7-22.) Director Storey specifically informed Plaintiff that RDI needed to operate "more harmoniously," any more "back sliding" was "not acceptable," and "things need to improve and that improvement has to be sustained, otherwise the board will need to look to other steps to protect the company's position." (HD#1 Ex. 37 at 1-2.)

C. The Board Engaged in a Months-Long Reasoned Review Under Which It Evaluated Plaintiff and Sought to Ameliorate His Inadequacies

With respect to Plaintiff, the RDI Board had "an individual who we're very concerned about" such that its "process or evaluation" of him was "constantly going on." (HD#1 Ex. 7 at 219:2-24.) The Board considered engaging an outside consultant to improve Plaintiff's "management and corporate governance" (HD#1 Ex. 11 at 354:23-357:24), and ultimately decided to appoint Director Storey as an "ombudsman" in March 2015—over Plaintiff's initial objections—to work with and coach Plaintiff, and mediate any disputes between him and other executives. (Ind. Defs.' MSJ No. 1 at 8; Pl.'s Mem. at 5 n.1; HD#1 Ex. 11 at 315:22-317:16.) Storey made clear to Plaintiff that "he needs to make progress in the business with Ellen and Margaret quickly, or the board will need to look to alternatives to protect the interests of the company." (HD#1 Ex. 37 at 2-3.) Indeed, Storey emphasized to Plaintiff, "if things don't work out in an acceptable manner, then the [B]oard is resolute in the view that it will then act in the best interests of the company in changing things." (*Id.* at 3.) While some directors wanted the ombudsman process to continue through the end of June 2015 (Pl's Mem. at 6 n.3), the Board "never set a date of June 30 for our intervention" and Director Kane and others felt that "there was no reason for us to wait until June 30" without progress. (HD#1 Ex. 6 at 532:12-533:15.)

The necessary improvement did not take place. While Adams had hoped that Plaintiff "could learn on the job and get up to speed quickly," by April 2015 he "was of the opinion that wasn't working out," as the Board had "been working with [Plaintiff] all these months and I don't see progress." (HD#1 Ex. 2 at 78:18-21, 83:23-87:23.) Similarly, "sometime in mid to late May of 2015," McEachern concluded that Plaintiff had "an inability to operate as a manager,

an inability to create trust, [and] an inability to communicate with people" such that "we're not making progress that our shareholders expect us to make in this organization, and we [have] got to get somebody in here who can help us move the company forward." (HD#1 Ex. 7 at 71:2-18, 293:23-294:15.) Director Kane had not yet "made up my mind" by mid-May, and considered abstaining in the event a motion was made to terminate Plaintiff. (HDO Ex. 12; HDO Ex. 6 at 309:19-310:1 (Kane noting "I wouldn't have invited [Plaintiff] to come down to my house and talk about how he could stay" if he had made up his mind).)[4]

As various directors independently contemplated Plaintiff's removal, they began a series of emails, meetings, and informal straw polls as to a potential termination vote, and commenced discussing what to do on an interim basis in the event that Plaintiff was fired. (HDO Ex. 9 at 175:17-179:7; HDO Ex. 3 at 98:8-99:22; HDO Ex. 4 at 366:14-373:2.) None of this was improper, as Plaintiff suggests. (Pl.'s Mem. at 5-6.) Rather, the Board had to determine if it was even worthwhile to formally discuss Plaintiff's employment status during a Board meeting, and it had an obligation to plan ahead if he was ultimately removed. Given that there was sufficient support to begin an open debate, Plaintiff's continuing role as CEO and President was placed on the agenda for the Board's May 21, 2015 meeting as an item for discussion. (HD#1 Ex. 39.)

Plaintiff, by taking certain emails out of context and omitting the following events, implies that what happened next was a "kangaroo court" to which "Directors Gould and/or Storey objected." (Pl.'s Mem. at 6.) But the only emails cited by Plaintiff pre-date the Board's May 21, 2015 meeting, and merely evince Storey's disagreement with the "apparent view" of certain directors "that no discussion is necessary" and a simple vote on Plaintiff's employment would suffice. (*See, e.g.*, HDO Ex. 14.) Storey instead wanted to "define and address the issue,

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[4] Plaintiff's citation to a May 19 email from Kane to Gould explaining that "the die is cast" is misleading to the extent that it implies Kane had made up his mind and wanted no debate. (Pl.'s Mem. at 6.) During his deposition, Kane explained that he did not mean that Plaintiff was going to be terminated without any discussion, but instead that "I was referring to the agenda . . . that was cast . . . . To me that meant the agenda is set, and that's what we'll discuss, and I see no reason to have a meeting beforehand" with Gould. (HDO Ex. 6 at 356:10-25, 360:5-12.)

discuss it, and come to a conclusion," which was "a separate issue [as] to the merits of the decision before us." (HDO Ex. 1 at 134:9-135:1; HDO Ex. 13 at 1-2.)

What Plaintiff leaves out is that the Board actually adopted and followed Storey's advice as to "proper procedure." The Board first met on May 21, 2015 to discuss potentially removing Plaintiff as CEO and President. (HD#1 Ex. 29.) Its discussion lasted nearly five hours, during which it utilized both outside counsel retained by the Company and additional outside counsel engaged by the non-Cotter directors. (*Id.*) That Plaintiff's employment was up for discussion was not a mystery to him, as Plaintiff hints. (Pl.'s Mem. at 5.) It was unambiguous that this was going to happen, as evidenced by the presence of Plaintiff's current litigation counsel at the May 21, 2015 Board meeting (HD#1 Ex. 29 at 1), and the fact that, in the days prior, both Plaintiff and his counsel had threatened to sue each director "and ruin them financially" if they voted for removal. (HD#1 Ex. 3 at 426:19-427:9; HD#1 Ex. 7 at 78:14-79:2.) At the May 21 meeting, Director Gould raised one possible solution to the problems being experienced by RDI under Plaintiff's leadership, which would be to have Plaintiff resign as CEO but "continue as President of the Company," with the Board to then "commence a search for a new Chief Executive Officer"—a proposal that Plaintiff "twice refused." (HD#1 Ex. 29 at 4.) Ultimately, after much debate in which Plaintiff was given the opportunity to discuss his performance (and actually did so "at length"), the Board chose not to terminate Plaintiff on May 21, 2015, and instead continued its deliberations for the next scheduled Board meeting. (*Id.* at 1-4.)

D. The Board Properly Considered a Potential Settlement That Would Have Resolved the Trust Litigation and Reduced Plaintiff's Authority as CEO

As planned, the Board discussed Plaintiff's performance and the possibility of his removal for another seven hours on May 29, 2015, once again in the presence of counsel. (HD#1 Ex. 30.) For a third time, Plaintiff refused the opportunity "to remain employed as President of the Company under the leadership of a new Chief Executive Officer." (*Id.* at 1-3.) Adams then made a motion, seconded by McEachern, to remove Plaintiff from his position as President and CEO, "principally based on Plaintiff's lack of leadership skills, understanding of the Company's business, temperament, managerial skills, decision-making and other attributes." (*Id.* at 2.)

Plaintiff's defense was limited to an assertion "that it was the intention of his father . . . that he run the Company and the Board should observe his wishes." (*Id.* at 3.)

Prior to a final vote, the Cotters informed the Board of an important development: they had reached an "agreement-in-principle," subject to review by counsel, documentation to their mutual satisfaction, and approval by the Board as to certain issues, that (1) addressed "the structure of the senior management of the Company" (a fact that Plaintiff noticeably leaves out of his motion (*see* Pl.'s Mem. at 6-8)) and (2) would resolve their pending trust litigation. (HD#1 Ex. 30 at 3-4.) Under the agreement, Plaintiff would remain as CEO, but his decisions would be subject to oversight by an Executive Committee composed of Ellen Cotter, Margaret Cotter, and Guy Adams, to which certain decisions were delegated—such as the hiring, firing, and compensation of senior personnel. (HD#1 Ex. 40.)[5] The Board saw this as a positive step, as the agreement had the potential to assuage the performance concerns regarding Plaintiff, "resolve issues relating to the control of the Company," "provide certainty to management and stockholders," and "reduce or eliminate the tension and obstacles" that had prevented Plaintiff from working with his sisters. (HD#1 Ex. 30 at 3.) As such, the Board adjourned the May 29, 2015 meeting without a vote to allow the documentation of the potential settlement. (*Id.* at 4.)

Director Kane, who had been aware of the possibility of a negotiated resolution in the previous days, did not "pressure" Plaintiff to accept the settlement, as Plaintiff wrongly claims. (Pl.'s Mem. at 18-20.)[6] Instead, it is clear from the evidence that Plaintiff reached out to Kane first to involve him in the settlement discussions, telling Kane on May 22, 2015 that he was the

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[5] The "agreement-in-principle" reached was not a "take-it or leave-it offer," as Plaintiff incorrectly claims. (Pl.'s Mem. at 7.) Indeed, the Cotters made revisions and exchanged drafts to the "Confidential Settlement Memo of Understanding" over the course of several days. (*See* HD#1 Ex. 40 (May 27, 2015 version); HDO Ex. 16 (June 3, 2015 revision).)

[6] To the extent that Plaintiff makes allegations challenging the independence of Directors Kane and Adams, those assertions are fully rebutted in the Individual Defendants' Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence and need not be repeated here. To the extent that Plaintiff relies on these distortions and inaccuracies to maintain that his summary judgment motion should be granted, Section III(C)(2)(b) below identifies the many factual and legal failings in Plaintiff's argument on the issue of director independence.

"most thoughtful director" who was the "only one I have now who can broker peace" (HDO Ex. 18 at 1), and begging Kane on May 27, 2015: "Is there anything you can do to broker this?" (HDO Ex. 15 at 2.) While Kane "strongly advise[d]" Plaintiff to come to a negotiated resolution (*id.* at 1), his encouragement was not motivated by a desire that Margaret Cotter remain the sole trustee of the Voting Trust, as Plaintiff asserts. (Pl.'s Mem. at 18-19.) Rather, the evidence is that, as of late May 2015, Kane had "not seen or heard the particulars" as to who would control the Trust (HDO Ex. 15 at 1), did not know that Margaret Cotter would be left as the sole trustee under the settlement, and "didn't want to know it." (HDO Ex. 7 at 597:9-22.) Rather, Kane told Plaintiff that he supported the general idea of a cooperative deal because it would "benefit you and your sisters and allow you to work together going forward," help end all "ill feelings," and allow Plaintiff to prove that he does "have the leadership skills to run this company." (HDO Ex. 15 at 1-2.) When Kane later learned that Margaret Cotter would control the trust under the proposed deal, he reemphasized to Plaintiff on June 11, 2015 that he would "much prefer that [Plaintiff] bend a bit and work it out between you to build the trust that is necessary so that you don't lose control of the company, as you presently have." (HDO Ex. 17.) Kane was well aware that "there were votes there to terminate [Plaintiff]" and that he himself would be "voting against him" by mid-June due to Plaintiff's deficiencies if they were not alleviated by the kind of further oversight and more harmonious management structure contemplated in the pending settlement. (HDO Ex. 7 at 596:13-25; HDO Ex. 5 at 193:3-195:2.)

Ultimately, the "agreement-in-principle" broke down by early June 2015 when the Cotters attempted to document its final form, and, there being no resolution of the ongoing management issues, Plaintiff's employment was placed back on the agenda for the Board's June 12, 2015 meeting. (Ind. Defs.' MSJ No. 1 at 11.) At that meeting, the Board once again discussed Plaintiff's management skills and experience, following which Directors Adams, Kane, and McEachern, as well as Ellen and Margaret Cotter, voted in favor of the pending motion to remove Plaintiff as the Company's CEO and President; directors Gould and Storey voted against the removal motion, while Plaintiff abstained. (HD#1 Ex. 31 at 1-2.) None of the directors—including Storey and Gould—believed that Plaintiff's failure to settle the trust and

estate litigation between him and Ellen and Margaret Cotter caused his termination as CEO and President of the Company. (Ind. Defs.' MSJ No. 1 at 11-12.) Instead, as both Storey and Kane testified, the majority felt that "things should be dealt with now," "[t]hey had come to a head and there was no point in delaying," "the current disharmony within the business was untenable going forward," "[t]here was a polarization in the office among the employees, and it had to be resolved one way or another." (HD#1 Ex. 1 at 119:25-120:12, 154:2-14; HD#2 Ex. 5 at 331:11-332:17.) As McEachern testified, "from August of 2014 until [Plaintiff's] termination, I cannot tell you one thing that we did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing." (HD#1 Ex. 7 at 292:2-5.) Following Plaintiff's removal, Ellen Cotter was elected interim and ultimately permanent CEO and President of RDI. (HD#1 Ex. 25.)

III. ARGUMENT

A. Plaintiff's Termination Cannot Support a Breach of Fiduciary Duty Claim

Plaintiff's motion fails because it has no basis in the law, ignores the relevant law, and focuses instead on inapplicable law and facts. Plaintiff avoids any mention of RDI's Bylaws, the governing Nevada corporate statutes (or even his own Employment Contract) on his fiduciary duty claims. Indeed, he does not identify *a single case* in which *any court* (let alone a Nevada court) has found members of a board liable for breaching fiduciary duties of care or loyalty by terminating a corporate officer. Every case cited by Plaintiff is inapposite—such as where a board is alleged to have breached its duties when faced with a corporate merger or sale, or where there is an accusation that corporate assets have been misused; noticeably absent is any case law in which the employment of an officer is at issue. *See, e.g.*, *McMullin v. Brand*, 765 A.2d 910, 917 (Del. 2000) (proposed sale of corporation); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (two-stage tender offer/merger transaction); *Paramount Commc'ns Inc. v. QVC Network*, 637 A.2d 34, 42 (Del. 1994) (merger); *Venhill Ltd. P'ship v. Hillman*, C.A. No. 1866-VCL, 2008 WL 2270488, at *22 (Del. Ch. June 3, 2008) (partner accused of improper investments and misuse of trust assets). Under the governing law and undisputed material facts, Plaintiff's claims related to his termination should be rejected.

1. RDI's Board Had the Undisputed Right to Remove Plaintiff at Any Time, With or Without Cause

First, pursuant to the RDI Bylaws, and the broad latitude afforded decisions by a board of directors under Nevada law, Plaintiff's claim fails.

Under Nevada law, officers such as Plaintiff "hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors," and may remain in office until the "expiration of his or her term" or "until the officer's resignation or removal before the expiration of his or her term." NRS 78.130(3)-(4). "[T]here is no vested right to retain one's office in the face of a properly executed removal." *Cooper v. Anderson-Stokes, Inc.*, 571 A.2d 786, 1990 WL 17756, at *2 (Del. 1989) (table). RDI's Amended and Restated Bylaws mirror NRS 78.130, and provide that Plaintiff could hold office as the Company's CEO and President only until the appointment of his successor, his death, or until he shall resign or "is removed in the manner as hereinafter provided for such term as may be prescribed by the Board of Directors." (HD#1 Ex. 19, Art. IV § 1.)

The Company's Bylaws expressly provide that Plaintiff served solely "at the pleasure of the Board of Directors," and that he could "be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof." (*Id.*, Art. IV § 10.) Plaintiff's Employment Contract similarly recognized that the Board had an undiminished right to terminate him "with cause," in which event he was owed no relief, or "without cause," in which case he was due a specified sum. (HD#1 Ex. 20 § 10.)

A corporation's charter and bylaws "are contracts among the shareholders of a corporation." *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990). Here, because the Board had an *express, unrestricted right* to terminate Plaintiff's employment at any time, for any reason, under both Nevada law and RDI's Bylaws, as a matter of law it cannot be liable for breaching its fiduciary duties and violating any fundamental covenant between the Company and its stockholders. *See, e.g., Nahass v. Harrison*, C.A. No. 15-12354, 2016 WL 4771059, at *6 (D. Mass. Sept. 13, 2016) (terminated officer could not maintain fiduciary duty claim where his termination was authorized under "the Bylaws"); *In re Eagle Corp.*, 484 B.R.

640, 654 (Bankr. D.N.J. 2012) (removal of officer and director could not be a breach of fiduciary duty where "Delaware General Corporation Law provides for removal . . . with or without cause"); *Goldstein v. Lincoln Nat'l Convertible Sec. Fund, Inc.*, 140 F. Supp. 2d 424, 438 (E.D. Pa. 2001) (plaintiff could not maintain fiduciary duty claim "[g]iven the express statutory authorization for the Board's action"), *vacated on other grounds*, 2003 WL 1846095 (3d Cir. Apr. 2, 2003); *Quadrant Structured Prod. Co., Ltd. v. Vertin*, C.A. No. 6990-VCL, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014) (dismissing action, in part, because the company's "governing documents authorized" the challenged "strategy"); 2 Fletcher Cyc. Corp. § 360 (2015) ("a court has no right or jurisdiction to review the discretionary action of the board in removing an officer, unless the contract rights of the person removed are involved"); *id.* § 363 ("where a bylaw provided that any officer might be removed by a majority vote of the entire board whenever the best interests of the company require it, it was for the directors to determine what was in the best interests of the company; the courts will not interfere unless for fraud or illegality"). To hold otherwise would effectively rewrite the RDI's Bylaws and fundamentally alter the "contract" between Company and its stockholders. Given the clear authority of the Board to terminate him without cause, Plaintiff's motion should be denied.

2. Courts Routinely Reject Attempts to Transform the Termination of an Officer's Employment Into a Breach of Fiduciary Claim

Second, Plaintiff's inability to locate direct authority supporting the availability of a fiduciary duty claim in the context of an officer termination decision is not surprising. Most courts regularly reject attempts to use "an appeal to general fiduciary law" to transform cases involving the dismissal of an officer into claims that a company's directors "breached a fiduciary duty as corporate officers." *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 190 (1989) (rejecting effort by operating manager and minority shareholder, upon his firing, to assert fiduciary duty violations); *see also Hackett v. Marquardt & Roche/Meditz & Hackett, Inc.*, Civ. No. 02-990166881S, 2002 WL 31304216, at *2 (Conn. Sup. Ct. Sept. 17, 2002) (rejecting breach of fiduciary duty claim, and holding that "the law of employment relations seems to provide sufficient protection for any civil wrongs" in the event of a purportedly unlawful termination).

Such courts have found that claims of fiduciary breaches by terminated officers represent "novel argument[s]" for which there is "no case in support." *Carlson v. Hallinan*, 925 A.2d 506, 540 (Del. Ch. 2006) (plaintiff could not "articulate a theory as to how Carlson's removal as President . . . could be a breach of fiduciary duty"); *see also Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 384 (D. Conn. 2012) (allegations of "breach of fiduciary duty" based on "allegedly wrongful termination . . . fail to state a claim").

These courts instead have barred breach of fiduciary duty claims against corporate directors arising from their decision to terminate the employment of an officer. *See, e.g.*, *Berman v. Physical Med. Ass'n, Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (affirming dismissal of fiduciary duty claim that directors did not follow fair procedures in deciding to terminate stockholder/doctor's employment because "any injury caused by the termination decision itself would be an injury to his interests as an employee, not as a stockholder"); *In re Eagle Corp.*, 484 B.R. at 654 (a stockholder "who is also an employee cannot recover on a breach of fiduciary duty claim when the claim is grounded solely in an employment dispute"); *Wall St. Sys., Inc. v. Lemence*, No. 04 Civ. 5299, 2005 WL 2143330, at *8 (S.D.N.Y. Sept. 2, 2005) (dismissing third-party claims against directors because "they are essentially employment disputes that cannot sustain a claim of fiduciary breach under Delaware law"); *Dweck v. Nassar*, No. 1353-N, 2005 WL 5756499, at *5 (Del. Ch. Nov. 23, 2005) (finding that "[the shareholder's] allegations of wrongdoing in connection with her termination as President and CEO" by the Board of Directors "are insufficient to support a claim for breach of fiduciary duty").

In fact, "under Delaware law," which Plaintiff maintains is "persuasive authority" (Pl.'s Mem. at 22 n.6), courts are emphatic that "there can be no breach of fiduciary duty stemming from the termination of [an officer's] employment." *Kasper v. LinuxMall.com, Inc.*, No. Civ. A. 00-2019, 2001 WL 230494, at *3 (D. Min.. Feb. 23, 2001) (applying Delaware law in context of termination of president); *see also Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39-40 (Del. 1996) (no liability for breach of fiduciary duty where stockholder/plaintiff was "an employee of the corporation under an employment contract with respect to issues involving that employment").

The Court need not proceed any further. Given that Plaintiff's termination was explicitly

authorized at any time, for any reason, under RDI's Bylaws by a simple majority "of the entire Board," and courts are virtually unanimous in rejecting attempted fiduciary duty claims arising out of an employee's termination, Plaintiff's fiduciary duty claims relating to his firing are not supportable. Plaintiff's motion should be denied, as summary judgment in favor of the Individual Defendants as to Plaintiff's termination claims is immediately warranted instead.

B. Even If the Termination of an Employee Could Constitute a Breach of Fiduciary Duty, Plaintiff Lacks Standing to Maintain His Derivative Action

Even assuming that, contrary to the great weight of established caselaw, it is theoretically possible for a plaintiff to maintain a viable breach of fiduciary duty claim relating to the termination of a corporate officer, Plaintiff himself lacks standing to derivatively assert breach of fiduciary duty claims against the Individual Defendants arising out of his termination. Elements of standing are not merely pleading requirements, but are an "indispensable part of the plaintiff's case" on which "the plaintiff bears the burden of proof" at each of "the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiff cannot meet his burden with respect to his standing now that discovery has occurred.

For the reasons set forth in detail in the Individual Defendants' Motion for Summary Judgment (No. 1), Plaintiff lacks the necessary standing to assert derivative claims on behalf of RDI and its stockholders relating to his termination because: (1) clear economic antagonisms exist between Plaintiff and RDI's stockholders; (2) the injury alleged to, and the remedy sought by, Plaintiff is entirely personal, and is not a harm suffered by RDI itself or its stockholders; (3) other significant litigation is pending covering the same conduct at issue, and the overlap indicates that Plaintiff is personally using this derivative suit to attempt to obtain a more favorable global settlement; (4) Plaintiff is clearly driven by vindictiveness; and (5) significant unaffiliated stockholders in RDI do not support Plaintiff's derivative action as it relates to his termination or to the extent it demands his belated reinstatement. (*See* Ind. Defs.' MSJ No. 1 at 23-28.) Plaintiff's inability to satisfy the standing requirements for his derivative action as it relates to his termination and reinstatement merits not only the denial of his partial summary judgment motion, but also the entry of summary judgment against him.

C. Even If the Termination of an Employee Could Constitute a Breach of Fiduciary Duty and Plaintiff Had Standing, Plaintiff's Claims Fail as a Matter of Law

Even assuming *arguendo* that the termination of an employee could *ever* support a breach of fiduciary duty claim *and* Plaintiff has standing to maintain a derivative action on behalf of RDI itself and its stockholders that asserts fiduciary duty claims relating to his termination, Plaintiff—to sustain his suit—must produce cognizable evidence showing (1) "the existence of a fiduciary duty"; (2) the decision by the Board to terminate him as CEO and President of the Company represented a "breach of that duty" to RDI itself as a matter of law; and (3) "that the breach proximately caused the damages" to the Company alleged. *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008). Moreover, under NRS 78.138(7), in order for the Individual Defendants to be liable, Plaintiff must prove that the fiduciary breach "involved intentional misconduct, fraud or a knowing violation of the law." Yet Plaintiff cannot meet *any*—let alone all—of these requirements. His motion for partial summary judgment fails for four additional and independent reasons.

1. Plaintiff Has Not Argued, Let Alone Established, Any Damages to RDI as a Result of His Termination

In his Second Amended Complaint, Plaintiff has asserted claims on behalf of the Company relating to his termination against the Individual Defendants for the breach of the duty of care, the breach of the duty of loyalty, and aiding and abetting these alleged breaches. (Pl.'s Mem. at 1; SAC Counts I, II, IV.) An essential element to pleading (and establishing) each of these causes of action under Nevada law is the requirement that Plaintiff show that the purported breaches proximately caused damages to RDI. *See Olvera v. Shafer*, No. 2:14-cv-01298, 2015 WL 7566682, at *2 (D. Nev. Nov. 24, 2015) ("A claim for breach of fiduciary duty under Nevada law requires a plaintiff to demonstrate a fiduciary duty exists, that duty was breached, and the breach proximately caused the damages."); *In re Amerco Deriv. Litig.*, 127 Nev. 196, 225 (2011) (adopting the Delaware standard for "aiding and abetting a breach of a fiduciary duty," for which one of the "four elements" is "the breach of the fiduciary relationship resulted in damages"). In his motion for summary judgment, however, Plaintiff does not argue—let

alone provide any evidence—that the alleged breaches caused *any* damages, let alone proximately caused damages to the Company. This failure alone is immediately fatal to Plaintiff's motion.[7]

2. The Board's Decision to Terminate Plaintiff Is Protected by the Business Judgment Rule

In his motion, Plaintiff does not contest that, if the business judgment rule were to apply, his fiduciary duty claims arising out of his termination would automatically fail as a matter of law. (*See also* Ind. Defs.' MSJ No. 1 at 18-22 (establishing why the business judgment rule bars Plaintiff's action).) Instead, his sole argument is that "the business judgment rule has no application here" because certain Board members purportedly "had an interest in the challenged conduct" or lacked "independence" from those that had such an interest. (Pl.'s Mem. at 21-22.) According to Plaintiff, *Delaware's* "entire fairness test"—rather than Nevada law—should be applied when evaluating any breach of fiduciary duty relating to his termination. (*Id.* at 25-28.) Plaintiff's attempt to avoid the application of the business judgment rule fails for two reasons.

(a) Under Nevada Law, the Business Judgment Rule Applies in the Context of an Employee Termination

Plaintiff's entire argument rests upon his assumption that if either Director Kane or Director Adams was not "independent" with respect to the Board's decision to terminate his employment, then the Individual Defendants automatically lose the presumptive application of the business judgment rule. (*See* Pl.'s Mem. at 21-25.) But Plaintiff cites no Nevada law or statute in support of this assumption. Instead, he relies only on general Delaware common law principles focused on—as noted above—inapposite situations, such as merger transactions or corporate asset sales. (*Id.*) Plaintiff's complete avoidance of Nevada law is telling, because the text of Nevada's actual corporate statutes fatally undermines his unsupported analysis.

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[7] Of course, Plaintiff cannot raise a new argument in his reply brief that was not made in his opening brief, and has waived his ability to argue damages for the purposes of his motion. *See Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 261 n.13 (Nev. 2012); *Leonard v. State*, 114 Nev. 639, 662 (1998); *United States v. Bez*, 740 F.2d 903, 916 (11th Cir. 1984).

NRS 78.138(3) codifies Nevada's business judgment rule, providing that "[d]irectors and officers, in deciding upon *matters of business*, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." *Id.* (emphasis added). Under Nevada's corporate law, the presumptive application of the state's business judgment rule may be called into question in only two scenarios, both of which are inapplicable here (and neither are cited by Plaintiff).

Directors are "given the benefit of the presumptions established by subsection 3 of NRS 78.138" in "connection with a change or potential change in control of the corporation," but may lose that shield if they take certain actions "to resist a change or potential change in control of a corporation" and specified elements are not met. *See* NRS 78.139(1)(b), 2-4. *The Board's termination of Plaintiff as a corporate officer does not implicate this provision*, as it did not involve a change in the stockholder control of RDI.

NRS 78.140 sets forth the only other way that the benefit of the business judgment rule may be removed under Nevada law. NRS 78.140(1) provides that "[a] contract or other transaction is not void or voidable solely because the contract or transaction is between a corporation and one or more of its directors or officers; or another corporation, firm or association in which one or more of its directors or officers are directors or officers or are financially interested"—even if "a common or interested director or officer" is present, that director "authorizes or approves the contract or transaction," and the director's vote is counted—as long as certain conditions in NRS 78.140(2) are met. NRS 78.140 on its face *also is not implicated by Plaintiff's termination*; instead it is limited to so-called "related party transactions" in which potential "self-dealing" by the director or officer doing business with the corporation must be evaluated. *See Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 86 (1987) (NRS 78.140 is focused on when "a corporate officer or director may contract directly with the corporation"); *Pederson v. Owen*, 92 Nev. 648, 650 (1976) (applying NRS 78.140 to transaction between corporation and another entity owned by one of its officers); *Schoff v. Clough*, 79 Nev. 193, 196 (1963) (noting, under previous iteration of statute, "[a] contract between a corporation and an officer is not void or voidable except for unfairness or fraud"); *Foster v. Arata*, 74 Nev. 143,

153-54 (1958) (corporation's execution of an outside contract with one of its officers does not invalidate the contract, but subjects it to a close scrutiny as to the good faith of the deal); *Kruss v. Booth*, 185 Cal.App.4th 699, 710 (2010) (describing NRS 78.140 as addressing "self-dealing"); *In re Sec. Asset Capital Corp.*, 390 B.R. 636, 647-48 (Bankr. D. Minn. 2008) (applying NRS 78.140 to evaluate outside consulting contracts between company and directors).

The RDI Board's termination of Plaintiff clearly falls outside the scope of NRS 78.140. Plaintiff's firing was not a "related party transaction": it was a purely intra-company matter that did not involve a deal between RDI and another entity, or a relationship between RDI and Plaintiff acting outside of his role as an RDI employee. Plaintiff's termination was also not a "related party transaction" with respect to Director Kane or Director Adams (the only two Directors whose "independence" Plaintiff challenges in his motion) since they were not the subject of the decision and they "did not stand on both sides of the transaction or receive any personal financial benefit." *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, No. 2:12-cv-509 JCM, 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014) (applying Nevada law).

Accordingly, the RDI Board's business decision to remove a divisive, poorly-performing officer is entitled to the Nevada statutory presumption of reasonable business judgment under NRS 78.138(3). *See Nahass*, 2016 WL 4771059, at *5 (questioning how the "entire fairness" doctrine ever "would apply to employment decisions or decisions of non-controlling shareholders," and rejecting fiduciary duty claim by officer terminated by company's directors). Because the business judgment rule applies as a matter of law, and Plaintiff has not even contested the availability of his termination claims under that rule, Plaintiff's motion should be denied and judgment entered against him.

(b) Directors Kane and Adams Were Both "Disinterested" and "Independent"

Even if the disinterestedness and/or independence of RDI's directors could have an impact on whether the business judgment rule applies to the Board's termination of a corporate

officer (which they do not), Directors Kane and Adams were clearly "disinterested" and "independent" with respect to their decisions to support Plaintiff's removal from office.[8]

First, with respect to disinterestedness, Plaintiff's motion misstates the law. Taking two quotations out of context, Plaintiff assumes that a director is "interested" and there is a "conflict of interest" that necessitates Delaware's "entire fairness" test anytime personal considerations might be among the many motivating factors behind a director's decision. (*See* Pl.'s Mem. at 22-23.) But that is not the test for whether there is directorial "interest" in either Delaware or Nevada. Rather, under both Delaware and Nevada law, "interest" is limited to meaning: (1) "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally"; or (2) "a corporate action will have a materially detrimental impact on a director, but not on the corporation and the stockholders." *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (summarizing Delaware law); *In re Amerco Deriv. Litig.*, 127 Nev. at 232 (applying same test); *Wynn*, 2014 WL 994616, at *4 (same).

Plaintiff does not—and cannot—satisfy these requirements. With respect to Director Kane, his only allegation is that Kane "acted as 'Uncle Ed' throughout to effectuate what he thought were JJC, Sr.'s wishes" with respect to the Cotter Voting Trust. (Pl.'s Mem. at 23.) There is no allegation (or evidence) that Kane somehow stood "on both sides of" Plaintiff's termination, or that he engaged in "self-dealing" such that he derived any "personal financial benefit" from Plaintiff's removal. Similarly, with respect to Adams, Plaintiff simply makes the unsupported assertion that he "separately stood to benefit" from Plaintiff's firing "in a manner not shared with other RDI shareholders." (Pl.'s Mem. at 14.) But Plaintiff is unable to identify a

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[8] The Individual Defendants, for the purposes of this motion, do not contest the disinterestedness or independence of Ellen and Margaret Cotter as RDI directors with respect to Plaintiff's termination. (*See* Ind. Defs.' MSJ No. 2 at 14 n.2.) For the purposes of his motion, Plaintiff also does not contest the fact that Director McEachern "was disinterested and/or independent" (Pl.'s Mem. at 23 n.7)—a concession that Plaintiff had to make given his deposition testimony that McEachern is "independent" and has "no relationship" or "business relationship" with Ellen and/or Margaret Cotter that would lead him to question McEachern's independence. (HD#2 Ex. 7 at 84:21-86:4.)

single financial benefit to Adams resulting from Plaintiff's termination. Adams did not become interim CEO of RDI (instead, he voted for Ellen Cotter to assume that role (HD#1 Ex. 31 at 2)); his contractual financial ties to family entities controlled by Plaintiff and his sisters continued unchanged following Plaintiff's termination (as they had since 2012); and there is no evidence that Adams' ongoing relationship with the Cotter Family Farms or the contractual sums he was owed under his real estate ventures with James J. Cotter, Sr. were ever threatened by Plaintiff. As such, Adams did not have a disabling "interest" in Plaintiff's potential removal.

Second, with respect to independence, Plaintiff must overcome the "presumption that directors are independent," *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), and show that Kane and/or Adams are so "beholden" to Ellen and Margaret Cotter "or so under their influence that their discretion would be sterilized." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 639 (2006) (same). For the reasons set forth in the Individual Defendants' Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence, incorporated by reference hereto, Plaintiff cannot make this showing. (*See id.* at 6-10, 15-19, 22-27.) In sum:

- Plaintiff has conceded that director Kane does not have a business relationship with either Ellen or Margaret Cotter that would lead him to question Kane's independence. (HD#2 Ex. 7 at 85:2-5.) The "deep friendship" of which Plaintiff complains with respect to director Kane was actually between Kane and the now-deceased James J. Cotter, Sr.—not between Kane and the Cotter sisters. While Margaret and Ellen Cotter at times have called Kane "Uncle Ed," so has Plaintiff.[9] There is simply no evidence that the outside relationship between Kane and the Cotter sisters is of such "a bias-producing nature" that Kane would be more willing to risk his well-earned reputation rather than jeopardize his relationship with them. Instead, Kane has stressed that he does not "take into account the Cotter children" when evaluating what is best for

[9] Of course, as the Supreme Court of Nevada has noted, an actual "uncle/nephew relationship does not establish the parties as members of one another's immediate families" and is considered a "more remote family relationship[]" that is not disqualifying to a director. *See In re Amerco Deriv. Litig.*, 127 Nev. at 232-33.

RDI, and Plaintiff himself "reviewed" and approved materials filed by RDI with the SEC weeks prior to his termination that identified Kane as "independent." (*See* Ind. Defs.' MSJ No. 2 at 6-8, 15-19.) Moreover, Kane did not "extort" Plaintiff into resolving the trust litigation, as Plaintiff incorrectly asserts (Pl.'s Mem. at 25); rather Kane—who gave advice on the matter at Plaintiff's request—supported a negotiated compromise because it would "benefit you and your sisters and allow you to work together going forward," and he was aware that, due to Plaintiff's inadequacies as a CEO, there were sufficient votes to remove Plaintiff absent both the creation of an Executive Committee to oversee Plaintiff and demonstrable progress in Plaintiff's relationship with key RDI executives such as Ellen and Margaret Cotter. (*Supra* Section II(D).)

- The financial ties of which Plaintiff complains with respect to director Adams are clearly insufficient to render him "beholden" to Margaret and Ellen Cotter as a matter of law. There is nothing unusual about the fees that Adams has earned as an RDI director: the amounts paid to him by the Company are consistent with the compensation paid to all other non-employee directors who have spent substantial time in the past two years addressing the deficiencies in Plaintiff's performance as CEO, Plaintiff's ultimate termination, and the various challenges encountered by the Company in its normal course of business and as a result of Plaintiff's baseless personal attacks. To the extent that Adams has ties to certain Cotter family entities outside of his Board service, those dealings originated years before his election to the RDI Board, were the result of dealings with James J. Cotter, Sr. (rather than any of the Cotter siblings), were well-known to Plaintiff (who worked with Adams on some of these outside ventures), and the funds from those ventures are either contractually-owed to him (and thereby immune from present-day pressures) or immaterial to his overall economic situation. Plaintiff has identified no financial reason why Adams would be biased in favor of Margaret and Ellen Cotter and against him. Indeed, Adams is of retirement age, has a substantial net worth, and has been repeatedly found to be "independent" under the NASDAQ standards for the purposes of his general service as an RDI director, including in materials "reviewed" and approved by Plaintiff. (*See* Ind. Defs.' MSJ No. 2 at 8-10, 22-27 & n.7.)

Because there is no reasonable legal basis upon which the presumed disinterestedness or independence of Directors Kane and Adams can be questioned, not only must Plaintiff's summary judgment motion be denied, but judgment as a matter of law should be entered against him, as the business judgment rule applies and definitively acts to bar his termination claims.

3. The Board's Termination of Plaintiff Was Fair

Nevada law does not recognize Delaware's "entire fairness" standard and does not employ a "fairness review" outside of the inapplicable circumstances of NRS 78.140(2)(d), and specifically not for "employment decisions." *See also Nahass*, 2016 WL 4771059, at *5 (questioning whether a "fairness" review of employment decisions would ever be appropriate). Even assuming, *arguendo*, that this Court should evaluate the fairness of the process or decision, no colorable argument can be made that Plaintiff's removal was not "fair" to RDI (which is the actual "derivative plaintiff"). *See* NRS 78.140(2)(d) (a vote involving a transaction with an interested director is not void or voidable simply because of the vote of that director if "the contract or transaction *is fair as to the corporation* at the time it is authorized or approved" (emphasis added)).[10]

First, the process involved in Plaintiff's removal was clearly fair. (*See also* Ind. Defs.' MSJ No. 1 at 21-22.) Prior to formally discussing Plaintiff's removal at any Board meeting, the RDI Board worked cooperatively with Plaintiff over several months in an attempt to rectify and alleviate his many deficiencies, including appointing Director Storey as an "ombudsman" to help coach him. Storey had warned Plaintiff months prior to May 21, 2015 that he faced removal absent significant short-term improvement. Indeed, Plaintiff "knew that his position as CEO was in jeopardy for a longer period of time than just May 21," (HD#1 Ex. 7 at 176:1-9), and was aware that there was "the possibility of getting an interim CEO . . . as early as October 2014." (HD#1 Ex. 11 at 528:9-529:20.) Though it was not required and Plaintiff could be removed "at

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[10] Because Plaintiff's claim is derivative, the only basis to evaluate "fairness" is fairness to the Company (which Plaintiff ignores). Indeed, the process of Plaintiff's termination under his employment contract is the subject of a separate arbitration proceeding. That said, the facts show that the process was fair to everyone—including Plaintiff.

any time" under RDI's Bylaws (as he recognized (HD#1 Ex. 12 at 705:13-706:9)), the Board gave Plaintiff advance notice on May 19, 2015 that his continued employment was going to be debated at the May 21 Board meeting. Far less notice has routinely been found "fair."[11]

Once the formal Board review process began, there was no "kangaroo court," as Plaintiff misleadingly claims. (Pl.'s Mem. at 27.) Rather, the Board took the advice of Storey and Gould, engaged outside counsel to assist it in its fiduciary duties, and rigorously debated the merits of Plaintiff's termination in three different Board meetings held over a three-week period that lasted a combined 13 hours. The Board gave Plaintiff the opportunity to speak "at length" regarding his tenure, and the chance to present a business plan (which he was unable to do). His response was an appeal to nepotism (*see* HD#1 Ex. 30 at 3 (plaintiff asserting "that it was the intention of his father . . . that he run the Company and the Board should observe his wishes") and an attempt to intimidate the Board by threatening to "ruin them financially" if RDI's directors challenged his entrenchment. (HD#1 Ex. 3 at 426:19-427:9.) The Board properly deferred a final termination decision when it appeared that Plaintiff agreed to a revised management structure, which would have created oversight over his responsibilities and had the potential to end his adversarial relationship with his sisters, who were key RDI employees and also sat on the Board. And the Board gave Plaintiff three separate chances to stay on as President under a new CEO so that he could better learn the business and gain the management skills he so sorely lacked. The extensive review process utilized by the Board went far above any "fair procedure" requirement.

Second, the decision to terminate Plaintiff was unquestionably fair on the merits. (*See* Ind. Defs.' MSJ No. 1 at 18-20). With respect to Plaintiff, the Board faced a CEO that was "young," chosen on "short notice," and lacked significant hands-on experience in numerous, highly-relevant business areas. RDI's Board and stockholders recognized that "nepotism" may

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[11] *See Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1043-44 (Del. 2014) (rejecting claim that CEO's firing was improper because of lack of agenda item giving advance notice); *OptimisCorp. v. Waite*, C.A. No. 8773-VCP, 2015 WL 5147038, at *66-67 (Del. Ch. Aug. 26, 2015) (rejecting argument that directors "breached their duty of loyalty by not advising [CEO] in advance of his potential termination"); 2 Fletcher Cyc. Corp. § 357.20 (2015) (board's failure to give CEO advance notice of removal plan does "not invalidate his termination").

have benefitted Plaintiff in his selection as CEO, but all hoped that he could grow into the role and develop on the job. Within two to three months, the Board saw that Plaintiff needed help, which it attempted to provide. But Plaintiff had significant weaknesses: he could not work well with certain key executives, and some Board members came to believe that he was more interested in undermining central figures within the Company rather than in addressing pending issues; he acted—or was perceived to act—in a manner that was violent and abusive to employees and fellow Board members; and he demonstrated a lack of understanding with respect to metrics critical to evaluating RDI's businesses.

Plaintiff's insinuation that his termination was somehow "improper" because he was fired after he ultimately declined to settle the Cotter trust litigation is baseless. (Pl.'s Mem. at 27.) The Board's support for and consideration of a potential deal between the Cotter siblings was far from "extortion"; rather, the accord made business sense because it could have (1) alleviated the admitted "dysfunction" and "thermonuclear' hostility" within the management ranks that was clearly affecting the Company and stockholder value; and (2) rectified some of the otherwise-terminal problems in Plaintiff's CEO tenure, while also providing him a structure within which to grow and gain experience. Once that agreement fell through, the Board was left with the same intractable problems as before. Given that it was faced with a CEO that could not perform adequately, lacked experience and expertise, required close supervision, did not process the requisite leadership skills, and could not work well with various directors or executives, the Board's decision to terminate Plaintiff on June 12, 2015 was objectively fair. Plaintiff's motion should therefore be denied, and judgment entered against him on his termination claims.

4. Plaintiff Cannot Show That His Termination Involved Intentional Misconduct, Fraud, or a Knowing Violation of the Law

Even if Plaintiff's termination was somehow unfair (it was not), another independent reason to deny Plaintiff's motion is that the Individual Defendants are statutorily immune from individual liability where, as here, any "breach" did not involve intentional misconduct, fraud, or a knowing violation of law. Under Nevada law, "directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional

misconduct, fraud, or a knowing violation of the law." *Shoen*, 122 Nev. at 640 (citing NRS 78.138(7)); *see also In re AgFeed USA, LLC*, 546 B.R. 318, 330-31 (Bankr. D. Del. 2016) (citing *Shoen* and concluding that "the second cause of action fail[ed] to state a claim for breach of the duty of loyalty because the complaint [fell] well short of alleging intentional misconduct, fraud, or a knowing violation of the law."). "As for the terms *knowing violation* and *intentional misconduct*," "both require knowledge that the conduct was wrongful." *In re ZAGG Inc. S'holder Deriv. Action*, No. 15-4001, 2016 WL 3389776, at *7, 11 (10th Cir. June 20, 2016).

Plaintiff again completely avoids any mention—let alone discussion—of NRS 78.138(7) in his motion. This is not surprising. There can be no "knowing violation" or "intentional misconduct" where the RDI Board weighed the propriety of Plaintiff's termination over several meetings, considered his attempted defense of his tenure, engaged outside counsel to assist it in exercising its fiduciary duties, and articulated a wide variety of business-specific reasons motivating its removal decision. Even the directors that voted not to terminate Plaintiff on June 12, 2015 recognized significant problems with his performance, and objected more to the timing of his removal than to the underlying basis. (*See* Ind. Defs.' MSJ No. 1 at 8-12, 19.) Plaintiff has not identified a single case anywhere in which directors have been held liable for breaching their fiduciary duties in the context of an employee termination, let alone under the strict requirements set forth in NRS 78.138(7). Because Plaintiff has not attempted to (and cannot) meet the showing required under NRS 78.138(7) to establish individual liability, his motion must be denied and judgment entered in favor of the Individual Defendants.

D. Plaintiff's Reinstatement Demand Is Unsupportable and Untenable

Even if the Board's removal of Plaintiff somehow constituted a breach of fiduciary duty, the relief sought by Plaintiff—an order that his termination "was and is of no legal force and effect" and full reinstatement (Pl.'s Mem. at 28)—is both unsupportable and untenable. Plaintiff has not identified a single case in any jurisdiction in which the firing of a corporate officer was reversed following a breach of fiduciary duty claim. Indeed, in *Kendall v. Henry Mountain Mines, Inc.*, 78 Nev. 408 (1962), the only Nevada case that Plaintiff cites for the general proposition that a conflict of interest can result in the voiding of a transaction, the court noted

that transactions involving a conflict of interest "are not absolutely void" and "are only voidable at the instance of the corporation . . . or its stockholders," who can "elect to confirm a transaction which could have been repudiated." *Id.* at 410-11. Thus, even if the decision to terminate Plaintiff was "voidable," RDI as a corporation (and Ellen and Margaret Cotter, who control a majority of its voting shares) could simply elect to "confirm" his firing. Indeed, the court in *Kendall* refused to void the challenged transaction at issue in that case.

For the reasons set forth in detail in the Individual Defendants' Motion for Summary Judgment (No. 1), Plaintiff's attempt to achieve, via this derivative action, a reinstatement remedy beyond what is available under his Employment Contract fails because: (1) equity will not assume jurisdiction for the purpose of reinstating a removed officer; (2) Plaintiff's remedy at law is adequate; (3) there are strong policy reasons against compelling a company to retain an employee against its wishes; (4) Plaintiff could simply be re-terminated if reinstated, as he has no vested right to the positions he seeks; (5) the fact that over 15 months have passed since Plaintiff's termination (far longer than he served as CEO) counsels against his reinstatement; and (6) reinstatement is not proper here given the irreparable animosity between the parties. (*See* Ind. Defs.' MSJ No. 1 at 28-30.) Accordingly, to the extent that Plaintiff's partial summary judgment seeks to void his termination and obtain reinstatement, it also fails as a matter of law.

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IV. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court deny Plaintiff James J. Cotter Jr.'s Motion for Partial Summary Judgment and grant both their Motion for Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims and their Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence.

Dated: October 13, 2016

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ H. Stan Johnson

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Attorneys for Defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, and Edward Kane

DECLARATION OF COUNSEL NOAH S. HELPERN IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF JAMES J. COTTER, JR.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Noah Helpern, state and declare as follows:

1. I am a member of the Bar of the State of California, and am an attorney with the law firm of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), attorneys for the Individual Defendants. I make this declaration based upon personal, firsthand knowledge, except where stated to be on information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

2. Attached hereto as Exhibit 1 is a true and correct copy of transcript excerpts from the deposition of Timothy Storey, taken on February 12, 2016.

3. Attached hereto as Exhibit 2 is a true and correct copy of transcript excerpts from the deposition of Timothy Storey, taken on August 3, 2016.

4. Attached hereto as Exhibit 3 is a true and correct copy of transcript excerpts from the deposition of Guy Adams, taken on April 28, 2016.

5. Attached hereto as Exhibit 4 is a true and correct copy of transcript excerpts from the deposition of Guy Adams, taken on April 29, 2016.

6. Attached hereto as Exhibit 5 is a true and correct copy of transcript excerpts from the deposition of Edward Kane, taken on May 2, 2016.

7. Attached hereto as Exhibit 6 is a true and correct copy of transcript excerpts from the deposition of Edward Kane, taken on May 3, 2016.

8. Attached hereto as Exhibit 7 is a true and correct copy of transcript excerpts from the deposition of Edward Kane, taken on June 9, 2016.

9. Attached hereto as Exhibit 8 is a true and correct copy of transcript excerpts from the deposition of Ellen Cotter, taken on May 18, 2016.

10. Attached hereto as Exhibit 9 is a true and correct copy of transcript excerpts from the deposition of Ellen Cotter, taken on June 16, 2016.

11. Attached hereto as Exhibit 10 is a true and correct copy of transcript excerpts from the deposition of William Gould, taken on June 8, 2016.

12. Attached hereto as Exhibit 11 is a true and correct copy of an email from Ellen Cotter to Guy Adams, Timothy Storey, and William Gould re: "Corporate Framework Notes," dated October 14, 2014, previously marked as Exhibit 61 during Guy Adams' deposition.

13. Attached hereto as Exhibit 12 is a true and correct copy of an email from Edward Kane to Guy Adams, dated May 18, 2015, previously marked as Exhibit 81 during Guy Adams' deposition.

14. Attached hereto as Exhibit 13 is a true and correct copy of an email from Timothy Storey to Edward Kane, William Gould, Guy Adams, Ellen Cotter, Margaret Cotter, Douglas McEachern, and Plaintiff, dated May 19, 2015, previously marked as Exhibit 116 during Edward Kane's deposition.

15. Attached hereto as Exhibit 14 is a true and correct copy of an email from Timothy Storey to Douglas McEachern re: "Reading," dated May 20, 2015, previously marked as Exhibit 131 during Douglas McEachern's deposition.

16. Attached hereto as Exhibit 15 is a true and correct copy of an email chain that includes emails from Plaintiff, Edward Kane, and Margaret Cotter re: "Confidential," dated May 28, 2015, previously marked as Exhibit 305 during Edward Kane's deposition.

17. Attached hereto as Exhibit 16 is a true and correct copy of a draft "Confidential Settlement Memo of Understanding," dated June 3, 2015, previously marked as Exhibit 167 during Margaret Cotter's deposition.

18. Attached hereto as Exhibit 17 is a true and correct copy of an email from Edward Kane to Plaintiff, dated June 11, 2015, previously marked as Exhibit 306 during Edward Kane's deposition.

19. Attached hereto as Exhibit 18 is a true and correct copy of an email from Plaintiff to Edward Kane, dated May 22, 2015, previously marked as Exhibit 402 during Plaintiff's deposition.

20. This declaration is made in good faith and not for the purpose of delay.

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

Executed on the 13th day of October, 2016, in Los Angeles, California.

/s/ Noah Helpern
Noah Helpern

CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2016, I caused a true and correct copy of the foregoing **INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF JAMES J. COTTER, JR.'S MOTION FOR SUMMARY JUDGMENT** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System.

/s/ Sarah Gondek
An employee of Cohen|Johnson|Parker|Edwards

EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	No. A-15-719860-B Coordinated with: P-14-082942-E

DEPOSITION OF TIMOTHY STOREY, a defendant herein, noticed by LEWIS ROCA ROTHGERBER CHRISTIE LLP, at 1453 Third Street Promenade, Santa Monica, California, at 9:28 a.m., on Friday, February 12, 2016, before Teckla T. Hollins, CSR 13125.

Job Number 291961

and the first full paragraph there, you see it talks about, "We would look to review his progress as CEO in June"?

A. Yes.

Q. And that was your understanding as to what had been agreed previously in connection with the work you were doing as ombudsman; correct?

A. Yes.

Q. Going down two paragraphs, there's a short paragraph that said, "This is a matter of urgency. I, for one, don't want to take part in a kangaroo court or what might appear to be a kangaroo court." Do you see that?

A. I do.

Q. Was that your way of communicating to the recipients of this e-mail that you thought the process had been inadequate?

MR. SEARCY: Objection. Vague. Assumes facts. Lacks foundation.

THE WITNESS: It was a comment of my view that we needed to do things properly in my view and, as I said earlier, define and address the issue, discuss it, and come to a conclusion.

MR. KRUM:

Q. Okay.

A. Separate battle to the merits of the issue.

Q. And did any of Messrs. Adams, McEachern and Kane ever tell you what process, if any, they went through to determine to vote to terminate Jim Cotter, Jr. as president and CEO?

A. I don't recollect.

Q. And the next paragraph, you say, "To be clear, my concern here is that we act with appropriate procedure." Is that the same notion that you're suggesting to them that a proper procedure and process has to be undertaken independent of the merits in the decision making?

MR. SEARCY: Objection. Vague.

THE WITNESS: Yes.

MR. KRUM:

Q. Directing your attention to the top of the second page of Plaintiff's Exhibit 25, that's the page bearing production number 364 in the lower left, do you see the May 20, 3:40 p.m. e-mail reply by Mr. Kane to you?

A. Yes.

Q. Do you see where it says, quote, "We have heard from Nevada counsel via those memos," closed quote?

A. Yes.

Q. What's your understanding as to what memo or

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc.,	)	
Plaintiff,	)	Case No. A-15-719860-B
VS.	)	Coordinated with:
MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive,	)	Case No. P-14-082942-E
	)	Case No. A-16-735305-B
Defendants.	)	
and	)	
READING INTERNATIONAL, INC., a Nevada corporation,	)	
Nominal Defendant.	)	

(Caption continued on next page.)

VIDEOTAPED DEPOSITION OF TIMOTHY STOREY

Wednesday, August 3, 2016

Wednesday, California

REPORTED BY:

GRACE CHUNG, CSR No. 6426, RMR, CRR, CLR

Job No.: 323867

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

Plaintiff,

vs.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

Videotaped Deposition of TIMOTHY STOREY taken on behalf of Plaintiff, at 3993 Howard Hughes parkway, Suite 600, Las Vegas, California, beginning at 9:39 a.m. and ending at 12:19 p.m., on Wednesday, August 3, 2016, before GRACE CHUNG, CSR No. 6246, RMR, CRR, CLR.

Mr. McEachern express any views to you with respect to the progress or lack of progress arising from those discussions?

A. I think he was happy with the process. I think, you know, they, like me as well, were somewhat frustrated that it would take time, but it was expected to take time. We were dealing with difficult issues, potentially difficult issues, which needed to be drawn out and discussed.

Q. What were those issues?

A. I'm sure there are a whole lot of issues. But the ones that spring to mind immediately were predominantly around the employment status or otherwise of Ellen and Margaret Cotter; and also -- I'm going from memory, I think around the request that we put in place business plans and budgets for the business for each of the divisions; and then, also from memory, around reporting lines and the process for which plans and budgets would be adopted and had to be reported upon.

Q. What were the issues regarding the employment status or otherwise for Ellen Cotter?

A. Ellen Cotter did not have a formal employment contract, and sometime earlier we put in place -- a formal employment contract being in

place for Jim Cotter, Jr. And she wanted a -- or looked for a formal employment contract.

Secondly, I think that there was a discussion around what her role actually was. I think her designation was Vice President of U.S. Cinemas, and Bob Smerling, who was in his 80s, was nominally president, and I think there was a view around how best to describe or how Ellen should be described. Talked about the issues around employment, and also, of course, issues around remuneration and the fact that she felt that she was underpaid, given the job that she was doing and had been for some time.

Q. What were the issues regarding the employment or lack of employment status for Margaret Cotter?

A. As it became clearer, Margaret was, in fact, in my view, not employed by the company, but was, in fact, providing services to the company through a company called "Liberty." So Liberty had a contract to manage the live theaters on behalf of Reading, and she was remunerated through that. So on analysis, it became clear that she wasn't employed by the -- by the company.

THE REPORTER: She was or wasn't?

EXHIBIT 3

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants, and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	Case No. A-15-719860-B Case No. P-14-082942-E Related and Coordinated Cases

Complete caption, next page.

VIDEOTAPED DEPOSITION OF GUY ADAMS

LOS ANGELES, CALIFORNIA

THURSDAY, APRIL 28, 2016

VOLUME I

REPORTED BY: LORI RAYE, CSR NO. 7052

JOB NUMBER: 305144

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

Case No. A-15-719860-B
P-14-082942-E

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

Plaintiffs,

vs.

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

Defendants,

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

time?

A. I strongly suspected she had spoken with Ed Kane.

Q. And had either you or Ed Kane spoken to Doug McEachern about that?

A. I haven't, no. I don't know if Ed did.

Q. Okay. When was the first time you spoke with Doug McEachern about either terminating Jim Junior as CEO or about a subject of -- the subject of an interim CEO?

A. That I talked to McEachern? I would say it was maybe -- again, I can only approximately guess. Maybe two weeks before the meeting.

Q. And you're referring to the May 18th -- May 21st meeting, it was, wasn't it?

A. Yes. I don't know the exact date, but yeah.

Q. So what else did Ellen say and what else did you say during this approximate hour-plus breakfast meeting?

A. My recollection, we talked about Jim Junior and the CEO position, and Ellen, I guess, talked to other people because she was feeling that there was support for Jim Junior to be removed.

Q. What did she say that caused you to

conclude she had talked to other people about Jim Junior being removed?

A. I don't know specifically what she said. Maybe it was innuendos that she maybe talked to McEachern, maybe. But it wasn't specific.

Q. Did you ever learn after the fact whether that was the case?

A. Considering McEachern, when I did call him, like two weeks before the vote, he said he was on board with that. I suspect she called and talked to him. I sure didn't. So I suspect -- I suspect she did or maybe Ed Kane did. I don't know.

Q. What else, if anything, did you discuss with Ellen Cotter at the breakfast meeting at the Peninsula in April?

A. Nothing further that I can remember at this time.

Q. What, if anything, did she say about why she wanted Jim Junior removed as CEO?

A. I think she felt he wasn't doing an adequate job as CEO.

Q. Excuse me. My question is, what did she say?

A. What did she say about -- I'm sorry.

EXHIBIT 4

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants, and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	Case No. A-15-719860-B Case No. P-14-082942-E Related and Coordinated Cases

Complete caption, next page.

VIDEOTAPED DEPOSITION OF GUY ADAMS

LOS ANGELES, CALIFORNIA

FRIDAY, APRIL 29, 2016

VOLUME II

REPORTED BY: LORI RAYE, CSR NO. 7052

JOB NUMBER 305149

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

Case No. A-15-719860-B
P-14-082942-E

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

Plaintiffs,

vs.

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

Defendants,

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

(Exhibit 82 was marked for identification.)

THE WITNESS: Yes, I remember this.

BY MR. KRUM:

Q. You recognize Exhibit 82?

A. Yes.

Q. This is an email exchange you had with Mr. Kane on May 18 and 19?

A. Yes.

Q. During the telephone conversation you had with him on May -- Sunday or Monday, May 17 or 18, did the two of you discuss other motions?

A. Evidently not.

Q. What was your understanding as of the date of -- as of May 18 and 19, what the other motions were or might be?

A. Well, there were like two other motions. One was the removal of Jim Junior as CEO and president. Another motion -- there were three motions. One of them was to -- if you remove the CEO, you have to appoint an interim CEO. And there was a third motion which, I apologize, for the life of me, I can't remember what it is. There must be a board agenda or something with those items.

Q. The subject of interim CEO, where did

that stand as of May 19th?

A. Ellen, Margaret and Ed and Doug McEachern were of the opinion, yes, on an interim basis.

Q. Yes what?

A. Yes to Guy Adams being the interim CEO on a short-term basis.

Q. What about Ed Kane?

A. As interim?

Q. Okay. I'm sorry.

So how did you know that each of Ellen, Margaret, Ed Kane and Doug McEachern were agreeable to you being appointed CEO on an interim -- interim CEO or a short-term basis?

MR. TAYBACK: Objection to the extent it's asked and answered.

You can answer.

THE WITNESS: My recollection -- and I can't remember if it was Ellen or Ed Kane -- one of them told me and I followed up with a phone call to Doug McEachern to confirm it. So that's how I knew.

BY MR. KRUM:

Q. Okay. When did you have the follow-up phone call with Doug McEachern?

A. Help me -- what was the date of the meeting, that meeting? We're up to May 19. What

was the date of the meeting?

Q. I think it was May 21st.

A. 21st?

Q. Yes.

A. I called Doug either one or two days before the meeting.

Q. What did you say and what did he say?

A. I said, I understand you're going to vote for the removal of Jim Junior. He said yes. And I said, Are you comfortable with me being interim CEO for a short duration? He said yes. And I said, Okay. I'll see you in Los Angeles.

Q. That was it?

A. That was pretty much it.

Q. When did you first come to understand that Mr. McEachern had agreed or determined to vote to remove Jim Cotter Junior as president and CEO?

A. Again, either Ellen or Ed Kane informed me of that.

Q. When?

A. I'm not sure. Maybe -- I mean, I could guess.

Q. Well, if you would --

A. It was prior to this date.

Q. If you would do this, Mr. Adams, I don't

want you to guess a date but if you can put it in context or sequence of time or point of reference to a date we can -- an event we can date.

A. My recollection would be two weeks, three weeks before May 19th.

Q. And at that point in time, it was either Ellen Cotter or Ed Kane who told you that Doug McEachern had --

A. Yes, I didn't have conversations with Ed about it.

Q. I'm sorry. Let me finish.

So you learned that McEachern --

A. I apologize.

Q. No, it's okay. It happens. I've done it, too.

You were told by one or the other of Ellen Cotter or Ed Kane that Doug McEachern had determined to vote to terminate Jim Cotter Junior as president and CEO; correct?

A. Yes.

Q. And as you sit here today, do you recall if it was Ellen Cotter or Ed Kane who told you that?

A. It may have been both.

Q. And do you recall that as happening in a

single conversation with the two of them or separate conversations --

A. Separate.

Q. -- with each?

A. Separate conversation with each, yes.

Q. Okay. So as best you can recall, in the conversation with Ellen, was that in person or telephonic?

A. Ellen, could have been in person.

Q. Okay. And what did she say and what did you say?

A. I said, Well, if we're going to go through this stress of replacing a CEO, it's a very weighty decision. Before you have a board meeting call, you better make sure there are people that think like you do to remove him.

Q. To remove Jim Junior as president and CEO?

A. Yes.

Q. What was her response?

A. Well, she said, Well, Ed's going to vote, you're going to vote and I'm talking to Doug McEachern tomorrow. I talked to him earlier last week, or something like that. So she was clearly talking to him.

Q. Okay. And so you understood her to communicate that her expectation was that Doug McEachern also was going to agree to vote or had indicated that he might agree or would agree?

A. Yes.

Q. What exactly was your takeaway from that conversation?

A. That she felt that Doug McEachern would vote to remove Jim Junior. And I had -- I don't remember a specific but I had a notion there was another phone call in which she was talking to him again to reconfirm it.

Q. And directing your attention, Mr. Adams, to your conversation with Ed Kane in which he communicated to you his understanding that Mr. McEachern had agreed to vote to terminate Jim Cotter Junior as president and CEO --

A. Yes.

Q. -- what did Mr. McEachern say and what did you say?

A. You mean what did Mr. Kane --

Q. Thank you.

What did Mr. Kane say and what did you say?

A. He said, I'll talk to Doug and something

to the effect he's on board or sees things the way we do, something to that effect.

Q. Now, you haven't mentioned Margaret.

A. Yes.

Q. Was it your understanding that Margaret was prepared to vote to terminate Jim Cotter Junior as president and CEO?

A. Yes.

Q. And did that understanding develop sometime in the fall of 2014?

MR. TAYBACK: Objection; assumes facts.

You can answer.

THE WITNESS: No, not to my knowledge.

BY MR. KRUM:

Q. When did you come to understand that Margaret Cotter was prepared to vote to terminate Jim Cotter Junior as president and CEO?

A. When they asked me to be interim CEO, and what I didn't want was Ellen to want me, and if we terminated Jim Junior, he wouldn't be my friend anymore, and if Margaret didn't want me to be it -- I wanted to make sure they were both on board.

And when he said, Oh, Margaret and I both want you to be interim CEO, I said, Okay, here are the three conditions. When Margaret said that, I

was of the opinion that Margaret would vote to terminate Jim Junior.

MR. TAYBACK: I think he misspoke. I think he meant Ellen when he said Margaret, but maybe not.

MR. KRUM: Well, let me go through this.

Q. Directing your attention, Mr. Adams, to the telephonic -- strike that.

Directing your attention to the conversation you had with Ellen Cotter in which she inquired if would serve as interim CEO and you indicated that you would, subject to the three conditions you described, do you have that in mind?

A. Yes, sir.

Q. During that conversation, did Ellen Cotter indicate to you that she was asking on her behalf and Margaret's behalf?

A. Yes, sir.

Q. And as best you can recall, what did she say in that respect?

A. Margaret and I would both like you to be interim CEO.

Q. Now, in that conversation with Ellen Cotter about which you're testifying presently, did either of you talk about a process to search for a permanent CEO?

EXHIBIT 5

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant	Case No. A-15-719860-B Coordinated with: Case No. P-14-082942-E

DEPOSITION OF: EDWARD KANE

TAKEN ON: MAY 2, 2016

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

Cotter, Jr.

But I know there were other emails.

Q. And what communications did you have with Jim Cotter, Jr., regarding a resolution with his sisters during the time frame commencing with the supposed board meeting of May 20, 2015, through the supposed board meeting of June 12, 2015?

MR. SEARCY: Objection. Argumentative.

THE WITNESS: I was told that -- and it may have been by one of the Cotter sisters, that -- and in fact at a meeting, one of the last meetings we had, my recollection is Bill Gould suggested that Jim take the title of president, giving up the C.E.O. He refused.

Then Margaret Cotter -- and that may have been the May 29th -- said, "No. Keep the title of C.E.O., and we'll have a committee, executive committee, Margaret, Ellen, Jimmy" -- and initially they said Guy Adams -- and he would keep the title because it was important to him.

And I communicated with him. He -- usually my communications were not me advising. It was him asking my advice or they'd ask my advice. I didn't want to lecture them and tell them what to do.

I -- I said to him at one point, "Take it. You have nothing to lose. You're going to get terminated if you don't. If you can work it out with your sisters, it will go on and I will support you. I'll even make a motion to see if the company will reimburse the legal fees."

I did not want him to go.

And you, I'm sure, see emails in there to that effect. Even though I voted -- was voting against him, I wanted him to stay as C.E.O.

BY MR. KRUM:

Q. If you wanted him to stay as C.E.O. --

A. Right.

Q. -- why did you vote against him?

A. Because I wanted him to stay as C.E.O., working with his sisters who were work -- willing to work with him for the benefit of the company.

And to me it was a wonderful solution, and it had no adverse impact. If it didn't work out, then we would deal with it. But he would work with them and -- as an executive committee.

He told me that he didn't want Guy Adams on there. And I told him, "I'll do my best to make sure that he isn't on that; just you and your sisters."

And if they could work together, that's all we wanted.

Q. Are you drawing a distinction, Mr. Kane, between Ellen and Margaret working with Jim Cotter, Jr., as distinct from working for him?

MR. SEARCY: Objection. Vague.

THE WITNESS: I don't think I ever made that distinction, but I think he would glean and learn a lot working with them.

After all they were the operating executives of this company.

BY MR. KRUM:

Q. And did you understand that -- strike that.

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

MR. SEARCY: Objection. Vague.

THE WITNESS: He rejected it, yes.

(Whereupon Ms. Bannett left the deposition proceedings at this time.)

BY MR. KRUM:

Q. And he got himself terminated, right?

MR. SEARCY: Objection. Vague.

THE WITNESS: Yes.

EXHIBIT 6

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant	Case No. A-15-719860-B Coordinated with: Case No. P-14-082942-E

VIDEOTAPED DEPOSITION OF EDWARD KANE

TAKEN ON MAY 3, 2016

VOLUME 2

Job no. 305191

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

terminate Mr. Cotter.

Q. Okay. Does that refresh your recollection that no later than May 18, 2015, you agreed to vote to terminate Mr. Cotter as president and C.E.O.?

MR. SEARCY: Objection. Misstates testimony.

THE WITNESS: No.

BY MR. KRUM:

Q. Okay. The next sentence says, quote, "If the vote is five/three, I might wants to abstain and make it four/three," period.

It continues, quote, "If it's needed, I will vote," period, close quote.

You see those two sentences?

A. Yes.

Q. What is it you're agreeing to vote if it's needed?

A. If it came to the point that we would vote to terminate him, I didn't want to vote to terminate him.

But I obviously had not made up my mind, because I wouldn't have invited him to come down to

my house and talk about how he could stay.

Q. Well, Mr. Kane, when you --

A. Yes.

Q. -- said to Mr. Adams in Exhibit 81 on May 18th --

A. Yes.

Q. -- quote,

"If the vote is five/three I may want to abstain and make it four/three. If it's needed, I will vote," period, close quote.

A. Yes.

Q. Is that not telling Mr. Adams that if your vote is required to carry the vote to terminate James Cotter, Jr., as president and C.E.O. of RDI, that you would cast that vote to terminate him?

A. If there were a motion to do so and there were no other way of getting him to work with his sisters, I would have.

But I don't think Mr. Adams -- or at least my recollection is it would -- it hadn't got to that point on May 18th.

Q. Well, I direct your attention, Mr. Kane, to the last sentence of Exhibit 81 --

A. Uh-huh.

Q. And I direct your attention to the last sentence of your email reply above it. That sentence reads, quote,

"The dye is cast and we will meet as a full board. And if you don't like it, don't show up," close quote.

Do you see that?

A. Yes.

Q. Were you telling him that the outcome of the vote on the question of whether to terminate Jim Cotter, Jr., as president and C.E.O. had already been set and that what remained was to show up, vote and be done with it?

MR. SEARCY: Objection. Argumentative, vague.

THE WITNESS: No. I think I was referring to the agenda --

BY MR. KRUM:

Q. So, when --

A. -- that was cast.

Q. When you're said "the dye is cast," you're referring simply to the agenda?

A. We have a meeting and an agenda. And that's enough.

MR. SEARCY: Objection. Vague.

THE WITNESS: That -- that's his position, yes.

BY MR. KRUM:

Q. Okay. And were you respond -- you were responding to that position with which you disagreed when you said "the die is cast," correct?

MR. SEARCY: Objection. Argumentative, misstates the document and testimony.

THE WITNESS: To me that meant the agenda is set, and that's what we'll discuss, and I see no reason to have a meeting beforehand.

BY MR. KRUM:

Q. Okay. Do you recall that the supposed board of directors meeting on May 21st concluded without a resolution of the question of whether Jim Cotter, Jr., would be terminated as president and C.E.O.?

A. Sir, we had several meetings at that point. I can't in my mind figure out when we did A and when we did B or C.

I do know we had meetings and there was adjournment and a meeting just with Mr. Cotter and his sisters. He asked me to participate in that meeting. I refused to do so.

EXHIBIT 7

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant	Case No. A-15-719860-B Coordinated with: Case No. P-14-082942-E

VIDEOTAPED DEPOSITION OF EDWARD KANE

TAKEN ON JUNE 9, 2016

VOLUME 3

Job No.: 315759

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

there's a sentence in the middle of it --

A. Uh-huh.

Q. -- that reads as follows, quote,

"If it is take it or leave it, then I strongly advise you to take it."

And the words "I strongly advise you to take it" are all caps.

Do you see that?

A. Yes.

Q. Why was that?

MR. SEARCY: Objection.

BY MR. KRUM:

Q. I mean why did you so advise Mr. Cotter?

A. I was looking out for his interests. I felt that if he didn't take what they offered, and leaving him as C.E.O. was a big concession, that he would be terminated; that there were votes there to terminate him. And I didn't want him to be terminated.

And I felt that if he could retain his title and work with his sisters for -- for a period of time on an equal footing, a lot of the issues would disappear.

And in the long run the stock goes to the kids anyway.

Q. The kids being the grandkids?

A. His kids and Margaret's kids.

Q. His being Jim Cotter, Jr.?

A. Uh-huh.

Q. You need to answer audibly.

A. Yes. Yes.

Q. Okay. Thank you.

A. Yes.

Q. As of the time you sent this email, approximately 2:00 P.M. on May 28, 2015, did you know that one of the terms of the proposal was that Jim Cotter, Jr., agree that Margaret would be the sole trustee of the voting trust that voted the RDI class B voting stock?

A. I don't --

MR. SEARCY: Objection. Vague, lacks foundation.

THE WITNESS: Sorry.

MR. SEARCY: It's all right. Go ahead.

THE WITNESS: I don't think I knew that. I didn't want to know it.

BY MR. KRUM:

Q. Did you subsequently learn that?

A. I don't think I did.

Q. Does that surprise you that that was a

EXHIBIT 8

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant	Case No. A-15-719860-B Coordinated with: Case No. P-14-082942-E

VIDEOTAPED DEPOSITION OF ELLEN COTTER

TAKEN ON MAY 18, 2016

VOLUME 1

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

seek to report to an executive committee of the RDI board of directors rather than to report to your brother Jim as C.E.O.?

A. I don't remember exactly when that request was developed, but it was sometime during the fourth quarter of 2014.

Q. How did it come to pass that you developed that request?

A. We were having issues with Jim, and we wanted to figure out a way to have a structure in place that would be almost transitional that would help us work together so that we could work through any issues that we would have.

Q. Prior to your father's resignation as C.E.O., to whom had you reported during the time you had been an executive at RDI?

A. Jim was the president at the time. My father was the chairman and C.E.O. So, technically I probably reported to Jim; or probably technically to Bob.

But we never operated that way.

Q. Was the way you operated since 2000 and up to the point when your father resigned as C.E.O. that you reported to him?

MR. SEARCY: Objection. Vague.

EXHIBIT 9

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES J. COTTER, JR. individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants.	Index No. A-15-179860-B
READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	

VIDEOTAPED DEPOSITION OF ELLEN COTTER

New York, New York

Thursday, June 16, 2016

Reported by:
MICHELLE COX
JOB NO. 316936

MR. TAYBACK: Objection. Asked and answered.

A No.

Q So when you use the same phraseology status to refer to the president and CEO in Item 1 as you use to refer to Craig Tomkins and Robert Smerling in Item 6, and yourself and Margaret Cotter in Item 7, were you attempting to obscure or conceal the fact that Item 1 was actually about terminating Jim Cotter as president and CEO?

MR. TAYBACK: Objection; argumentative, compound.

You can answer.

A I mean, there was no intention on my part to deceive anybody.

Q Well, in point of fact, prior to distributing Exhibit 338, you already had had discussions with Ed Kane, Guy Adams, Doug McEachern and Margaret Cotter about terminating Jim Cotter, Jr. as president and CEO, correct?

A Prior to this meeting we did have discussions about whether Jim would remain as the CEO and president.

Q Well, you had discussions with each of -- Guy Adams, Ed Kane, Doug McEachern and Margaret Cotter about terminating Jim Cotter, Jr. as CEO prior to distributing Exhibit 338 on May 19th, correct?

MR. TAYBACK: Objection. Asked and answered.

A Yes.

Q You had no such discussions with Tim Storey, correct?

A I did have discussions with Tim Storey.

Q What discussions did you have with Tim Storey and when did you have them?

A I had had discussions with Tim Storey about Jim and his performance.

Q Okay. The question is: What discussions did you have with Tim Storey, if any, prior to distributing Exhibit 338 on May 19, 2015, about terminating Jim Cotter, Jr. as president and CEO?

A I don't remember the specific discussion that I had with Tim.

Q Did you have any conversation with Tim Storey prior to distributing Exhibit 338 on May 19, 2015, in which the subject of

terminating Jim Cotter, Jr. as president and CEO of RDI was discussed?

A Prior to this agenda being sent out, Tim and I had had discussions about whether Jim would continue as CEO and president.

Q What discussion did you have with Tim Storey in that regard, and when did they occur?

A I don't remember the specific conversation, but I remember Tim taking the position that he -- he understood that Jim was inexperienced and it wasn't -- Jim's position would be under review and under evaluation.

Q When did you have that discussion?

A As I said, I don't remember.

Q Was it in person?

A I probably did have -- Tim came to Los Angeles a lot. I probably did have some of these discussions in person.

Q What is it that you said during that discussion or those discussions with respect to the subject of Jim Cotter, Jr. continuing as president and CEO or being terminated?

A I don't remember the specifics of the discussion.

Q Do you remember, generally, anything you said, if anything, with respect to Jim Cotter, Jr. continuing as president and CEO or being terminated?

MR. TAYBACK: To Mr. Storey?

MR. KRUM: Yes, thank you.

A I remember having conversations with Tim about whether Jim was the right person to lead Reading.

THE VIDEOGRAPHER: Counsel, I have less than five minutes left on this DVD.

Q Anything else?

A I don't remember the specifics.

Q What discussions did you have with Bill Gould, if any, prior to distributing Exhibit 338 on May 19 about terminating Jim Cotter, Jr. as president and CEO?

A My conversations with Bill would have been similar to what they were with Tim, questioning whether Jim was the right person to lead Reading.

Q As you sit here today, do you recall actually having had such conversation or conversations with Bill Gould?

A I do recall having conversations with

Bill Gould about it.

Q Was anyone else present?

A We had a meeting -- my sister and I had a meeting with Tim Storey and Bill Gould at his office where we discussed Jim's performance.

Q When was that?

A I don't remember when it was.

Q Do you recall that Tim Storey and Bill Gould met separately with Jim on the one hand, and either separately with Ellen and Margaret or together with the two of you at Bill Gould's office in March 2015?

A Yes.

Q And do you recall what followed from that was that Tim Storey assumed the role of ombudsman?

A Well, that's eventually what -- what transpired.

MR. KRUM: I'll ask the court reporter to mark as Exhibit 339, what purports to be a May 16th e-mail from Ellen Cotter to -- at her Reading address to her private e-mail address.

(Deposition Exhibit 339, E-mail dated May 16, 2015, from Ellen Cotter to nelle1438@gmail.com, marked for identification

IN THE SUPREME COURT OF NEVADA

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

Appellant,

v.

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

Respondents,

and

READING INTERNATIONAL, INC., a Nevada Corporation,

Nominal Defendant.

Supreme Court Case No: 75053

JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

VOLUME XVI (JA3751-4000)

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JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

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2016-10-13	Individual Defendants' Opposition to Plaintiff James J. Cotter Jr.'s Motion for Partial Summary Judgment	XVI, XVII	JA3991-JA4009
2016-10-21	Individual Defendants' Reply ISO of their Partial MSJ No. 1	XIX	JA4593-JA4624
2017-11-09	Individual Defendants' Supplement to Partial MSJ Nos. 1, 2, 3, 5, and 6	XX, XXI	JA4946-JA5000 **(Under Seal)**
2017-12-08	Joint Pre-Trial Memorandum	XXIV	JA5791-JA5822
2016-04-05	Judy Codding and Michael Wrotniak's Answer to First Amended Complaint	I	JA144-JA167
2017-12-28	Motion [to] Stay and Application for OST	XXVI	JA6177-JA6185
2018-02-01	Notice of Appeal	XXVI	JA6326-JA6328
2018-01-04	Notice of Entry of Order Denying Plaintiff's Motion to Stay and Motion for Reconsideration	XXVI	JA6300-JA6306
2018-01-04	Notice of Entry of Order Granting Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6293-JA6299 **(Under Seal)**
2016-12-22	Notice of Entry of Order on Partial MSJ Nos. 1-6 and MIL to Exclude Expert Testimony	XX	JA4935-JA4941
2017-12-29	Notice of Entry of Order Re Individual Defendants' Partial MSJs, Gould's Motion for Summary Judgment, and parties' Motions in Limine	XXVI	JA6212-JA6222
2018-01-04	Order Denying Plaintiff's Motion to Stay and Motion for Reconsideration	XXVI	JA6257-JA6259
2018-01-04	Order Granting Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6254-JA6256
2017-12-28	Order Re Individual Defendants' Motions for Partial Summary Judgment and Defendants' Motions in Limine	XXVI	JA6170-JA6176

Date	Description	Vol. #	Page Nos.
2017-12-11	Transcript from December 11, 2017 Hearing on Motions for [Partial] Summary Judgment, Motions In Limine, and Pre-Trial Conference	XXIV	JA5823-JA5897
2017-11-27	Transcript of 11-20-2017 Hearing on Motion for Evidentiary Hearing re Cotter, Jr., Motion to Seal EXs 2, 3 and 5 to James Cotter Jr.'s MIL No. 1	XXI	JA5001-JA5020
2017-12-29	Transcript of 12-28-2017 Hearing on Motion for Reconsideration and Motion for Stay	XXVI	JA6186-JA6209
2018-01-05	Transcript of January 4, 2018 Hearing on Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6307-JA6325
2016-11-01	Transcript of Proceedings re: Hearing on Motions, October 27, 2016	XX	JA4750-JA4904

CERTIFICATE OF SERVICE

I certify that on the 22nd day of January 2019, I served a copy of **JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF VOLUME XVI (JA3751-4000)** 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 efiling service:

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By: /s/ Patricia A. Quinn
An employee of Morris Law Group

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs. Case No.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,
Defendants. A-15-719860-B

and

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

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF JAMES COTTER, JR.
Los Angeles, California
Wednesday, July 6, 2016
Volume III

Reported by:
JANICE SCHUTZMAN, CSR No. 9509
Job No. 2343561
Pages 568 - 838

compensation committee, comprised entirely of independent directors."

Do you see that?

A. Right.

Q. And it lists the current members of the compensation committee as Mr. Kane, Mr. Adams, and Mr. Storey. 04:18PM

When you certified this document, you also believed that Mr. Kane, Mr. Adams, and Mr. Storey were also properly characterized to the market as independent directors; correct? 04:18PM

MR. KRUM: Same objections.

THE WITNESS: Well, again, at the time that this was filed and I signed the certification, I didn't realize the extent of Guy Adams' reliance for his livelihood on the Cotter entities. So -- 04:18PM

BY MR. TAYBACK:

Q. You told me you had some concerns going back at least to September of 2014 with respect to Guy Adams. 04:19PM

A. Right, I did.

Q. And you don't -- you nonetheless were comfortable certifying an SEC filing that identified him as being independent?

MR. KRUM: Objection -- 04:19PM

THE WITNESS: The --

MR. KRUM: -- argumentative, mischaracterizes the prior testimony.

You can answer.

THE WITNESS: The certification is to the best of my knowledge. And these matters are -- to the best of my knowledge, there's no material misstatement in this filing. 04:19PM

So I reviewed the document as carefully as I could. And to the best of my knowledge at that time, I felt that everything here was materially true. 04:19PM

BY MR. TAYBACK:

Q. So the first meeting at which your potential termination was discussed was May 21st; correct? 04:19PM

A. Yes.

Q. That was 13 days after you certified this document?

A. Yes. 04:19PM

Q. By that point in time, you had decided firmly that Mr. Adams was not independent; correct?

MR. KRUM: Objection. That --

THE WITNESS: I --

MR. KRUM: -- squarely contradicts the 04:20PM

I, JANICE SCHUTZMAN, Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that the testimony of the witness and all objections made by counsel at the time of the examination were recorded stenographically by me, and were thereafter transcribed under my direction and supervision; and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or any of the parties.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of July, 2016.

JANICE SCHUTZMAN

CSR No. 9509

EXHIBIT B

EX-31.1 2 rdi-20150508xex311.htm EX-31.1

CERTIFICATION OF PERIODIC REPORT UNDER SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, James J. Cotter, Jr., certify that:

1. I have reviewed this Annual Report on Form 10-K/A of Reading International, Inc.

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report.

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report.

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a–15(e) and 15d–15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a–15(f) and 15d –15(f)) for the registrant and have:

(a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

(b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

(c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

(d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting.

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

(a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial

reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

(b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: May 8, 2015

/s/ JAMES J. COTTER, JR.

James J. Cotter, Jr.
Chief Executive Officer

JOIN
MARK E. FERRARIO, ESQ.
(NV Bar No. 1625)
KARA B. HENDRICKS, ESQ.
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Counsel for Reading International, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of JAMES J. COTTER, Deceased. JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Plaintiff, v. MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive, Defendants. And READING INTERNATIONAL, INC., a Nevada Corporation, Nominal Defendant.	**Case No. A-15-719860-B** **Dept. No. XI** **Coordinated with:** Case No. P 14-082942-E Dept. XI Case No. A-16-735305-B Dept. XI **READING INTERNATIONAL, INC.'S JOINDER TO THE INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NO. 4 RE PLAINTIFF'S CLAIMS RELATED TO THE EXECUTIVE COMMITTEE** **Date of Hearing: October 25, 2016** **Time: 8:30 a.m.**

READING INTERNATIONAL, INC., hereby submits its *Joinder to the Individual Defendants' Motion for Summary Judgment No. 4 Re Plaintiff's Claims Related to the Executive Committee (the "Motion")*. Reading International, Inc. ("RDI") joins with the Individual Defendants in seeking summary judgment as to the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint filed by Plaintiff James J. Cotter, Jr. ("Plaintiff" and/or "Cotter, Jr.") to the extent that such claims relate to the existence and decisions of RDI's Executive Committee. In addition to joining the arguments advanced on behalf of the Individual Defendants in their Motion, RDI requests judgment in its favor on these claims for the reasons set forth in the attached memorandum of points and authorities, and based on the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing of this Motion.

DATED: this 3rd day of October, 2016.

GREENBERG TRAURIG, LLP

/s/ Mark E. Ferrario
MARK E. FERRARIO, ESQ.
(NV Bar No. 1625)
KARA B. HENDRICKS, ESQ.
(NV Bar No. 7743)
TAMI D. COWDEN, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

This Court should grant judgment in favor of RDI on the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint ("SAC") to the extent that such claims rely on the existence of, and the decisions made by, RDI's Executive Committee. Cotter, Jr.'s attack on the Executive Committee most clearly illustrates the absurdity of this entire litigation. He offers the existence and use of the Executive Committee as a purported example of a breach of fiduciary duty, even though he not only admits that the Executive Committee has existed for a decade, if not longer, but also admits that he, himself, had been a member of this committee until his termination. Indeed, his complaint that the Executive Committee has been "repopulated" is

revealed as being based on nothing more than the fact that his sister Ellen Cotter is now Chair of the Executive Committee, in place of him.

Significantly, when first asked which decisions made by the Executive Committee he claimed represented breaches of fiduciary duty, Cotter, Jr. could not even think of a single decision to condemn. And while one might expect that he would have been much better prepared on his subsequent depositions dates, even then he was able to come up with only two Executive Committee decisions to challenge: the Executive Committee's selection of a "record date" for the 2015 annual shareholder's meeting; and the appointment of Michael Wrotniak to RDI's Audit and Conflicts Committee, to replace the retiring Timothy Storey.

Moreover, as to the first, Cotter, Jr. could explain his objection only by asserting that the Board of Directors could easily have made the decision. As to the latter, Cotter, Jr. claimed that Mr. Wrotniak was unqualified for the committee. However, Cotter, Jr. admitted that he was not personally aware of any qualifications for that committee. Furthermore, Cotter, Jr. was apparently oblivious to the fact that a mere sixteen days after the Executive Committee appointed Mr. Wrotniak, the Board of Directors voted to continue Mr. Wrotniak's assignment to that committee, rendering the complaint about such an appointment being made by the Executive Committee wholly moot.

In short, Cotter, Jr.'s attack on the Executive Committee is not actually based on any *realistic* belief or theory ---let alone, any ***evidence***---that the committee's existence or actions have actually caused any harm to RDI or its shareholders. Instead, this attack is simply another example of Cotter, Jr.'s condemnation of virtually *every* action taken by the Board of Directors since his termination. Even if Cotter, Jr. honestly believes that any decision not personally blessed by him must necessarily be harmful to RDI, such irrational thought patterns do not, and should not, suffice to perpetuate litigation against RDI. Cotter, Jr.'s continuation of this litigation is, itself, harmful to RDI, and must be brought to a halt.

Cotter, Jr. is unable to show that the Executive Committee's existence is a breach of any defendant's fiduciary duty to the RDI shareholders. He is also unable to show that RDI's shareholders have suffered any damage as a result of the challenged decisions of the Executive

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Committee. Accordingly, summary judgment in favor of RDI and the Individual Defendants should be granted.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. RDI's By-Laws permit the Board of Directors to form committees having at least one director, and to delegate to such committee powers of the Board of Directors in the management of the company. Specifically, the RDI Bylaws provide:

> The Board of Directors may, by resolution adopted by a majority of the whole Board, designate one or more committees of the Board of Directors, each committee to consist of at least one or more directors of the Corporation which, to the extent provided in the resolution, shall have and may exercise the power of the Board of Directors in the management of the business and affairs of the Corporation . . .".

Ex. A, RDI Bylaws, Art. II, § 10. The bylaws exclude from this authorization only such substantial decisions as amendment of the Articles of Incorporation or Bylaws, approvals of mergers or consolidation, recommendations for a sale of all of RDI's assets, or declaration of dividends or issuance of stock. ***Id.***

2. RDI has had an executive committee, composed solely of members of the Board of Directors, for at least the past ten years. **Ex. B, Deposition of James J. Cotter, Jr. (Vol. I) 43:23-44:16; (Vol. III) 803:25-804:15.**

3. While Cotter, Jr. was CEO of RDI, RDI's Executive Committee was composed of Cotter, Jr., Margaret Cotter, Guy Adams, and Edward Kane. The Executive Committee was authorized to take action on matters between meetings of the full board. **Ex. B,** ***id.***

4. Subsequent to Cotter, Jr.'s termination as CEO, Ellen Cotter replaced Cotter, Jr. as a member of the Executive Committee. Otherwise, the composition of the Executive Committee is the same as when Cotter, Jr. chaired the Committee. *Id.*

5. The powers of the Executive Committee have not changed since Cotter, Jr. chaired the committee. **Ex. B, 805:6-10.**

6. Cotter, Jr. testified that he does not object to an Executive Committee existing, but that it should be used only "as a normal public company would use an executive committee." **Ex. B. 54:18-25.** However, Cotter, Jr. was unable to provide an example of a "normal public

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company" whose practices RDI should emulate. **Ex. B, 57:4-11.**

7. When initially questioned as to Executive Committee actions to which he objected, Cotter, Jr. was unable to recall *any* such actions. **Ex. B, 49:8-50:13.** At a subsequent deposition, he identified only two actions taken by the Executive Committee that he considers inappropriate. These two actions are:

a. Deciding upon a "record date" for the 2015 Annual meeting of RDI; and

b. Appointing Michael Wrotniak as a member of RDI's Audit and Risk Committee.

Id.

8. RDI's Bylaws contain the following provision:

> The Board of Directors may fix in advance a date not more than sixty days nor less than ten days preceding the date of any meeting of stockholders . . . as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, and any adjournment thereof . . . and in such case, such stockholders, and only such stockholders as shall be stockholders of record on the date so fixed, shall be entitled to notice of and to vote at such meeting, or any adjournment thereof. . . notwithstanding any transfer of any stock on the books of the Corporation after any such record date fixed as aforesaid.

Ex. A RDI Bylaws, Art. V, § 4.

9. On August 28, 2015, RDI's Executive Committee set October 6, 2016 as the "record date" for the RDI's 2015 annual meeting. **Ex. C, August 28, 2015 Ex. Com. Minutes.** This date was more than ten days, and fewer than 60 days from the November 10, 2015 annual meeting date.

10. On October 25, 2015, the Executive Committee appointed Mr. Wrotniak to take the seat on RDI's Audit and Conflicts Committee left vacant as a result of the retirement of Mr. Storey as a director. **Ex. D October 25, 2016 Ex. Com. Minutes**. The Minutes of the Executive Committee's meeting show that the Committee was expressly informed that Mr. Wrotniak had been the tax matters partner for several years at Minico Resources, LLC, a privately held international commodities trading firm. ***Id.*** Other than the replacement of Mr. Storey, the composition of the Audit and Conflicts Committee, which also included Messrs. McEachern and Kane, remained the same. ***Id.***

11. Sixteen days later, on November 10, 2015, immediately following RDI's Annual

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Shareholder Meeting, the Board of Directors met and assigned all directors to various committees. Michael Wrotniak was again appointed to RDI's Audit and Conflicts Committee, as were Messrs. McEachern and Kane; thus, the composition of the committee remained the same. **Ex. E, Nov. 10, 2015 BOD Minutes.** Only Cotter, Jr. voted against the committee assignments.

12. Cotter, Jr. contends that Mr. Wrotniak is unqualified to be appointed to the Audit and Conflicts Committee. **Ex. B, 807:10-16.** However, Cotter, Jr. admitted to being unaware of any qualifications for appointment to the Audit and Conflicts Committee. **Id. at 808:7-15.**

13. RDI is listed on the NASDAQ exchange. **SAC, ¶ 26.**

14. NASDAQ's listing rules related to company's audit committees include the following relevant provisions:

5605. Board of Directors and Committees

(a) Definitions

> **(1)** "Executive Officer" means those officers covered in Rule 16a-1(f) under the Act.
>
> **(2)** "Independent Director" means a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. For purposes of this rule, "Family Member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home. The following persons shall not be considered independent:
>
> > **(A)** a director who is, or at any time during the past three years was, employed by the Company;
> >
> > **(B)** a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:
> >
> > > **(i)** compensation for board or board committee service;
> > >
> > > **(ii)** compensation paid to a Family Member who is an employee (other than an Executive Officer) of the Company; or
> > >
> > > **(iii)** benefits under a tax-qualified retirement plan, or non-discretionary compensation.

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Provided, however, that in addition to the requirements contained in this paragraph (B), audit committee members are also subject to additional, more stringent requirements under Rule 5605(c)(2).

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the Company as an Executive Officer;

(D) a director who is, or has a Family Member who is, a partner in, or a controlling Shareholder or an Executive Officer of, any organization to which the Company made, or from which the Company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than the following:

(i) payments arising solely from investments in the Company's securities; or

(ii) payments under non-discretionary charitable contribution matching programs.

(E) a director of the Company who is, or has a Family Member who is, employed as an Executive Officer of another entity where at any time during the past three years any of the Executive Officers of the Company serve on the compensation committee of such other entity; or

(F) a director who is, or has a Family Member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor who worked on the Company's audit at any time during any of the past three years.

* * *

(c) Audit Committee Requirements

* * *

(2) Audit Committee Composition

(2) Audit Committee Composition

(A) Each Company must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be an Independent Director as defined under Rule 5605(a)(2); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act); (iii) not have participated in the preparation of the financial statements of the Company or any current subsidiary of the Company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a Company's balance sheet, income statement, and cash flow statement. Additionally, each Company must

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certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities

NASDAQ Listing Rules, § 5605.

15. Rule 10A-3(b)(1) of the Securities Act provides:

> **(b)** *Required standards* -
>
> > **(1)** *Independence.*
> >
> > > **(i)** Each member of the audit committee must be a member of the board of directors of the listed issuer, and must otherwise be independent; provided that, where a listed issuer is one of two dual holding companies, those companies may designate one audit committee for both companies so long as each member of the audit committee is a member of the board of directors of at least one of such dual holding companies.
> > >
> > > **(ii)** *Independence requirements for non-investment company issuers.* In order to be considered to be independent for purposes of this paragraph (b)(1), a member of an audit committee of a listed issuer that is not an investment company may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee:
> > >
> > > > **(A)** Accept directly or indirectly any consulting, advisory, or other compensatory fee from the issuer or any subsidiary thereof, provided that, unless the rules of the national securities exchange or national securities association provide otherwise, compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the listed issuer (provided that such compensation is not contingent in any way on continued service); or
> > > >
> > > > **(B)** Be an affiliated person of the issuer or any subsidiary thereof.

17 CFR 240.10A-3(b)(1).

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16. Cotter Jr. has not alleged, and cannot show, that Mr. Wrotniak is not qualified under the requirements set forth in NASDAQ Listing Rule § 5605 or 17 CFR 240.10A-3(b)(1).

17. None of the circumstances that disqualify a director from membership on the Audit and Conflicts Committee, as set forth in the NASDAQ listing rules or under federal law, are present as to Mr. Wrotniak. **Ex. F, Decl. of Wrotniak. ¶5.**

18. Mr. Wrotniak is able to read and understand corporate financial reporting documents. *Id.*

19. Cotter, Jr.'s damage expert has not assigned any damages purporting to have been caused by any issue related to the Executive Committee. *See* Report of Tiago Duarte-Silva.

LEGAL ARGUMENT

This Court should grant RDI summary judgment as to Cotter, Jr.'s First, Second, Third and Fourth causes of action of the SAC, to the extent such claims rely on assertions that RDI's maintenance of an Executive Committee, or any action by that committee, constitutes a breach of duty to RDI shareholders. Cotter, Jr. is unable to present evidence sufficient to show that a material issue of fact exists as to RDI's entitlement to judgment as to this issue.

Summary judgment should be granted if the pleadings, admissions, and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). In that event, the non-moving party is then obligated to present admissible evidence to show that there are material issues of fact preventing summary judgment, or summary judgment must be granted. *Id.* Because a plaintiff is required to prove each element of his cause of action, if any element cannot be proven by admissible evidence, then summary judgment is proper. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

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Here, plaintiff, Cotter, Jr. bears the burden of proof on his breach of fiduciary duty claims. Accordingly, he can survive this motion for summary judgment only if he affirmatively presents admissible evidence sufficient to persuade a reasonable jury that the existence of RDI's Executive Committee, or the decisions it made regarding the record date for RDI's 2015 shareholder meeting or Mr. Wrotniak's appointment to the Audit and Conflicts Committee violated a fiduciary duty to RDI's shareholders. This he cannot do. Accordingly, RDI is entitled to judgment as a matter of law.

I. BECAUSE COMMITTEES AUTHORIZED TO PERFORM DUTIES OF THE BOARD ARE PERMITTED BY RDI'S BY-LAWS, THE EXISTENCE AND ACTIONS OF SUCH A COMMITTEE CANNOT, WITHOUT MORE, CONSTITUTE A BREACH OF FIDUCIARY DUTY.

Cotter, Jr. cannot present any evidence to show that either the maintenance or the challenged uses of RDI's Executive Committee constitute a breach of fiduciary duty. Under Nevada law, corporations are free to permit any and all board functions to be delegated to committees. Specifically, Nevada's corporate statutes provide, in relevant part:

> **NRS 78.125 Committees of board of directors: Designation; powers; membership.**
>
> 1. Unless it is otherwise provided in the articles of incorporation, the board of directors may designate one or more committees which, to the extent provided in the resolution or resolutions or in the bylaws of the corporation, ***have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation.***
>
> 2. Each committee must include at least one director. Unless the articles of incorporation or the bylaws provide otherwise, the board of directors may appoint natural persons who are not directors to serve on committees.
>
> * * *

NRS 78.125 (emphasis added). As can be seen, provided at least one member of the board of directors sits on the committee, and provided the corporation's bylaws do not prohibit such delegation, Nevada law expressly permits the use of a committee to exercise board functions.

So far from prohibiting such delegation, RDI's bylaws expressly permit the delegation of most director actions to committees. **SUF 1.** Like the statute, RDI also requires such committees to have only one board member. ***Id.*** Notably, RDI's four-person Executive

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Committee consists *solely* of members of its Board of Directors.

While RDI limits the type of actions that may be taken by Committee, *id.*, Cotter, Jr. does not contend that the Executive Committee has taken any such action not permitted under the bylaws. There can be no dispute that there is no preclusion for any committee to make such decisions as determining record dates for purposes of the annual shareholders' meeting, or from appointing board members to other committees.

The Executive Committee's authority is to make decisions as matters arise between meetings of the full Board of Directors. Both of the decisions attacked by Cotter, Jr. were made on days when no Board of Directors meeting was held. Accordingly, the decisions were made in accordance with the Committee's express authority.

II. COTTER, JR. CANNOT SHOW THAT RDI'S SHAREHOLDERS HAVE BEEN INJURED BY THE TWO EXECUTIVE COMMITTEE ACTIONS HE CLAIMS WERE IMPROPER.

RDI is entitled to judgment on Cotter, Jr.'s claims related to the Executive Committee, because he is unable to satisfy the elements of such claims. In Nevada, a derivative action for breach of fiduciary duty requires proof of an actual injury resulting from the tortious conduct of a defendant who owes a fiduciary duty to the shareholders. *Foster v. Dingwall*, 126 Nev. 56, 69, 227 P.3d 1042, 1051 (2010), citing *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) ("fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship."). Additionally, in order to satisfy the breach element of his claims, Cotter, Jr. must present evidence sufficient to rebut NRS 78.138(3)'s statutory presumption that directors have acted in the best interests of the corporation. NRS 47. 180(1). Additionally, in order to satisfy the damages element of his claims, Cotter, Jr. must present evidence to show that an actual injury occurred as a result of the existence of, or decisions made by, RDI's Executive Committee. Because Cotter, Jr. cannot do either of these things, summary judgment should be granted.

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A. Cotter, Jr. Cannot Show any Impropriety in the Executive Committee's 2015 Determination of the Record Date for the 2015 Annual Meeting.

Cotter, Jr.'s objection to the Executive Committee deciding on the record date for the 2015 Shareholder's meeting is apparently based on nothing more than the fact that the Board of Directors could have made that decision. He has produced no evidence that would show that the date itself, which falls within the requirements of both RDI's Bylaws, and Nevada's statutes, was somehow improper. Nor has Cotter, Jr. produced any evidence that would indicate that the Executive Committee's making of the choice, as opposed to the entire Board of Directors, was improper. As shown above, the Executive Committee was duly authorized to exercise Board powers between meetings of the Board. Accordingly, this decision was wholly within the authority of the Executive Committee.

Cotter, Jr. has not presented any evidence that the choice of the record date was motivated by anything other than the subjective belief by members of the Executive Committee that such date was appropriate and in the best interests of RDI. Nor has he produced any evidence to show that the record date somehow caused harm to RDI. Accordingly, his claim that the choice of the record date by the committee was a breach of fiduciary duty must fail.

B. Cotter, Jr. Cannot Show any Impropriety in the Executive Committee's Appointment of Director Michael Wrotniak to RDI's Audit and Conflicts Committee.

Cotter, Jr. is unable to support his assertion that the Executive Committee should not have appointed Michael Wrotniak to RDI's Audit and Conflicts Committee to complete Mr. Storey's term. Cotter, Jr. has produced no evidence to show that Mr. Wrotniak does not meet the qualifications for membership on the Audit and Conflicts Committee. Indeed, Cotter, Jr. admitted that he does not even know what qualifications a member of this committee must have, **SUF 12.**

Significantly, upon Mr. Storey's retirement from the Board of Directors, appointment of another member of the Board of Directors to the Audit and Financial Committee was necessary, pursuant to the NASDAQ listing rules. **SUF 13.** Nor can Cotter, Jr. show that RDI suffered any

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harm from such appointment. Indeed, to do so, he would have to show some harm arising from Mr. Wrotniak's presence on the Audit and Conflicts Committee during the sixteen days between Mr. Wrotniak's October 25, 2015 appointment, and his November 10, 2015 reappointment by the Board of Directors. Cotter, Jr. has not produced any such evidence.

CONCLUSION

Cotter, Jr. cannot demonstrate that the existence or actions of RDI's Executive Committee constituted a breach of a fiduciary duty to the shareholders. Nor can Cotter, Jr. prove that the shareholders were injured as a result of the existence of actions of RDI's Executive Committee. Therefore, RDI is entitled to summary judgment as to any claims premised on the existence or actions of the Executive Committee.

DATED: this 3rd day of October, 2016.

GREENBERG TRAURIG, LLP

/s/ Mark E. Ferrario
MARK E. FERRARIO, ESQ.
(NV Bar No. 1625)
KARA B. HENDRICKS, ESQ.
(NV Bar No. 7743)
TAMI D. COWDEN, ESQ.
(NV Bar No. 8994)
Counsel for Reading International, Inc.

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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 on this day, I caused a true and correct copy of the forgoing ***Reading International, Inc.'s Joinder to the Individual Defendants' Motion for Summary Judgment No. 4 Re Plaintiff's Claims Related to The Executive Committee*** to be filed and served via the Court's Wiznet E-Filing system on all registered and active parties. 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 3rd day of October, 2016.

/s/ Andrea Lee Rosehill
An employee of GREENBERG TRAURIG, LLP

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EXHIBIT A

EXHIBIT 3.6

AMENDED AND RESTATED

BYLAWS

OF

Reading International, Inc.

A Nevada Corporation

(formerly Citadel Holding Corporation)

[redacted]

shall be as valid and effective in all respects as if passed by the Board of Directors in a regular meeting.

A quorum of the directors may adjourn any directors meeting to meet again at a stated day and hour; provided, however, that in the absence of a quorum, a majority of the directors present at any directors' meeting, either regular or special, may adjourn from time to time, without notice other than announcement at the meeting, until a quorum is present.

Notice of the time and place of holding an adjourned meeting need not be given to the absent directors if the time and place are fixed at the meeting adjourned.

SECTION 10 COMMITTEES

The Board of Directors may, by resolution adopted by a majority of the whole Board, designate one or more committees of the Board of Directors, each committee to consist of at least one or more directors of the Corporation which, to the extent provided in the resolution, shall have and may exercise the power of the Board of Directors in the management of the business and affairs of the Corporation and may have power to authorize the seal of the Corporation to be affixed to all papers which may require it; but no such committee shall have the power to amend the Articles of Incorporation, to adopt an agreement or plan of merger or consolidation, to recommend to the stockholders a sale, lease or exchange of all or substantially all of the Corporation's assets, to recommend to the stockholders dissolution or revocation of dissolution, or to amend these Bylaws, and, unless the resolution or the Articles of Incorporation expressly so provide, no such committee shall have the power or authority to declare a dividend or to authorize the issuance of stock. Such committee or committees shall have such name or names as may be determined from time to time by the Board of Directors. The Board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The members of any such committee present at any meeting and not disqualified from voting may, whether or not they constitute a quorum, unanimously appoint another member of the Board of Directors to act at the meeting in the place of any absent or disqualified member. At meetings of such committees, a majority of the members or alternate members shall constitute a quorum for the transaction of business, and the act of a majority of the members or alternate members at any meeting at which there is a quorum shall be the act of the committee.

The committees, if required by the Board, shall keep regular minutes of their proceedings and report the same to the Board of Directors.

SECTION 11 ACTION WITHOUT MEETING; TELEPHONE MEETINGS

Any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting if a written consent thereto is signed by all members of the Board of Directors or of such committee, as the case may be, and such written consent is filed with the minutes of proceedings of the Board or committee.

[redacted]

the Corporation may be facsimiles. In case any officer who has signed or whose facsimile signature has been placed upon a certificate shall cease to be such officer before such certificate is issued, such certificate may be issued with the same effect as though the person had not ceased to be such officer. The seal of the Corporation, or a facsimile thereof, may, but need not be, affixed to certificates of stock.

SECTION 2 SURRENDERED; LOST OR DESTROYED CERTIFICATES

The Board of Directors or any transfer agent of the Corporation may direct a new certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the Corporation alleged to have been lost or destroyed upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost or destroyed. When authorizing such issue of a new certificate or certificates, the Board of Directors (or any transfer agent of the Corporation authorized to do so by a resolution of the Board of Directors) may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost or destroyed certificate or certificates, or the owner's legal representative, to advertise the same in such manner as it shall require and/or give the Corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the Corporation with respect to the certificate alleged to have been lost or destroyed.

SECTION 3 REGULATIONS

The Board of Directors shall have the power and authority to make all such rules and regulations and procedures as it may deem expedient concerning the issue, transfer, registration, cancellation and replacement of certificates representing stock of the Corporation.

SECTION 4 RECORD DATE

The Board of Directors may fix in advance a date not exceeding sixty days nor less than ten days preceding the date of any meeting of stockholders, or the date for the payment of any distribution, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, or a date in connection with obtaining the consent of stockholders for any purpose, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, and any adjournment thereof, or entitled to receive payment of any such distribution, or to give such consent, and in such case, such stockholders, and only such stockholders as shall be stockholders of record on the date so fixed, shall be entitled to notice of and to vote at such meeting, or any adjournment thereof, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, or to give such consent, as the case may be, notwithstanding any transfer of any stock on the books of the Corporation after any such record date fixed as aforesaid.

SECTION 5 REGISTERED OWNER

The Corporation shall be entitled to recognize the person registered on its books as the owner of shares to be the exclusive owner for all purposes including voting and distribution, and the Corporation shall not be bound to recognize any equitable or other claim to or interest in such

[redacted]

EXHIBIT B

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs. Case No.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive, A-15-719860-B
Defendants.

and

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

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF JAMES COTTER, JR.
Los Angeles, California
Monday, May 16, 2016
Volume I

Reported by:
JANICE SCHUTZMAN, CSR No. 9509
Job No. 2312188
Pages 1 - 297

Q. So as you're sitting here now, you can't think of the -- any specific issue where you're asking the company to go back and undo it or change it based upon untimely disclosure of agenda items or material in advance of board meetings, as you sit here now? 10:44:51

A. As I sit here now.

MR. KRUM: Objection, misstates the testimony.

BY MR. TAYBACK: 10:44:56

Q. As you sit here now, that's correct; right?

MR. KRUM: Same objection.

THE WITNESS: As I sit here today.

BY MR. TAYBACK:

Q. That's correct? 10:45:01

A. Right.

Q. Ask you about the -- you talked about the -- initially, you said the creation of an executive committee, and then I think you said activation of an executive -- 10:45:12

A. Right.

Q. -- committee.

What's your understanding of the executive committee of the board of Reading? What is it?

A. The executive committee of the board is a 10:45:21

committee of four -- I think it's four members. It's been in existence for some time. It has never been utilized by the company for at least the last five to seven years and maybe longer, but it has never been utilized by the company. 10:45:41

I was the chairman of the executive committee, appointed in May of 2014, I believe. My sister Margaret was on the committee, Guy Adams and Ed Kane.

That committee, on or shortly after my termination, was reconstituted and reactivated so that it took all of the authority of the board, and it acted, in effect, as the board of directors, and it had the effect of disenfranchising the other directors because decisions were made by that executive committee. 10:45:59 10:46:25

Q. Was there a -- I think you said activation.

Was there a moment in time or a particular action at a board meeting or elsewhere where the executive committee became activated? 10:46:42

A. As I testified, shortly after my termination -- or, actually, on the date of my termination, I was removed from the executive committee. It was reconstituted. And then at some -- between that board meeting and the following 10:47:08

A. It's my assumption based on the historical practice of never utilizing the executive committee that clearly existed and based on my recollection of reading through Reading's filings.

Q. Now I want to ask you some questions about the executive committee after it was activated, to use your word. 10:51:19

What decisions are you aware of that that executive committee has made to which you object?

A. Sitting here right now, I cannot think of any specific decisions that were made by the executive committee. 10:51:33

Q. Can you think of any specific actions taken by the executive committee?

A. Again, sitting here today, I cannot recall specifically certain actions taken by the executive committee. 10:51:43

Q. Can you think of any --

Because you're still on the Reading board; correct?

A. Correct.

Q. The executive committee has reported to the board; correct?

A. Correct.

Q. And as you sit here now, you can't recall 10:52:04

any actions or decisions by the executive committee that were reported back to the board at which you were present to which you object; is that correct?

A. There were a number of actions taken by the executive committee that I cannot recall at this point, yes, that's correct. 10:52:27

Q. Meaning there were a number of actions but you can't recall any of them?

A. At this -- today, sitting here, I cannot recall. 10:52:36

Q. Okay. You understand this is your deposition in the derivative suit; right?

A. I do.

Q. Yeah.

A. Of course. 10:52:41

Q. You mentioned that the process for a search for the CEO as something that is a grievance of yours in this case -- withdraw that.

Back to the executive committee.

To redress the perceived wrong of activating this executive committee to take actions that you can't recall now, what do you want the company to do -- 10:53:05

MR. KRUM: Objection --

BY MR. TAYBACK:

seemed.

So there wasn't a lot of thought given when I was appointed to the executive committee. It was only until it was activated and it was used to make decisions in place of the full board of directors. 10:56:50

BY MR. TAYBACK:

Q. When you say that wasn't a lot of thought given, you mean you didn't give it a lot of thought because it wasn't being used.

That's what you mean; right? 10:56:58

A. I can only say what -- yeah, that's correct.

Q. And when you say -- what you're saying is you didn't give it a lot of thought when you were first appointed to the executive committee because 10:57:05 it didn't seem that important at the time?

A. Correct.

Q. And I'm asking you now what you would want the company to do.

Do you want the company to take this 10:57:20 executive committee, keep it, but only use it in case of emergency?

That's one thing; correct?

A. To use it properly as a normal public company would use an executive committee. 10:57:34

BY MR. TAYBACK:

Q. Can you -- I don't want to cut you off.

A. Sure. No, no. Go ahead.

Q. Can you name any publicly held companies that you believe are comparable to Reading and have an executive committee that you think is more consistent with the executive committee that you believe Reading should have? 11:00:03

A. I can't recall specifically a company of Reading's size and how it uses an executive committee. 11:00:23

Q. The process for the search of a CEO, you said that you're seeking redress for what you believe to be a breach of fiduciary duty by that process that was used for searching for a CEO. 11:00:48

Describe for me what the redress for that is that you're seeking.

A. I might have --

MR. KRUM: Wait, wait, wait. Let me do my objection. 11:01:03

Objection, calls for a legal conclusion, complaint speaks for itself.

Go ahead.

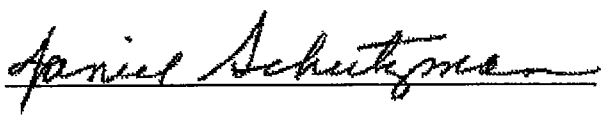
THE WITNESS: Chris, I might have misstated testimony earlier. 11:01:15

I, JANICE SCHUTZMAN, Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that the testimony of the witness and all objections made by counsel at the time of the examination were recorded stenographically by me, and were thereafter transcribed under my direction and supervision; and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or any of the parties.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of May, 2016.



JANICE SCHUTZMAN

CSR No. 9509

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs. Case No.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,
Defendants. A-15-719860-B

and

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

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF JAMES COTTER, JR.
Los Angeles, California
Wednesday, July 6, 2016
Volume III

Reported by:
JANICE SCHUTZMAN, CSR No. 9509
Job No. 2343561
Pages 568 - 838

testimony from today.

THE WITNESS: At some point, I learned of what -- the compensation that Guy Adams was receiving from the Cotters, what that represented of his total overall income. And when I learned that, that was subsequent to the date of this filing. 04:20PM

BY MR. TAYBACK:

Q. So sometime after May 8th and before your termination is when you learned the facts that gave rise to your conclusion that Mr. Adams was not independent; is that correct? 04:20PM

MR. KRUM: Asked and answered.

THE WITNESS: Yes.

BY MR. TAYBACK:

Q. And that just happens to coincide with your discovery that Mr. Adams was not supporting you as CEO; correct? 04:20PM

A. It happens to coincide, yes.

Q. If I could ask you to go up -- higher up on this document. 04:20PM

There's a paragraph that says "Executive Committee."

Do you see that?

A. Yes.

Q. And it states here: 04:21PM

"A standing executive committee currently comprised of Mr. Cotter, Jr., who serves as chair, Ms. Margaret Cotter, and Messrs. Adams and Kane, is authorized to the fullest extent permitted by Nevada law, to take action on matters between meetings of the full board."

Do you see that?

A. I do. 04:21PM

Q. That accurately describes the executive committee that existed in May of 2015; correct?

A. It may accurately describe the committee, but the committee had taken no action for at least the last 10 years. 04:21PM

Q. And that's, in fact, what it says; correct?

A. It --

Q. Well, it doesn't say 10 years. Do you see -- if you read on.

Do you see what it says? 04:21PM

MR. KRUM: In 2014?

BY MR. TAYBACK:

Q. In 2014.

MR. KRUM: The first sentence, the next paragraph. 04:21PM

[redacted]

THE WITNESS: Right. Yes.

BY MR. TAYBACK:

Q. So my question is whether that's an accurate statement of the executive committee?

A. Appears to be. 04:22PM

Q. And whether it's taken action or not taken action is another fact, but the power that the executive committee has is the power that it has now and is the power it had in 2015; correct?

A. Right. 04:22PM

Q. And you didn't object to it having --

MR. KRUM: Objection --

BY MR. TAYBACK:

Q. -- that power?

MR. KRUM: -- vague and ambiguous. 04:22PM

THE WITNESS: I did not object to the executive committee having that power, no, because it had never exercised that power.

BY MR. TAYBACK:

Q. Let me just make sure. 04:22PM

Do you feel like that the power is okay as long as it's not used?

MR. KRUM: Objection.

BY MR. TAYBACK:

Q. Is that your contention? 04:22PM

it took, some of which I felt benefited Ellen and Margaret as stockholders, such as the determination of the record date, a simple determination that has always -- could easily have been made by the board and it had been made by the executive committee. 04:24PM

Q. And do you disagree with the determination it made or the fact that the executive committee made that determination?

A. I disagree with both.

Q. What are the other specific actions taken by the executive committee that you object to? 04:24PM

A. I believe that it appointed Michael Wrotniak to the audit committee, and I objected to the use of the executive committee to appoint a member who I felt was unqualified to serve on the audit committee. 04:24PM

Q. And do you have -- well, let me ask you.

Okay. Any other actions by the executive committee to which you object?

A. I can't think of any at this time. 04:25PM

Q. You agree with me that as you certified previously, whether the executive committee took action or not, that, in fact, the executive committee is authorized to the fullest extent of Nevada law to take action? 04:25PM

MR. KRUM: Asked and answered.

BY MR. TAYBACK:

Q. You don't have an opinion as to whether or not the actions they actually took exceeded Nevada law? 04:25PM

A. I don't have an opinion, no.

Q. The -- with respect to the appointment of Mr. Wrotniak, you agree, as you certified previously, that there are, in fact, no qualifications required to be a director or to sit on even a certain committee; correct? 04:26PM

MR. KRUM: Objection, asked and answered or incomplete hypothetical.

THE WITNESS: I mean, none that I'm aware of. 04:26PM

MR. KRUM: Well --

BY MR. TAYBACK:

Q. So --

MR. KRUM: -- excuse me.

Misstates the testimony, too. 04:26PM

BY MR. TAYBACK:

Q. So when you say Mr. Wrotniak was unqualified, that's your opinion. It's not like there were qualifications that are required for appointment to a particular committee? 04:26PM

I, JANICE SCHUTZMAN, Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that the testimony of the witness and all objections made by counsel at the time of the examination were recorded stenographically by me, and were thereafter transcribed under my direction and supervision; and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or any of the parties.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of July, 2016.

JANICE SCHUTZMAN

CSR No. 9509

[redacted]

EXHIBIT C

Minutes of the
Meeting of the Executive Committee
of the Board of Directors
of
Reading International, Inc.

August 28, 2015

A duly called meeting of the Executive Committee (the "Committee") of the Board of Directors of Reading International, Inc. (the "Company") was held telephonically on August 28, 2015 at 9:00 a.m. (Los Angeles time). Present by telephone were Guy Adams (Chairman), Ellen Cotter, Margaret Cotter and Edward Kane. Present at the invitation of the Committee was Craig Tompkins, who acted as Recording Secretary. Each of the participants confirmed that they could hear one another.

Setting of Record Date and Annual Shareholder Meeting Date

The Board of Directors on August 4, 2015, delegated to the Committee the authority to set the Record Date and the date of the Annual Shareholders Meeting.

The Committee discussed the matter and set the following dates:

Record Date: October 6, 2015

Annual Shareholder Meeting Date: November 11, 2015

The Committee unanimously authorized management to issue a Form 8-K and press release during the week of August 31, 2015 providing for public disclosure of the record and meeting dates, and including such other information as management should in its discretion determine to be appropriate.

Conclusion of Meeting

There being no further business, the meeting was adjourned at 9:30 a.m. (Los Angeles time).

S. Craig Tompkins, Recording Secretary

EXHIBIT D

Minutes of the
Meeting of the Executive Committee
of the Board of Directors
of
Reading International, Inc.

October 25, 2015

A duly called meeting of the Executive Committee (the "Committee") of the Board of Directors of Reading International, Inc. (the "Company") was held telephonically on October 25, 2015 at 3:00 pm (Los Angeles time). Present by telephone were Ellen Cotter, Margaret Cotter and Edward Kane. Present at the invitation of the Committee was Doug McEachern, the Chairman of the Company's Audit Committee. In Guy Adam's absence, Ellen Cotter acted as Chair of the Meeting and as Recording Secretary. Each of the participants confirmed that they could hear one another. Guy Adams had advised earlier that he would not be able to attend, but had consented to the meeting proceeding in his absence and had waived notice.

Appointment of Michael Wrotniak to the Audit and Conflicts Committee

Ellen Cotter discussed the need to fill the vacancy on the Company's Audit and Conflicts Committee (the "Audit Committee") created by the retirement of Tim Storey. NASDAQ rules require three independent directors be included on the Company's Audit Committee. Michael Wrotniak, a newly elected Director of the Company, was being considered to fill the vacancy on the Audit Committee. Mr. Doug McEachern described a telephonic meeting on October 23, 2015 attended by himself, Dev Ghose, the Company's Chief Financial Officer, Craig Tompkins, the Company's Special Counsel, and Mr. Wrotniak. At that meeting, the participants discussed (i) whether Mr. Wrotniak's financial experience and qualifications were satisfactory to be a member of the Audit Committee and (ii) the time commitment necessary on Mr. Wrotniak's part.

Mr. McEachern described again for the Executive Committee the financial qualifications of Mr. Wrotniak, which included, among other things, being the tax matters partner for several years at Amaco Resources, LLC, a privately held international commodities trading firm. Mr. McEachern further reported that he had discussed with Mr. Wrotniak the time commitment involved in serving on the Audit Committee, and that Mr. Wrotniak had advised that he would be able to meet that time commitment and was willing to serve on the Audit Committee. Mr. McEachern thereafter recommended to the Executive Committee, Mr. Wrotniak's appointment to the Audit Committee.

Prior to this meeting of the Executive Committee, Mr. McEachern informed those present that he had discussed his recommendation with Guy Adams, the Chair of the Executive Committee. Mr. Adams gave Mr. McEachern his proxy to vote in favor of Mr. Wrotniak's appointment to the Audit Committee.

After discussing the matter, the Executive Committee members on this telephone conference unanimously voted (Mr. McEachern casting Mr. Adams vote in favor) to appoint Mr. Wrotniak to the Audit Committee, effective immediately, such appointment to continue until the reformation of the Board's committees immediately following the Annual Meeting of Stockholders scheduled for November 10, 2015.

Conclusion of Meeting

There being no further business the meeting was adjourned at 3.30pm (Los Angeles time).

Ellen M. Cotter, Recording Secretary

EXHIBIT E

Minutes of the
Annual Organizational Meeting of
the Board of Directors
of
Reading International, Inc.

November 10, 2015

A duly called and noticed meeting of the Board of Directors (the "Board") of Reading International, Inc. (the "Company") was held immediately following the Annual Meeting of the Stockholders of the Company, on Tuesday, November 10, 2015, in the Plaza Room at the Ritz Carlton Marina Del Rey Hotel, in Los Angeles, California. In attendance, in person, were Chairperson Ellen Cotter, Vice Chairperson Margaret Cotter, and Board members Guy Adams, Dr. Judy Codding, James J. Cotter, Jr., William Gould, Edward L. Kane, Douglas McEachern, and Michael Wrotniak. Present at the invitation of the Board were Dev Ghose (Chief Financial Officer), Andrzej Matyczynski (Strategic Consultant), William Ellis (General Counsel and Corporate Secretary) and Craig Tompkins (Special Counsel and Recording Secretary). Also present for portions of the meeting at the invitation of the Board were Michael Buckley (Edifice Realty Estate Partners), Robert Snorling (President, Domestic Cinemas), Wayne Smith (Managing Director, Australia and New Zealand), Matthew Bourke (Director of Real Estate, Australia and New Zealand), John Goeddel (Chief Information Officer) and Victor Albizures (Security and Compliance Manager). Messrs. Smith and Bourke participated by telephone.

Chair Cotter called the meeting to order at 12:30 PM, Pacific Savings Time.

U.S. Real Estate Operations

The first business taken up was a report by Mr. Buckley and Margaret Cotter on the status of the Company's Union Square and C123 redevelopment projects. Mr. Buckley and Ms. M. Cotter advised the Board that:

- As to the Union Square redevelopment project, they advised, among other things, that:
  - The project continues to proceed on time and on budget;
  - Edifice Real Estate Partners (the Company's development manager) and Newmark Grubb Knight Frank (the Company's broker) have each conducted recent analyses as to likely gross rents for the project and have come out very close to the estimated gross rents previously estimated by Edifice and Newmark;
  - The NY Film Academy has vacated the building, and we do not anticipate any problem getting 100% vacant possession by the end of the year;
  - They anticipate that asbestos abatement will begin by the end of the year;

- Newmark is working on marketing materials and they should be ready for the ICSC Convention in New York on December 7th & 8th; and
- The current plans do not provide for any theater space in the building.

➢ As to C123, they advised the Board, among other things, that:

- It is anticipated that a feasibility plan would be ready to circulate to the adjacent land owners by the end of the month;
- The design work is in the early stages. The feasibility study contemplates a mixed use of retail, restaurant, and residential/hotel;
- The adjacent landowners are principally in the restaurant business, have no interest in selling their land (although, if the joint development goes forward, it would be contributed to an LLC), and want to have the right to be the restaurant tenant; and
- We believe it likely that a deal can be worked out with the adjacent landowners, since the economics are compelling for both parties. Factors include not only the larger footprint, but the material increase in street frontage and the ability to spread the cost of the required subway work over a larger project.

➢ Dev Ghose advised that he was working on a financing package for the Union Square project, seeking 100% financing, no amortization and a Libor-based variable interest rate.

➢ Responding to director questions regarding the status of the leasing of the Union Square project, Management responded that:

- We are not currently executing any contracts that do not have early termination clauses, and will not be entering into any material binding obligations before Management's next presentation to the Board with respect to this project;
- It is not currently the anticipation of Management that the property would be developed on a speculative basis (i.e. without any leases in place);
- We will likely have a much better idea of the development schedule, lender requirements and the rental market after the December ICSC conference;
- We are ultimately going to have to balance the benefits of entering into a lease before the commencement of construction or waiting until we have a definite completion date that we can take to market;

* It appears that financing may be available that is not conditioned upon having tenants in place; and

* Management will be coming back to the Board with further information at a meeting sometime in December.

Financial Results, Liquidity and Debt Matters

The next business taken up was a report by Mr. Ghose on third quarter operating results and a proposed modification of the NAB Loan. Mr. Ghose reported that he had been able to negotiate several favorable modifications to the NAB Loan (the "NAB Loan Modification"), as follows:

* Reduction of 45 basis points on borrowing costs from 235 basis points over BBSY to 190 bps over;

* The spread of 190 bps will be split up into a facility fee of 95 bps over BBSY; a drawn margin of 95 bps over BBSY will be paid only on outstanding borrowings;

* Elimination of annual loan amortization of AU$2 M;

* Split up the facility into a Revolving Line of AU$66.5 M and a guarantee facility of $5M; and

* Permission to repatriate up to AU $30 M out of the facility;

Mr. Ghose further reported that cost savings to the Company could be between $220,000 (fully drawn) and $840,000 (undrawn). On motion duly made and seconded, the Board unanimously voted to authorize Management to proceed with the NAB Loan Modification generally as outlined at the meeting and described above in these Minutes.

U.S. Cinema Operations

Chair Cotter and Mr. Smerling next presented their report regarding the results of operations for the domestic cinemas, and responded to questions.

Australia/New Zealand Cinema Operations

At this time, Messrs Smith and Bourke joined the meeting.

Mr. Smith next presented his report on cinema operations in Australia and New Zealand and responded to questions.

Australia/New Zealand Real Estate Operations

Mr. Bourke next presented his report on real property operations in Australia and New Zealand, focusing on a proposed acquisition of the land underlying our cinema in Townsville, Australia, commonly known as Cannon Park. Mr. Bourke reported, among other things, that:

- We have been selected as the preferred bidder for the property, based on an offer of AU$31.5 million (approximately US$22.4 million), and Management is currently negotiating a "heads of agreement" (essentially a letter of intent) with the seller;
- These negotiations are confidential in nature;
- The proposed purchase price represents an approximately 8.5% yield;
- Any transaction will be subject to satisfactory completion of due diligence and approval of the Board;
- We were not the highest bidder, but other terms of our offer (principally a fast close) gave us the edge;
- We are already familiar with the property because it is the location of our Cannon Park Cinema, and we believe that the property offers the opportunity for us to increase the cash flow from the property and to increase the number of auditoriums at our cinema;
- We have the cash on hand to complete the purchase;
- While Management is aware of the potential development of a competitive theater at the Stockland's shopping center, Management believes that any such development (if it were to occur) would be several years away, and the possibility of such potential completion was not, in their view, a good reason for not acquiring the property at the currently proposed price;
- Management will report back to the Board after it has definitive deal terms and completed due diligence; and
- No binding agreement will be entered into until such time as Board approval is obtained.

Mr. Smith advised the Board that he agreed with Mr. Bourke's analysis, including the analysis regarding potential competition at Stockland's.

It was the consensus of the Board that Management should continue to advance this potential transaction, subject to Board approval upon completion by Management of its due diligence.

At this point, Messrs Smith and Bourke left the meeting and Messrs. Goeddel and Albizures joined the meeting.

Cybersecurity Presentation

Next, the Board heard a presentation by John Goeddel (Chief Information Officer) and Victor Albizures (Security and Compliance Manager) regarding cybersecurity, and responded to questions. The Board complemented Messrs. Goeddel and Albizures as to the quality of their presentation, noted the importance of sound cybersecurity, determined that follow up work should be done, and delegated responsibility for conducting such further review and analysis and coordinating with Management the work to be done (if any) to the Audit and Conflicts Committee. It is anticipated that the Audit and Conflicts Committee will report back to the Board at an appropriate time during the first quarter of next year.

Review of Board of Directors Minutes

After a discussion regarding the draft minutes of the Board Meetings held on October 5, 2015 and October 12, 2015, on motion made by Director Adams, seconded by Director Kane, with Mr. Cotter Jr. voting no as to both sets of minutes, Mr. Wrotniak abstaining as to both sets of minutes, and Dr. Judy Codding abstaining as to the minutes dated October 5, 2015 and voting in favor of the minutes dated October 12, 2015, the minutes of the Board Meetings held on October 5, 2015 and October 12, 2015 were approved.

Committee Assignments

The Board next took up the topic of Board Committee assignments. Chair Cotter made the following recommendations to the Board:

Executive Committee:

Guy Adams: Chair
Ellen Cotter
Margaret Cotter
Edward L. Kane

Audit Committee:

Douglas McEachern: Chair
Edward L. Kane
Michael Wrotniak

Compensation Committee:

Edward L. Kane: Chair
Guy Adams
Dr. Judy Codding

Tax Oversight Committee:[1]

Edward L. Kane, Chair
James J. Cotter, Jr.

Mr. Cotter, Jr. raised the issue of the ongoing role of the Executive Committee and the matter was discussed. During this discussion, it was disclosed that the only action taken by the Executive Committee that would have otherwise required Board action was the appointment of Mr. Wroblak to the Audit Committee, and the directors were given the opportunity to identify any actions taken by the Executive Committee to which they took exception. No actions were identified. While no formal motion was presented or considered, no director other than Mr. Cotter, Jr. took any exception to the continuation of the authority previously delegated to the Executive Committee.

Following further discussion, on motion duly made and seconded, the above Committee assignments were approved by a vote of 8 to 1, with Mr. Cotter, Jr. voting no. Mr. Cotter, Jr. did, however, agree to serve on the Tax Oversight Committee, to the extent that such committee had work to do.

Discussion Regarding Insider Trading Policy

The Board next discussed the Blackout period established that day by the Company's Chief Compliance Officer (Mr. Craig Tompkins), after consultation with the Company's Chief Executive Officer. Mr. Cotter, Jr. expressed his view that the Company's insider trading policies had been adopted not for sound business or regulatory reasons, but in order to harass him and prevent him from selling shares in the Company and that something needed to be done so that he could sell his shares. He stated that he believed it to be inappropriate that his sister (Ellen Cotter) be involved in decisions relating to when he could and could not sell his stock in the Company.

Mr. Tompkins explained that:

[redacted]

[1] It is not anticipated that the Tax Oversight Committee will have any regular meeting schedule or any specific duties, other than to be available to consult with and assist the Chief Financial Officer, to the extent requested from time to time.

[redacted]

Following discussion, no action was proposed or taken to revise the Company's insider trading policy.

Directors McEachern and Kane left the meeting at this time.

Appointment of Officers

The Board next considered Chair Cotter's recommendations as to the appointment of officers. Chair Cotter recommended the following individuals to hold the following offices. The individuals identified with an * are designated as "executive officers" of the Company for purposes of Section 16 of the Securities Exchange Act.

- Ellen M. Cotter, Interim President and Chief Executive Officer, and Chief Operating Officer – Domestic Cinemas*
- Devasis Ghose, Chief Financial Officer and Treasurer*
- William Ellis, General Counsel & Secretary*
- Robert F. Smerling, President, Domestic Cinemas*
- Wayne Smith, Managing Director, Australia and New Zealand*
- Steve Lucas, Chief Accounting Officer and Controller
- Matthew Bourke, Director of Real Estate of Australia and New Zealand

Following discussion, on motion duly made and seconded, the Chair's recommended appointments were approved and such individuals duly appointed to the offices specified above.

During this process, discussion was had as to who should serve going forward as Chairman and Vice Chairman. Mr. Cotter, Jr. reminded Ellen Cotter and Margaret Cotter that

under certain trust documents of James Cotter Sr., the chairmanship was to be rotated on an annual basis between Ms. E. Cotter, Ms. M. Cotter and himself. As Directors Kane and McEachern had left the meeting, it was determined that this matter would be put over until the next meeting.

Legal Update

Next, Mr. Ellis presented his litigation report and responded to questions.

There being no further business, the meeting was adjourned at 3:30 p.m.

S. Craig Tompkins,
Recording Secretary

EXHIBIT F

DECLARATION OF MICHAEL WROTNIAK IN SUPPORT OF RDI'S JOINDER TO INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMETN (No. 4) ON PLAINTIFF'S CLAIMS RELATED TO THE EXECUTIVE COMMITTEE

I, Michael Wrotniak, state and declare as follows:

1. I am over the age of 18, am mentally competent, have personal knowledge of the facts in this matter, except where stated as based upon information and belief, and if called upon to testify, could and would do so.
2. I submit this declaration in support of RDI's Joinder to Individual Defendants' Motion for Summary Judgment (No. 4) on Plaintiff's Claims Related to the Executive Committee.
3. I am and have been since October, 2015, a member of the Board of Directors of Reading International, Inc. (the "Company").
4. Since October 25, 2015, I have been a member of the Company's Audit and Conflicts Committee.
5. The Company is listed on the NASDAQ Stock Exchange.
6. I am familiar with the provisions of NASDAQ List Rules Section 5605, which sets forth the qualifications for members of the audit committees of NASDAQ listed companies. As relevant here, such qualifications include that the members be independent directors, as defined therein, and that the members be able to read and understand financial statements. Specifically, the list rule provides:

> 5605. Board of Directors and Committees
>
> (a) Definitions
>
> **(1)** "Executive Officer" means those officers covered in Rule 16a-1(f) under the Act.
>
> **(2)** "Independent Director" means a person other than an Executive Officer or employee of the Company or any other individual having a relationship which, in the opinion of the Company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. For purposes of this rule, "Family Member" means a person's spouse, parents, children and siblings, whether by blood, marriage or adoption, or anyone residing in such person's home. The following persons shall not be considered independent:

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(A) a director who is, or at any time during the past three years was, employed by the Company;

(B) a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following:

(i) compensation for board or board committee service;

(ii) compensation paid to a Family Member who is an employee (other than an Executive Officer) of the Company; or

(iii) benefits under a tax-qualified retirement plan, or non-discretionary compensation.

Provided, however, that in addition to the requirements contained in this paragraph (B), audit committee members are also subject to additional, more stringent requirements under Rule 5605(c)(2).

(C) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the Company as an Executive Officer;

(D) a director who is, or has a Family Member who is, a partner in, or a controlling Shareholder or an Executive Officer of, any organization to which the Company made, or from which the Company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than the following:

(i) payments arising solely from investments in the Company's securities; or

(ii) payments under non-discretionary charitable contribution matching programs.

(E) a director of the Company who is, or has a Family Member who is, employed as an Executive Officer of another entity where at any time during the past three years any of the Executive Officers of the Company serve on the compensation committee of such other entity; or

(F) a director who is, or has a Family Member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor who worked on the Company's audit at any time during any of the past three years.

* * *

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[redacted]

(c) Audit Committee Requirements

* * *

(2) Audit Committee Composition

(A) Each Company must have, and certify that it has and will continue to have, an audit committee of at least three members, each of whom must: (i) be an Independent Director as defined under Rule 5605(a)(2); (ii) meet the criteria for independence set forth in Rule 10A-3(b)(1) under the Act (subject to the exemptions provided in Rule 10A-3(c) under the Act); (iii) not have participated in the preparation of the financial statements of the Company or any current subsidiary of the Company at any time during the past three years; and (iv) be able to read and understand fundamental financial statements, including a Company's balance sheet, income statement, and cash flow statement. Additionally, each Company must certify that it has, and will continue to have, at least one member of the audit committee who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities.

NASDAQ Listing Rules, § 5605.

7. I satisfy the qualifications under NASDAQ Listing Rule 5605, because I am an independent director as defined by Sec. 6505(a)(2) and Rule 10A-3(b)(1) under the Act; I have not participated in the preparation of the financial statement of the Company or any such Company's financial subsidiaries; and I am able to read and understand fundamental financial statements, including the Company's balance sheet, income statement, and cash flow statement.

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[redacted]

8. Director Doug McEachern, who is the Chair of the Audit and Conflicts Committee, is the director who has the specific experience required of one of the three minimum director members of a NASDAQ listed company.

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

Executed this 30th day of September, 2016.

MICHAEL WROTNIAK

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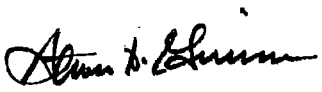

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

BUSINESS COURT

INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF JAMES J. COTTER JR.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: November 1, 2016
Time of Hearing: 8:30 a.m.

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