

1 previously approved is, oh, yeah, he'd been terminated. So if  
2 there was anybody who was interested in that transaction that  
3 had an axe to grind, it was the plaintiff.

4 I believe that addresses all of the outstanding  
5 issues on the motions. So unless you have a specific  
6 question --

7 MR. FERRARIO: Your Honor, I think Mr. Tayback  
8 started off by saying --

9 THE COURT: Yes, I'm probably going to grant 56(f)  
10 relief if Mr. Krum asks it.

11 MR. FERRARIO: Okay. And that's -- because then  
12 otherwise we'll just come back and argue this, because --

13 THE COURT: I have that note here. I'm waiting for  
14 Mr. Krum to say it, and then I'm going to wait for him to say  
15 it and then once he says --

16 MR. FERRARIO: Fine. Then I'm going to be quiet. I  
17 would point out, though, that if you listen to the dialogue  
18 here -- and we'll -- I'll shut up after this.

19 THE COURT: No, you won't.

20 MR. FERRARIO: I will. It shows you why courts  
21 don't get involved. These are discretionary, because this  
22 isn't like --

23 THE COURT: Mr. Ferrario, I know why I don't get  
24 involved in management. I've managed them in settlement  
25 conferences as part of the resolution process of these things.

1 I got stuck helping manage one, so I don't ever want to do it  
2 again.

3 MR. FERRARIO: Because this is not --

4 THE COURT: But I do want parties to be accountable  
5 and perform in a manner that appears to be consistent with  
6 Nevada law. So there may be something the parties decide to  
7 do between now and when I see them next.

8 MR. FERRARIO: It's the Nevada law we're waiting  
9 for, though.

10 THE COURT: But the Nevada law is the Nevada Supreme  
11 Court. And I keep telling you what I think the Schoen case  
12 says when you have interested directors.

13 MR. FERRARIO: Well, we're going to go back and read  
14 that. This isn't --

15 THE COURT: Interested directors, lots of -- you  
16 lose a lot of protections.

17 MR. FERRARIO: I think we'll be back.

18 THE COURT: And interested directors is a very  
19 intense factual analysis.

20 Go.

21 MR. KRUM: Thank you, Your Honor.

22 THE COURT: Are you going to ask for 56(f) relief?

23 MR. KRUM: Yes, Your Honor.

24 THE COURT: All right. It's granted on Motions 5,  
25 6, and there was one other one related to --

1 MR. TAYBACK: It's 3, Your Honor. It was related to  
2 the unsolicited offer I believe is the one you identified  
3 previously.

4 THE COURT: No. 5 and 6 were the only two we're  
5 talking about right now; correct?

6 MR. TAYBACK: Oh. Yes. Got it. Yeah. 5 and 6.

7 THE COURT: Okay. So 5 and 6. So there. It's  
8 4:54.

9 So here's the question. What do you want to do with  
10 the rest of them? Is everybody agreeable the motions to seal  
11 that are on calendar today can be granted because they include  
12 confidential and significant financial information that needs  
13 to remain protected given the company's activities?

14 MR. FERRARIO: Yes, Your Honor.

15 MR. KRUM: Yes.

16 THE COURT: Okay. So all the motions to seal are  
17 granted. Or redact. Seal and/or redact.

18 So what do you want to do next? Because I've got  
19 through in almost four hours not much.

20 MR. RHOW: Everyone's looking at me. I would love  
21 to. I hope we're last and least in terms of liability.

22 THE COURT: Well, it's 4:55.

23 MR. RHOW: Yeah. So, look, I want it to be heard  
24 and I do want to argue it, but --

25 THE COURT: Okay. Well, but you're not the last

1 one.

2 MR. RHOW: I understand. So --

3 THE COURT: I mean, I've got tons of them.

4 MR. RHOW: -- I don't want to be squeezed in --

5 THE COURT: But I am breaking at 5:00 o'clock, so  
6 you've got five minutes.

7 MR. FERRARIO: Do you want just come back on the 1st  
8 when we're going to come back anyhow?

9 MR. KRUM: I can't come back on the 1st.

10 MR. FERRARIO: Of December?

11 MR. KRUM: Oh. December.

12 MR. FERRARIO: I think that's when she reset --

13 MR. KRUM: Yes. Of course.

14 THE COURT: 12/1. 12/1.

15 MR. FERRARIO: We're going to get all this done,  
16 read, supplement, and come back on the 1st.

17 THE COURT: That was the hope. But I wasn't sure  
18 you were physically going to be here on 12/1. And here's the  
19 reason I'm not sure you're physically going to be here on  
20 12/1. I don't have the same hope and security that you do in  
21 believing that everyone will appear for deposition in the  
22 fashion that you guys think they will. I just as a person who  
23 practiced in complex litigation with lots of people, I could  
24 never get them all to show up when they were supposed to. So  
25 -- as a judge I can't get them to show up when they're



1 supposed to. I don't know if you heard the conference call I  
2 just had with my trial I finished two months ago. They still  
3 can't figure out when to come back for the post-trial motions.

4 MR. FERRARIO: We're going to get it done.

5 THE COURT: I don't believe you. So do you want to  
6 have a status conference where you guys together tell me  
7 whether you want to argue anything on 12/1, or not? Will you  
8 all get together and tell me that a couple days ahead of time  
9 so I can at least re-read what needs to be read before 12/1?

10 MR. FERRARIO: Yes.

11 MR. KRUM: Of course.

12 THE COURT: And if there are going to be  
13 supplemental briefs, that I can pull the supplemental briefs  
14 and read them?

15 MR. FERRARIO: Yes.

16 THE COURT: So when are you going to tell me that?

17 MR. FERRARIO: Three weeks out set a status  
18 conference?

19 THE COURT: No. I don't want you to -- I want you  
20 to do depositions. I don't want you coming back here. I  
21 don't want to see you for a long time.

22 MR. FERRARIO: What do you want, a week before the  
23 hearing?

24 THE COURT: I would like a few days, at least a few  
25 days before the hearing you to say, yes, Judge, we're coming

1 and we're arguing A, B, and C --

2 MR. FERRARIO: Okay.

3 THE COURT: -- or, no, Judge, we're not coming, can  
4 you give us a new date.

5 MR. TAYBACK: I think a week before --

6 THE COURT: Well, let's see what you guys negotiate.  
7 I don't really care what it is as long as you do it a couple  
8 of days before.

9 MR. FERRARIO: We'll know by the 23rd.

10 MR. KRUM: What day is --

11 MR. FERRARIO: That's the day before Thanksgiving.

12 THE COURT: And you all will send an email copied on  
13 each other to my people saying, Judge, we're either coming on  
14 December 1 and here's what we're doing, or, we're not coming  
15 on December 1 and can you give us a different date.

16 MR. KRUM: Yes.

17 THE COURT: Plan.

18 MR. KRUM: Thank you, Your Honor.

19 THE COURT: Good luck on your discovery.

20 MR. KRUM: Thank you.

21 THE PROCEEDINGS CONCLUDED AT 4:56 P.M.

22 \* \* \* \* \*

23

24

25

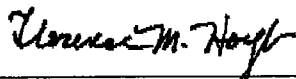
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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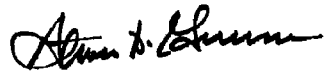
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FLORENCE HOYT  
Las Vegas, Nevada 89146

  
FLORENCE M. HOYT, TRANSCRIBER

10/31/16

\_\_\_\_\_  
DATE



CLERK OF THE COURT

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7 *Counsel for Reading International, Inc.*

8  
9 DISTRICT COURT  
10 CLARK COUNTY, NEVADA

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

13 Plaintiff,

14 v.

15 MARGARET COTTER, et al,

16 Defendants.

17 In the Matter of the Estate of

18 JAMES J. COTTER,

19 Deceased.

20 JAMES J. COTTER, JR.,

21 Plaintiff,

22 v.

23 READING INTERNATIONAL, INC., a  
24 Nevada corporation; DOES 1-100, and  
25 ROE ENTITIES, 1-100, inclusive,

26 Defendants.

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  
ANSWER TO PLAINTIFF'S SECOND  
AMENDED COMPLAINT

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**NOMINAL DEFENDANT'S ANSWER TO PLAINTIFF'S**

**SECOND AMENDED COMPLAINT**

Nominal Defendant Reading International, Inc. ("Nominal Defendant" or "RDI") hereby sets forth the following Answer to the Second Amended Verified Complaint, filed by Plaintiff on September 2, 2016 ("Complaint"). Any allegation, averment, contention or statement in the Complaint not specifically and unequivocally admitted is denied. Nominal Defendant responds to each of the paragraphs of the Complaint as follows:

**RESPONSE TO "NATURE OF THE CASE"**

1. RDI denies the allegations of paragraph 1 of the Complaint.
2. RDI denies the allegations of paragraph 2 of the Complaint.
3. RDI denies the allegations of paragraph 3 of the Complaint.
4. RDI denies the allegations of paragraph 4 of the Complaint.
5. RDI denies the allegations of paragraph 5 of the Complaint.
6. RDI denies the allegations of paragraph 6 of the Complaint.
7. RDI denies the allegations of paragraph 7 of the Complaint.
8. RDI denies the allegations of paragraph 8 of the Complaint.
9. RDI denies the allegations of paragraph 9 of the Complaint.
10. RDI admits that Ellen Cotter and Margaret Cotter acting in their capacity as the Co-Executors of the Estate of James J. Cotter, Sr. ("Estate") exercised on behalf of the Estate an option to acquire 100,000 shares of RDI Class B Voting Stock. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant, defers to the answers filed on behalf of the individual defendants. RDI denies the allegations in paragraph 10 in all other respect.
11. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant, defers to the answers filed on behalf of the individual defendants. RDI denies the allegations in paragraph 11 in all other respect.

1           12. To the extent the allegations in this paragraph relate to the actions of individual  
2 defendants, RDI as a nominal defendant, defers to the answers filed on behalf of the individual  
3 defendants. RDI denies the allegations in paragraph 12 in all other respect.

4           13. RDI denies the allegations of paragraph 13 of the Complaint.

5           14. RDI admits Ellen Cotter was appointed CEO following the termination of James  
6 Cotter, Jr. as President and CEO, that RDI retained Korn Ferry to conduct a search for a  
7 permanent CEO and that Ellen Cotter was approved by RDI's board to be the company's  
8 permanent CEO. To the extent the allegations in this paragraph relate to the actions of individual  
9 defendants, RDI as a nominal defendant, defers to the answers filed on behalf of the individual  
10 defendants. RDI denies the allegations in paragraph 14 in all other respect.

11           15. RDI admits Margaret Cotter was appointed as an executive Vice President of RDI  
12 and has responsibilities for real estate development in New York. To the extent the allegations in  
13 this paragraph relate to the actions of individual defendants, RDI as a nominal defendant, defers  
14 to the answers filed on behalf of the individual defendants. RDI denies the allegations in  
15 paragraph 15 in all other respect.

16           16. RDI admits it received an unsolicited expression of interest from a third party. To  
17 the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a  
18 nominal defendant, defers to the answers filed on behalf of the individual defendants. RDI denies  
19 the allegations in paragraph 16 in all other respect.

20           17. RDI admits that, at all times relevant hereto, James Cotter, Jr. was and is a  
21 stockholder of RDI. RDI admits that James Cotter, Jr. has been a director of RDI. RDI admits  
22 that James Cotter, Jr. was appointed Vice Chairman of RDI's Board of Directors, then later  
23 President of RDI. RDI admits that James Cotter, Jr. was appointed CEO by RDI's Board of  
24 Directors after James Cotter, Sr. resigned from that position. RDI admits that James Cotter, Jr. is  
25 the son of the late James Cotter, Sr. and the brother of Ellen Cotter and Margaret Cotter. RDI  
26 admits that there is a dispute regarding stock held by the James J. Cotter Living Trust, dated

1 August 1, 2006. RDI denies the allegations of paragraph 17 of the Complaint in all other  
2 respects.

3 18. RDI admits that Margaret Cotter is a director of RDI. RDI admits that Margaret  
4 Cotter is the owner and President of OBI, LLC, a company that, until recently, provided theater  
5 management services to live theaters indirectly owned by RDI through Liberty Theatres, LLC, of  
6 which Margaret Cotter is President. RDI admits that Margaret Cotter has been and is involved in  
7 development of real estate in New York owned directly or indirectly by RDI. RDI denies the  
8 allegations of paragraph 18 of the Complaint in all other respects.

9 19. RDI admits that Ellen Cotter is and at all times relevant hereto was a director of  
10 RDI and now serves as the CEO of RDI. RDI denies the allegations of paragraph 19 of the  
11 Complaint in all other respects.

12 20. RDI admits that Edward Kane is an outside director of RDI. RDI admits that  
13 Edward Kane has been a director of RDI since approximately October 15, 2009. RDI admits that  
14 Edward Kane was a friend of James Cotter, Sr.. RDI denies the allegations of paragraph 20 of  
15 the Complaint in all other respects.

16 21. RDI admits that Guy Adams is an outside director of RDI. RDI denies the  
17 allegations of paragraph 21 of the Complaint in all other respects.

18 22. RDI admits that Douglas McEachern is an outside director of RDI. RDI denies  
19 the allegations of paragraph 22 of the Complaint in all other respects.

20 23. RDI admits that William Gould is an outside director of RDI. RDI denies the  
21 allegations of paragraph 23 of the Complaint in all other respects.

22 24. RDI admits that Judy Coddington is an outside director of RDI. RDI denies the  
23 allegations of paragraph 24 of the Complaint in all other respects.

24 25. RDI admits that Michael Wrotniak is an outside director of RDI. RDI denies the  
25 allegations of paragraph 25 of the Complaint in all other respects.

1           26. RDI admits it is a Nevada corporation. Defendants admit that RDI has two  
2 classes of stock—Class A stock and Class B stock. The other allegations of paragraph 25 of the  
3 Complaint are purportedly based on written documents, which speak for themselves. RDI denies  
4 the remaining allegations of paragraph 26 of the Complaint.

5           27. RDI denies the allegations of paragraph 27 of the Complaint.

6                   **RESPONSE TO “ALLEGATIONS COMMON TO ALL CLAIMS”**

7  
8           28. RDI admits that, since approximately 2000 and until he resigned as Chairman and  
9 CEO of RDI, James J. Cotter, Sr. was the CEO and Chairman of the Board of Directors of RDI.  
10 RDI denies the allegations of paragraph 28 of the Complaint in all other respects.

11           29. RDI denies the allegations of paragraph 29 of the Complaint,

12           30. RDI denies the allegations of paragraph 30 of the Complaint.

13           31. RDI admits that James J. Cotter, Jr., attended management meetings in 2005, was  
14 appointed as Vice Chair of RDI’s board in 2007 and appointed as President of RDI in June 2013.  
15 RDI denies the allegations in paragraph 31 of the Complaint in all other respects.

16           32. RDI admits James J. Cotter Sr. passed on September 13, 2014. The allegations in  
17 the trust and estate litigation speak for themselves. RDI denies the allegations in paragraph 32 of  
18 the Complaint in all other respects.

19           33. RDI admits that, as President and CEO of RDI, James Cotter, Jr. had  
20 disagreements with his sisters regarding RDI. To the extent the allegations in this paragraph  
21 relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers  
22 filed on behalf of the individual defendants. RDI denies the allegations of paragraph 33 of the  
23 Complaint in all other respects.

24           34. RDI denies the allegation of paragraph 34 of the Complaint.





44. RDI admits the price of RDI stock has varied over time. RDI denies the  
allegations in paragraph 44 in all other respects.

45. The allegations of paragraph 45 of the Complaint are purportedly based on written documents which speak for themselves. RDI is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45 of the Complaint, and therefore denies them.

46. RDI admits the price of RDI stock has varied over time. RDI is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 46 of the Complaint, and therefore denies them.

47. RDI admits the price of RDI stock has varied over time. RDI is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 47 of the Complaint, and therefore denies them.

13 | 48. RDI denies the allegations of paragraph 48 of the Complaint.

14 49. RDI denies the allegations of paragraph 49 of the Complaint.

15           50. RDI admits Tim Storey worked as an ombudsman with James Cotter Jr., RDI  
16 denies the allegations of paragraph 50 of the Complaint in all other respects.

51. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 51 of the Complaint in all other respects.

20           52. To the extent the allegations in this paragraph relate to the actions of the  
21 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
22 individual defendants. RDI denies the allegations of paragraph 52 of the Complaint, in all other  
23 respects.

53. RDI admits that discussions took place between Margaret Cotter and RDI regarding her retention as a full time employee of RDI. To the extent the allegations in this paragraph relate to the actions of the individual defendants, RDI as a nominal defendant defers to

1 the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph  
2 53 of the Complaint, in all other respects.

3 54. RDI admits that the non-Cotter directors sought additional compensation for time  
4 expended on RDI matters. To the extent the allegations in this paragraph relate to the actions of  
5 the individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of  
6 the individual defendants. RDI denies the allegations of paragraph 54 of the Complaint, in all  
7 other respects.

8 55. RDI admits that former director Storey resides in New Zealand and that Storey  
9 traveled between New Zealand and Los Angeles on RDI business. To the extent the allegations  
10 in this paragraph relate to the actions of the individual defendants, RDI as a nominal defendant  
11 defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of  
12 paragraph 55 of the Complaint, in all other respects.

13 56. RDI is without knowledge or information sufficient to form a belief as to the truth  
14 of the allegations of paragraph 56 of the Complaint, and therefore denies them.

15 57. The allegations of paragraph 57 of the Complaint are purportedly based on written  
16 documents, which speak for themselves. RDI denies the remaining allegations of paragraph 57 of  
17 the Complaint.

18 58. RDI admits that the Stomp Producers gave a purported notice of termination of  
19 Stomp's lease at the Orpheum Theatre on or about April 23, 2015. To the extent the allegations in  
20 this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers  
21 to the answers filed on behalf of the individual defendants. RDI denies the allegations of  
22 paragraph 58 of the Complaint in all other respects.

23 59. The allegations of paragraph 59 of the Complaint are purportedly based on written  
24 documents which speak for themselves. To the extent the allegations in this paragraph relate to  
25 the actions of the individual defendants, RDI as a nominal defendant defers to the answers filed  
26

1 on behalf of the individual defendants. RDI denies the allegations of paragraph 59 of the  
2 Complaint, in all other respects.

3 60. RDI denies the allegations of paragraph 60 of the Complaint.

4 61. To the extent the allegations in this paragraph relate to the actions of the  
5 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
6 individual defendants. RDI denies the allegations of paragraph 61 of the Complaint, in all other  
7 respects.

8 62. To the extent the allegations in this paragraph relate to the actions of the  
9 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
10 individual defendants. RDI denies the allegations of paragraph 62 of the Complaint, in all other  
11 respects.

12 63. RDI denies the allegations of paragraph 63 of the Complaint.

13 64. To the extent the allegations in this paragraph relate to the actions of the  
14 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
15 individual defendants. RDI denies the allegations of paragraph 64 of the Complaint, in all other  
16 respects.

17 65. RDI denies the allegations of paragraph 65 of the Complaint, and therefore denies  
18 them.

19 66. RDI is without knowledge or information sufficient to form a belief as to the truth  
20 of the allegations of paragraph 66 of the Complaint, and therefore denies them.

21 67. To the extent the allegations in this paragraph relate to the actions of the  
22 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
23 individual defendants. RDI denies the allegations of paragraph 67 of the Complaint, in all other  
24 respects.

25 68. RDI denies the allegations of paragraph 68 of the Complaint.

26 69. RDI denies the allegations of paragraph 69 of the Complaint.



79. RDI admits EC sent an email to RDI Directors on May 27, 2015. The email is a document of independent significance and speaks for itself.

3 80. RDI denies the allegations of paragraph 80 of the Complaint.

4           81. The allegations of paragraph 81 of the Complaint are purportedly based on written  
5 documents, which speak for themselves. To the extent the allegations in this paragraph relate to  
6 the actions of the individual defendants, RDI as a nominal defendant defers to the answers filed  
7 on behalf of the individual defendants. RDI denies the remaining allegations of paragraph 81 of  
8 the Complaint, in all other respects.

9           82. To the extent the allegations in this paragraph relate to the actions of individual  
10 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
11 defendants. RDI denies the allegations of paragraph 82 of the Complaint in all other respects.

83. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 83 of the Complaint in all other respects.

84. To the extent the allegations in this paragraph relate to action taken in board meetings, the minutes of the meetings are the best evidence of the same. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 84 of the Complaint in all other respects.

85. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 85 of the Complaint in all other respects.

86. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 86 of the Complaint in all other respects.

87. To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI denies the allegations of paragraph 87 of the Complaint in all other respects.

8            89.     RDI is without knowledge or information sufficient to form a belief as to the truth  
9 of the allegations of paragraph 89 of the Complaint, and therefore denies the same.

90. RDI is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 90 of the Complaint, and therefore denies the same.

91. To the extent the allegations in this paragraph relate to the actions of individual  
defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual

14 defendants. RDI denies the allegations of paragraph 91 of the Complaint in all other respects.

15 92. To the extent the allegations in this paragraph relate to the actions of individual

16 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
17 defendants. RDI denies the allegations of paragraph 92 of the Complaint in all other respects.

18           93.     The allegations of paragraph 93 of the Complaint are purportedly based on written  
19 documents, which speak for themselves. RDI denies the remaining allegations of paragraph 93  
20 of the Complaint.

94. To the extent the allegations in this paragraph relate to the actions of the individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the

25            95.    RDI denies the allegations of paragraph 95 of the Complaint.

26 96. RDI denies the allegations of paragraph 96 of the Complaint.

1 97. RDI denies the allegations of paragraph 97 of the Complaint.

2 98. RDI denies the allegations of paragraph 98 of the Complaint.

3 99. RDI denies the allegations of paragraph 99 of the Complaint.

4 100. RDI denies the allegations of paragraph 100 of the Complaint, and therefore deny  
5 them.

6 101. Documents filed with the SEC are of independent significance and speak for  
7 themselves. RDI denies the remaining allegations of paragraph 101 of the Complaint and its  
8 subparts.

9 102. RDI admits Class B Voting Stock is held in the name of James J. Cotter Living  
10 Trust and that litigation is pending. RDI denies the allegations of paragraph 102 of the Complaint  
11 in all other aspects.

12 103. To the extent the allegations in this paragraph relate to the actions of individual  
13 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
14 defendants. RDI denies the allegations of paragraph 103 of the Complaint in all other respects.

15 104. RDI denies the allegations of paragraph 104 of the Complaint.

16 105. RDI denies the allegations of paragraph 105 of the Complaint.

17 106. RDI denies the allegations of paragraph 106 of the Complaint.

18 107. To the extent the allegations in this paragraph relate to the actions of individual  
19 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
20 defendants. RDI denies the allegations of paragraph 107 of the Complaint in all other respects.

21 108. To the extent the allegations in this paragraph relate to the actions of individual  
22 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
23 defendants. RDI denies the allegations of paragraph 108 of the Complaint in all other respects.

24 109. The allegations of paragraph 109 of the Complaint are purportedly based on  
25 written documents, which speak for themselves. RDI denies the remaining allegations of  
26 paragraph 109 of the Complaint.



1 110. To the extent the allegations in this paragraph relate to the actions of the  
2 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
3 individual defendants. RDI denies the allegations of paragraph 110 of the Complaint, in all other  
4 respects.

5 111. The allegations of paragraph 111 of the Complaint are purportedly based on  
6 written documents, which speak for themselves. RDI denies the remaining allegations of  
7 paragraph 111.

8 112. RDI denies the allegations of paragraph 112 of the Complaint.

9 113. RDI denies the allegations of paragraph 113 of the Complaint.

10 114. To the extent the allegations in this paragraph relate to the actions of the  
11 individual defendants, RDI as a nominal defendant defers to the answers filed on behalf of the  
12 individual defendants. RDI denies the allegations of paragraph 114 of the Complaint, in all other  
13 respects.

14 115. The allegations of paragraph 115 of the Complaint are purportedly based on  
15 written documents, which speak for themselves. RDI denies the remaining allegations of  
16 paragraph 115 of the Complaint.

17 116. The allegations of paragraph 116 of the Complaint are purportedly based on  
18 written documents, which speak for themselves. RDI denies the remaining allegations of  
19 paragraph 116 of the Complaint.

20 117. The allegations of paragraph 117 of the Complaint are purportedly based on  
21 written documents, which speak for themselves. RDI denies the remaining allegations of  
22 paragraph 117 of the Complaint.

23 118. RDI denies the allegations of paragraph 118 of the Complaint.

24 119. RDI denies the allegations of paragraph 119 of the Complaint.

25 120. RDI denies the allegations of paragraph 120 of the Complaint.

26 121. RDI denies the allegations of paragraph 121 of the Complaint.

- 1           122. RDI denies the allegations of paragraph 122 of the Complaint.
- 2           123. RDI denies the allegations of paragraph 123 of the Complaint.
- 3           124. RDI admits that Mary Cotter knows Judy Coddington. RDI denies the allegations of
- 4 paragraph 124 of the Complaint in all other respects.
- 5           125. RDI admits that, on October 5, 2015, Judy Coddington was made a director of RDI.
- 6 To the extent the allegations in this paragraph relate to the actions of individual defendants, RDI
- 7 as a nominal defendant defers to the answers filed on behalf of the individual defendants. RDI
- 8 denies the allegations of paragraph 125 of the Complaint in all other respects.
- 9           126. To the extent the allegations in this paragraph relate to the actions of individual
- 10 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual
- 11 defendants. RDI denies the allegations of paragraph 126 of the Complaint in all other respects.
- 12           127. RDI denies the allegations of paragraph 127 of the Complaint.
- 13           128. RDI denies the allegations of paragraph 128 of the Complaint.
- 14           129. To the extent the allegations in this paragraph relate to the actions of individual
- 15 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual
- 16 defendants. RDI denies the allegations of paragraph 129 of the Complaint in all other respects.
- 17           130. To the extent the allegations in this paragraph relate to the actions of individual
- 18 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual
- 19 defendants. RDI denies the allegations of paragraph 130 of the Complaint in all other respects.
- 20           131. RDI admits Michael Wrotniak was nominated as a director of RDI. RDI denies
- 21 the allegations of paragraph 131 of the Complaint in all other respects.
- 22           132. RDI denies the allegations of paragraph 132 of the Complaint.
- 23           133. RDI admits Michael Wrotniak was nominated as a director of RDI. RDI denies
- 24 the allegations of paragraph 133 of the Complaint in all other respects.
- 25           134. RDI denies the allegations of paragraph 134 of the Complaint.
- 26
- 27
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1           135. RDI admits is issued a Proxy Statement which is a written document, which  
2 speaks for itself. RDI denies the remaining allegations of paragraph 135 of the Complaint.

3           136. RDI admits is issued a Proxy Statement which is a written document, which  
4 speaks for itself. RDI denies the remaining allegations of paragraph 136 of the Complaint.

5           137. RDI admits a Board meeting was held on June 30, 2015 and that a CEO Search  
6 Committee was formed. RDI denies the allegations of paragraph 137 of the Complaint in all  
7 other respects.

8           138. RDI admits that Korn Ferry was selected as an outside search firm. To the extent  
9 the allegations in this paragraph relate to the actions of individual defendants, RDI as a nominal  
10 defendant defers to the answers filed on behalf of the individual defendants. RDI denies the  
11 allegations of paragraph 138 of the Complaint in all other respects.

12           139. RDI admits Korn Ferry interviewed candidates for the position of CEO.  
13 Defendants deny the allegations of paragraph 139 of the Complaint. To the extent the allegations  
14 of paragraph 139 of the Complaint are purportedly are based on written documents, such  
15 documents speak for themselves. RDI denies the remaining allegations in paragraph 139.

16           140. RDI admits Ellen Cotter resigned from the CEO Search Committee and decided  
17 to be a candidate for the positions of President and CEO of RDI. RDI denies the allegations in  
18 paragraph 140 of the complaint in all other respects.

19           141. To the extent the allegations in this paragraph relate to the actions of individual  
20 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
21 defendants. RDI denies the allegations of paragraph 141 of the Complaint in all other respects.

22           142. To the extent the allegations in this paragraph relate to the actions of individual  
23 defendants, RDI as a nominal defendant defers to the answers filed on behalf of the individual  
24 defendants. RDI denies the allegations of paragraph 142 of the Complaint in all other respects.





1 165. RDI denies the allegations of paragraph 165 of the Complaint.

2 166. RDI denies the allegations of paragraph 166 of the Complaint.

3 167. RDI denies the allegations of paragraph 167 of the Complaint.

4 168. RDI denies the allegations of paragraph 168 of the Complaint.

5 169. RDI denies the allegations of paragraph 169 of the Complaint.

6 170. RDI denies the allegations of paragraph 170 of the Complaint.

7 171. RDI denies the allegations of paragraph 171 of the Complaint.

8 172. RDI denies the allegations of paragraph 172 of the Complaint.

9 **RESPONSE TO "FIRST CAUSE OF ACTION"**

10 **(For Breach of Fiduciary Duty – Against All Defendants)"**

11 173. RDI reasserts and incorporates its responses to paragraphs 1 through 173 of the  
12 Complaint.

13 174. The allegations of paragraph 174 of the Complaint constitute conclusions of law  
14 to which no responsive pleading is required. To the extent a response is deemed required, the  
15 allegations of paragraph 174 of the Complaint are denied.

16 175. The allegations of paragraph 175 of the Complaint constitute conclusions of law  
17 to which no responsive pleading is required. To the extent a response is deemed required, the  
18 allegations of paragraph 175 of the Complaint are denied.

19 176. RDI denies the allegations of paragraph 176 of the Complaint.

20 177. RDI denies the allegations of paragraph 177 of the Complaint.

21 178. RDI denies the allegations of paragraph 178 of the Complaint.

22 179. RDI denies the allegations of paragraph 179 of the Complaint.

23 **RESPONSE TO "SECOND CAUSE OF ACTION"**

24 **(Breach of Fiduciary Duty – Against All Defendants)"**

25 180. RDI reasserts and incorporates its responses to paragraphs 1 through 180 of the  
26 Complaint.

1 181. The allegations of paragraph 181 of the Complaint constitute conclusions of law  
2 to which no responsive pleading is required. To the extent a response is deemed required, the  
3 allegations of paragraph 181 of the Complaint are denied.

4 182. The allegations of paragraph 182 of the Complaint constitute conclusions of law  
5 to which no responsive pleading is required. To the extent a response is deemed required, the  
6 allegations of paragraph 182 of the Complaint are denied.

7 183. RDI denies the allegations of paragraph 183 of the Complaint.

8 184. RDI denies the allegations of paragraph 184 of the Complaint.

9 185. RDI denies the allegations of paragraph 185 of the Complaint.

10 186. RDI denies the allegations of paragraph 186 of the Complaint.

11 **RESPONSE TO "SECOND CAUSE OF ACTION**

12 **(Breach of Fiduciary Duty – Against All Defendants)"**

13 187. RDI reasserts and incorporates its responses to paragraphs 1 through 187 of the  
14 Complaint.

15 188. The allegations of paragraph 188 of the Complaint constitute conclusions of law  
16 to which no responsive pleading is required. To the extent a response is deemed required, the  
17 allegations of paragraph 188 of the Complaint are denied.

18 189. The allegations of paragraph 189 of the Complaint constitute conclusions of law  
19 to which no responsive pleading is required. To the extent a response is deemed required, the  
20 allegations of paragraph 189 of the Complaint are denied.

21 190. RDI denies the allegations of paragraph 190 of the Complaint.

22 191. RDI denies the allegations of paragraph 191 of the Complaint.

23 192. RDI denies the allegations of paragraph 192 of the Complaint.

**RESPONSE TO "THIRD CAUSE OF ACTION**

**(Aiding and Abetting Breach of Fiduciary Duty – Against MC and EC)"**

193. RDI reasserts and incorporates its responses to paragraphs 1 through 193 of the Complaint.

194. Nominal Defendant RDI is not a party to this cause of action and as such, no response is required. To the extent the Court deems a response necessary, RDI denies the allegations of paragraph 194 of the Complaint.

195. Nominal Defendant RDI is not a party to this cause of action and as such, no response is required. To the extent the Court deems a response necessary, RDI denies the allegations of paragraph 195 of the Complaint.

196. Nominal Defendant RDI is not a party to this cause of action and as such, no response is required. To the extent the Court deems a response necessary, RDI denies the allegations of paragraph 196 of the Complaint.

197. Nominal Defendant RDI is not a party to this cause of action and as such, no response is required. To the extent the Court deems a response necessary, RDI denies the allegations of paragraph 197 of the Complaint.

198. Nominal Defendant RDI is not a party to this cause of action and as such, no response is required. To the extent the Court deems a response necessary, RDI denies the allegations of paragraph 198 of the Complaint.

199. RDI denies the allegations of paragraph 199 of the Complaint.

200. RDI denies the allegations of paragraph 200 of the Complaint.

**Irreparable Harm**

201. RDI denies the allegations of paragraph 201 of the Complaint.

202. RDI denies the allegations of paragraph 202 of the Complaint.



**RESPONSE TO "PRAYER FOR RELIEF"**

203. Responding to the unnumbered WHEREFORE paragraph following paragraph 203 of the Complaint, RDI admit that Plaintiff demands and prays for judgment as set forth therein, but denies that it caused or contributed to Plaintiff's or RDI's alleged injuries and further denies that Defendants are liable for damages or any other relief sought in the Complaint.

**AFFIRMATIVE DEFENSES**

Subject to the responses above, RDI alleges and assert the following defenses in response to the allegations, undertaking the burden of proof only as to those defenses deemed affirmative defenses by law, regardless of how such defenses are denominated herein. In addition to the affirmative defenses described below, subject to their responses above, RDI specifically reserves all rights to allege additional affirmative defenses that become known through the course of discovery.

**1. FAILURE TO STATE A CLAIM**

The Complaint, and each purported cause of action therein, is barred, in whole or in part, for failure to state a claim.

**2. FAILURE TO MAKE DEMAND**

Plaintiff has failed to make a demand prior to filing the purported derivative suit.

**3. CORPORATE GOVERNANCE**

Plaintiff's claims are barred because RDI has at all times acted, through its Board of Directors, in good faith consistent with corporate governance standards.

**4. IRREPAIRABLE HARM TO COMPANY**

Plaintiff's claims are barred because RDI would be irreparably harmed by the relief Plaintiff seeks.

**5. STATUTES OF LIMITATIONS AND REPOSE**

The Complaint, and each purported cause of action therein, is barred, in whole or in part, by the applicable statutes of limitations and/or statutes of repose.



Plaintiff is not entitled to injunctive relief because, among other things, he has not suffered irreparable harm, he has an adequate remedy at law, and injunctive relief is not supported by any purported cause of action alleged in the Complaint and is not warranted by the balance of the hardships and/or any other equitable factors.

Plaintiff is not entitled to damages of any kind or in any sum or amount whatsoever as a result of RDI's acts or omissions alleged in the Complaint because any damages sought are speculative, uncertain and not recoverable.

Plaintiff has failed to properly mitigate the damages, if any, he has sustained, and by virtue thereof, Plaintiff is barred, in whole or in part, from maintaining the causes of action asserted in the Complaint against RDI.

Plaintiff's recovery is barred, in whole or in part, based on principles of comparative fault, including Plaintiff's own comparative fault.

The Complaint, and each purported cause of action alleged therein, is barred, in whole or part, by the doctrine of equitable estoppel.

The Complaint, and each purported cause of action alleged therein, is barred, in whole or part, by Nevada Revised Statute 78.138, which provides that a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it is proven that: (a) the director's or officer's act or failure to act constituted a breach of his or her fiduciary

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Las Vegas, Nevada 89169  
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Facsimile: (702) 792-9002

1 duties as a director or officer; and (b) the breach of those duties involved intentional  
2 misconduct, fraud or a knowing violation of law.

3 **19. CONFLICT OF INTERST AND UNSUITABILITY TO SERVE AS**  
4 **REPRESENTATIVE**

5 The Complaint, and each purported cause of action alleged therein is barred, in whole or  
6 Part because Plaintiff has a conflict of interest and is unsuitable to serve as a derivative  
7 representative.

8 **WHEREFORE**, RDI requests that Plaintiff's Second Amended Complaint be dismissed  
9 in its entirety with prejudice, that judgment be entered in favor of RDI, that RDI be awarded  
10 costs and, to the extent provided by law, attorney's fees, and any such other relief as the Court  
11 may deem proper.

12 DATED this 20<sup>th</sup> day of December, 2016.

13 GREENBERG TRAURIG, LLP

14 /s/ Kara B. Hendricks

15 MARK E. FERRARIO, ESQ. (NV Bar No. 1625)

16 KARA B. HENDRICKS, ESQ. (NV Bar No. 7743)

17 3773 Howard Hughes Parkway

18 Suite 400 North

19 Las Vegas, Nevada 89169

20 *Counsel for Reading International, Inc.*

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Las Vegas, Nevada 89169  
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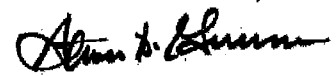
**CERTIFICATE OF SERVICE**

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 Answer to Second Amended Complaint* to be filed and served via the Court's Wiznet E-Filing system. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 20<sup>th</sup> day of December, 2016.

/s/ Andrea Lee Rosehill

AN EMPLOYEE OF GREENBERG TRAURIG, LLP



CLERK OF THE COURT

**ORDR**

Mark G. Krum (SBN 10913)  
Lewis Roca Rothgerber Christie LLP  
3993 Howard Hughes Pkwy, Suite 600  
Las Vegas, NV 89169-5996  
Tel: 702-949-8200  
Fax: 702-949-8398  
E-mail: mkrum@lrrc.com

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JAMES J. COTTER, JR., 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.

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 WROTONIAK, CRAIG  
TOMPKINS, and DOES 1 through 100,  
inclusive,

Defendants.

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

Coordinated with:

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

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

Jointly Administered

**Business Court**

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

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

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

**Lewis Roca  
ROTHGERBER CHRISTIE**

1 and.

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

4 Nominal Defendant.

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

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

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

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

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

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

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

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

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



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Las Vegas, NV 89169-5996

**Lewis Roca**  
**ROTHGERBER CHRISTIE**

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

5 DATED this 20 day of December, 2016.

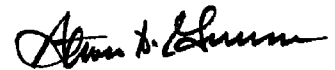
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7   
DISTRICT COURT JUDGE

8 Submitted by:

9 LEWIS ROCA ROTHGERBER CHRISTIE LLP

10 By: /s/ Mark G. Krum

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



CLERK OF THE COURT

**NEOJ**

Mark G. Krum (SBN 10913)  
Lewis Roca Rothgerber Christie LLP  
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Las Vegas, NV 89169-5996  
Tel: 702-949-8200  
Fax: 702-949-8398  
E-mail: [mkrum@lrcc.com](mailto:mkrum@lrcc.com)

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

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

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

Defendants.

and

READING INTERNATIONAL, INC., a  
Nevada corporation,

Nominal Defendant.

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

Plaintiffs,

vs.

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

Defendants.

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

Coordinated with:

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

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

Jointly Administered

**Business Court**

**NOTICE OF ENTRY OF ORDER**

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

**Lewis Roca**  
**ROTHGERBER CHRISTIE**

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

**Lewis Roca**  
**ROTHGERBER CHRISTIE**

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and

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READING INTERNATIONAL, INC., a  
Nevada corporation,

Nominal Defendant.

---

PLEASE TAKE NOTICE that on the 21st day of December, 2016, an "Order Regarding Defendants' Motions for Partial Summary Judgment Nos. 1-6 and Motion *in Limine* to Exclude Expert Testimony on Order Shortening Time" was entered in the above-entitled action. A copy of said Order is attached hereto.

DATED this 22nd day of December, 2016.

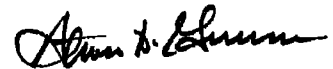
LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/ Mark G. Krum  
Mark G. Krum (SBN 10913)  
3993 Howard Hughes Pkwy, Suite 600  
Las Vegas, NV 89169-5958  
(702) 949-8200  
Attorneys for Plaintiff  
James J. Cotter, Jr.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of December, 2016, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** 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/ Jessie M. Helm  
An employee of Lewis Roca Rothgerber Christie LLP



CLERK OF THE COURT

1 **ORDR**

2 Mark G. Krum (SBN 10913)  
3 Lewis Roca Rothgerber Christie LLP  
3993 Howard Hughes Pkwy, Suite 600  
4 Las Vegas, NV 89169-5996  
Tel: 702-949-8200  
5 Fax: 702-949-8398  
E-mail: mkrum@lrrc.com

6 *Attorneys for Plaintiff*  
7 *James J. Cotter, Jr.*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

17 and

18 READING INTERNATIONAL, INC., a  
Nevada corporation,

19 Nominal Defendant.

20  
21 T2 PARTNERS MANAGEMENT, LP, a  
Delaware limited partnership, doing business as  
22 KASE CAPITAL MANAGEMENT, et al.,

23 Plaintiffs,

24 vs.

25 MARGARET COTTER, ELLEN COTTER,  
26 GUY ADAMS, EDWARD KANE, DOUGLAS  
McEACHERN, WILLIAM GOULD, JUDY  
27 CODDING, MICHAEL WROTONIAK, CRAIG  
TOMPKINS, and DOES 1 through 100,  
inclusive,

28 Defendants.

CASE NO.: A-15-719860-B  
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Coordinated with:

Case No. P-14-082942-E  
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Jointly Administered

**Business Court**

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

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

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

**Lewis Roca  
ROTHGERBER CHRISTIE**

1 and

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

4 Nominal Defendant.

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

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

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

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

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

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

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

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

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

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

**Lewis Roca**  
**ROTHGERBER CHRISTIE**

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

5 DATED this 20 day of December, 2016.

6   
7 DISTRICT COURT JUDGE

8 Submitted by:

9 LEWIS ROCA ROTHGERBER CHRISTIE LLP

10 By: /s/ Mark G. Krum

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



*Steven D. Grierson*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JAMES COTTER, JR. ET AL,

Plaintiff(s),

vs

MARGARET COTTER, ET AL,

Defendant(s),

READING INTERNATIONAL, INC,

Nominal Defendant.

AND ALL COORDINATED MATTERS.

Case No. 15 A 719860

Coordinated With;

16-A-735305

14-P-082942

Dept. No. XI

Date of Hearing: 09/25/17

Time of Hearing: 8:30a.m.

**1<sup>st</sup> AMENDED ORDER SETTING CIVIL JURY TRIAL,  
PRE-TRIAL CONFERENCE AND CALENDAR CALL**

**IT IS HEREBY ORDERED THAT:**

A. The above entitled case is set to be tried to a Jury on a Five week stack to begin,

**January 2, 2018 at 1:30 p.m.**

B. A calendar call will be held on **December 18, 2017 at 8:15 a.m.** Parties

must bring to Calendar Call the following:

- (1) Typed exhibit lists;
- (2) List of depositions;
- (3) List of equipment needed for trial, including audiovisual equipment;<sup>1</sup> and
- (4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the Dept at 671-3300 or via E-Mail at [CourtHelpDesk@clarkcountycourts.us](mailto:CourtHelpDesk@clarkcountycourts.us)

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1 C. A Pre-Trial Conference with the designated attorney and/or parties in proper  
2 person will be held on **December 4, 2017 at 8:30 a.m.**

3  
4 D. The Pre-Trial Memorandum must be filed no later than **December 3, 2017,**  
5 with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper  
6 person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel  
7 should include the Memorandum an identification of orders on all motions in limine or motions  
8 for partial summary judgment previously made, a summary of any anticipated legal issues  
9 remaining, a brief summary of the opinions to be offered by any witness to be called to offer  
10 opinion testimony as well as any objections to the opinion testimony.

11  
12 E. All motions in limine, must be in writing and filed no later than **November 9,**  
13 **2017. *Omnibus Motions in Limine are not allowed.* Orders shortening time will not be**  
14 **signed except in extreme emergencies.**

15  
16 F. All original depositions anticipated to be used in any manner during the trial  
17 must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is  
18 anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the  
19 portions of the testimony to be offered must be filed and served by facsimile or hand, two (2)  
20 judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by  
21 page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial  
22 day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior  
23 to publication.

24  
25 G. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits.  
26 All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in  
27 three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the  
28 final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be  
used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial  
Conference, counsel shall be prepared to stipulate or make specific objections to individual

1 proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked  
2 for identification but not admitted into evidence.

3 H. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to  
4 be included in the Jury Notebook. Pursuant to EDCR 2.68, at the final Pre-Trial Conference,  
5 counsel shall be prepared to stipulate or make specific objections to items to be included in the  
6 Jury Notebook.

7 I. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions  
8 to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side  
9 shall provide the Court, at the final Pre-Trial Conference, an agreed set of jury instructions and  
10 proposed form of verdict along with any additional proposed jury instructions with an electronic  
11 copy in Word format.

12 J. In accordance with EDCR 7.70, counsel shall file and serve by facsimile or hand,  
13 two (2) judicial days prior to the final Pre-Trial Conference voir dire proposed to be conducted  
14 pursuant to conducted pursuant to EDCR 2.68.

15 Failure of the designated trial attorney or any party appearing in proper person to  
16 appear for any court appearances or to comply with this Order shall result in any of the  
17 following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4)  
18 vacation of trial date; and/or any other appropriate remedy or sanction.

19 Counsel is required to advise the Court immediately when the case settles or is otherwise  
20 resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate  
21 whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A  
22 copy should be given to Chambers.

23 DATED this 29<sup>th</sup> day of September, 2017.

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ELIZABETH GONZALEZ, DISTRICT JUDGE

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**Certificate of Service**

I hereby certify that on or about the date filed, this document was Electronically Served to the Counsel on Record on the Clark County E-File Electronic Service List or mailed to the proper party as follows:

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Edward Kane, Judy Coddington, and Michael Wrotniak

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

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**

**DEFENDANTS MARGARET COTTER,  
ELLEN COTTER, GUY ADAMS,  
EDWARD KANE, DOUGLAS  
McEACHERN, WILLIAM GOULD, JUDY  
CODDING, MICHAEL WROTNIAK'S  
SUPPLEMENT TO MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT NOS.  
1, 2, 3, 5 AND 6**

1 **TO ALL PARTIES, COUNSEL, AND THE COURT:**

2 Pursuant to Nevada Rule of Civil Procedure 56, Defendants Margaret Cotter, Ellen Cotter,  
3 Guy Adams, Edward Kane, Douglas McEachern, Judy Coddington, and Michael Wrotniak  
4 (collectively, the "Moving Defendants"), by and through their counsel of record,  
5 CohenJohnsonParkerEdwards and Quinn Emanuel Urquhart & Sullivan, LLP, hereby submit this  
6 Supplement to their Motions for Partial Summary Judgment Nos. 1, 2, 3, 5 and 6.

7 This Supplemental Motion is based upon the following Memorandum of Points and  
8 Authorities; the accompanying Declaration of Noah S. Helpert and exhibits thereto; the pleadings,  
9 declarations, and exhibits previously-submitted in connection with Individual Defendants'  
10 Motions for Partial Summary Judgment Nos. 1, 2, 3, 5 and 6; the pleadings and papers on file; and  
11 any oral argument at the time of a hearing on this motion.

12  
13 Dated: November 9, 2017

**COHEN|JOHNSON|PARKER|EDWARDS**

14  
15  
16 By: /s/ H. Stan Johnson

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

1 **NOTICE OF MOTION**

2 **TO: TO ALL PARTIES, COUNSEL, AND THE COURT:**

3 PLEASE TAKE NOTICE that the above-referenced Motions will be heard on  
4 \_\_\_\_\_, 2017 at \_\_\_\_\_ in Department XI of the above designated  
5 Court or as soon thereafter as counsel can be heard.

6  
7 Dated: November 9, 2017

8 **COHEN|JOHNSON|PARKER|EDWARDS**

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





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**TABLE OF CONTENTS**

**Page**

I.	INTRODUCTION .....	1
II.	PROCEDURAL HISTORY .....	2
III.	ARGUMENT .....	3
A.	The Nevada Supreme Court and Legislature Both Recently Confirmed the Broad Scope of Nevada's Business Judgment Rule.....	3
B.	The Court Should Grant Partial Summary Judgment on Plaintiff's Claims Related to the Purported Unsolicited Offer (Motion for Partial Summary Judgment No. 3) .....	4
1.	Moving Defendants are protected by the business judgment rule.....	4
2.	There are no damages, as a matter of law, from a decision not to pursue a nonbinding expression of interest .....	7
C.	The Court Should Grant Partial Summary Judgment on Plaintiff's Claims Related to the Issue of Director Independence (Motion For Partial Summary Judgment No. 2) .....	7
D.	The Court Should Grant Partial Summary Judgment on Plaintiff's Claims Relating to the Appointment of Ellen Cotter as CEO, Approval of the Option Exercise, Hiring of Margaret Cotter, Approval of Market Compensation Packages to Ellen and Margaret Cotter, and Approval of One-Time Compensation Paid to Margaret Cotter and Guy Adams (Motions for Partial Summary Judgment Nos. 5 and 6) .....	9
E.	The Court Should Grant Partial Summary Judgment on Plaintiff's Claims Related to His Termination (Motion For Partial Summary Judgment No. 1) .....	10
F.	Plaintiff Cannot Demonstrate a Triable Issue of Fact Exists Regarding Any Supposed Intentional Misconduct, Fraud, or Knowing Violation of the Law by Moving Defendants .....	11
IV.	CONCLUSION .....	12

## TABLE OF AUTHORITIES

### Page(s)

### Cases

<i>Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart</i> , 845 A.2d 1040 (Del. 8 2004).....	8
<i>Brehm v. Eisner</i> , 746 A.2d 244 (Del. 2000).....	8
<i>Brown v. Kinross Gold U.S.A., Inc.</i> , 531 F. Supp. 2d 1234 (D. Nev. 2008) .....	7
<i>Cooke v. Oolie</i> , No. CIV. A. 11134, 2000 WL 710199 (Del. Ch. May 24, 2000).....	7
<i>Horwitz v. Sw. Forest Indus., Inc.</i> , 604 F. Supp. 1130 (D. Nev. 1985) .....	4
<i>La. Mun. Police Emps. ' Ret. Sys. v. Wynn</i> , No. 2-12-cv-509 JCM, 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014) .....	8
<i>Masonry &amp; Tile Contractors Ass'n of S. Nevada v. Jolley, Urga &amp; Wirth, Ltd.</i> , 113 Nev. 737 (1997).....	11
<i>Moore v. City of Las Vegas</i> , 92 Nev. 402 (1976).....	11
<i>Shoen v. SAC Holding Corp.</i> , 122 Nev. 621 (2006).....	3, 12
<i>In re Walt Disney Co. Derivative Litig.</i> , 731 A.2d 342 (Del. Ch. 1998), <i>aff'd in part, rev'd in part and remanded sub nom</i> .....	8
<i>WLR Foods, Inc. v. Tyson Foods, Inc.</i> , 857 F. Supp. 492 (W.D. Va. 1994) .....	3
<i>Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in &amp; for Cty. of Clark</i> , 399 P.3d 334 (Nev. 2017) .....	1, 2, 3, 6, 9

### Rules/Statutes

Fed. R. Civ. P. 56(f) .....	2, 8, 9, 12
Model Bus. Corp. Act § 8.30(e) .....	3
Nevada Revised Statute § 78.138.....	1, 2, 4, 5, 6, 10
Nevada Revised Statute § 78.138(3) .....	3, 4, 6, 9, 11
Nevada Revised Statute § 78.138(7) .....	4, 6, 9, 11

1	Nevada Revised Statute § 78.139.....	1, 4, 5, 6
2	Nevada Revised Statute § 78.139(4).....	5
3	Nevada Revised Statute § 78.140(1)(a).....	8

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 In his Second Amended Complaint, Plaintiff James Cotter, Jr. ("Plaintiff") alleges that  
4 members of the Board of Directors of Reading International, Inc. ("RDI" or the "Company")  
5 breached their fiduciary duties by, among other things: terminating Plaintiff as President and  
6 CEO; determining not to pursue a non-binding expression of interest in purchasing all of the stock  
7 of the Company; selecting Ellen Cotter as the Company's CEO; approving the exercise of an  
8 option by the Estate of James Cotter, Sr.; hiring Margaret Cotter as a full-time RDI employee;  
9 approving market compensation packages for Ellen and Margaret Cotter; and approving one-time  
10 additional earned compensation payments for Margaret Cotter and Guy Adams. Moving  
11 Defendants previously moved this Court for partial summary judgment on the claims based on  
12 each of these issues. At an October 27, 2016 hearing, the Court deferred ruling on motions for  
13 partial summary judgment until completion of all fact discovery. All discovery is now complete.<sup>1</sup>

14 Moving Defendants respectfully request that the Court grant their motions for partial  
15 summary judgment based on the original points and authorities submitted, as well as the additional  
16 points and authorities referenced herein. The law is clear: in order for there to be liability, the  
17 burden is on Plaintiff to present evidence sufficient for the trier of fact to conclude that  
18 Defendants did not act in good faith, on an informed basis, and with a view to the interests of RDI.  
19 In particular, the Nevada Supreme Court's decision in *Wynn Resorts, Ltd. v. Eighth Judicial Dist.*  
20 *Court in & for Cty. of Clark*, 399 P.3d 334 (Nev. 2017) and recent amendments to Nevada  
21 Revised Statute ("NRS") §§ 78.138 and 78.139 confirm Nevada's protections for director and  
22 officer decision-making under the business judgment rule. Both new and previously-cited Nevada  
23 authority, as well as the factual record developed in this case, make clear there is no reasonably-  
24 disputed issue of fact: the RDI Board is entitled to the presumption that their actions were

25  
26  
27 <sup>1</sup> Plaintiff has appealed a discovery order of this Court. See Nevada Supreme Court Case No.  
28 71267. Moving Defendants expressly reserve all rights with respect to the documents that are the  
subject of that order.

1 consistent with the proper exercise of business judgment, a presumption that Plaintiff cannot  
2 muster evidence to rebut.<sup>2</sup>

3 Plaintiff alleges—based entirely on his own assumptions and speculation—that certain  
4 Moving Defendants do not satisfy his own definition of “independence.” However, Plaintiff’s  
5 own baseless speculation is not sufficient to rebut Nevada’s statutory presumption that corporate  
6 directors act in good faith. Moreover, even if Plaintiff’s speculation were true (it is not),  
7 generalized allegations that some Moving Defendants, on a personal level, are closer with Ellen  
8 and Margaret Cotter than him, or believe in Ellen and Margaret Cotter’s vision for RDI over that  
9 of Plaintiff, does not strip them of the protections of the business judgment rule. Having opinions  
10 and preferences as to the future of RDI does not somehow prevent Moving Defendants, as a matter  
11 of law, from acting as independent directors. Indeed, directors *should* have views as to the future  
12 of a corporation, otherwise they are not doing their job. The Nevada Legislature did not craft a  
13 statutory scheme that removed the presumption of the business judgment rule any time there was a  
14 baseless allegation of lack of independence, and Plaintiff has failed to proffer evidence showing  
15 that any of RDI’s Directors made any particular decision (let alone *every* decision that is the  
16 subject of this suit) based on any conflicted or improper motive such that the legal presumptions  
17 of NRS § 78.138 would disappear. As the *Wynn* court confirmed, Nevada’s business judgment  
18 rule is designed to keep courts out of the business of running corporations and second-guessing  
19 corporate boards. Yet Plaintiff asks this Court to do precisely that by inserting itself in RDI’s  
20 decision-making because of some still-unarticulated lack of independence that, *even if true*, would  
21 be insufficient to rebut Nevada’s statutory presumptions.

## 22 **II. PROCEDURAL HISTORY**

23 At the October 27, 2016 hearing on Moving Defendants’ motions for partial summary  
24 judgment, the Court granted Rule 56(f) relief relating to Individual Defendants’ Motions for  
25 Partial Summary Judgment Nos. 2, 3, 5, and 6, deferring a ruling until after the close of discovery.  
26

---

27  
28 <sup>2</sup> A thorough review of the facts and legal standard is contained in the original motions for  
partial summary judgment. Moving Defendants incorporate such discussion by reference herein.

1 See Helpern Decl., Exh. A, at 62:21-63:3; 84:17-85:3; 150:22-151:8; Exh. D, at 3. Since that  
2 time, the parties have taken six additional fact depositions: the 30(b)(6) deposition of Ellen Cotter,  
3 the deposition of Judy Coddington, the deposition of Craig Tompkins, and the conclusion of Doug  
4 McEachern, Guy Adams, and James Cotter, Jr.'s depositions. All discovery is now complete.

### 5 **III. ARGUMENT**

#### 6 **A. The Nevada Supreme Court and Legislature Both Recently Confirmed the** 7 **Broad Scope of Nevada's Business Judgment Rule**

8 The decision-making process of each Moving Defendant with respect to each challenged  
9 decision is protected by the business judgment rule. The business judgment rule is a "presumption  
10 that in making a business decision the directors of a corporation acted on an informed basis, in  
11 good faith and in the honest belief that the action taken was in the best interests of the company."  
12 *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 (2006) (internal citation omitted); NRS  
13 § 78.138(3) (codifying the business judgment rule under Nevada law). The business judgment  
14 rule "not only protect[s] individual directors from personal liability, rather, it expresses a sensible  
15 policy of judicial noninterference with business decisions and is designed to limit judicial  
16 involvement in business decision-making so long as a minimum level of care is exercised in  
17 arriving at the decision." *Wynn*, 399 P.3d at 342 (internal quotation omitted).

18 In its 2017 *Wynn* decision, the Nevada Supreme Court held that while Nevada's business  
19 judgment statute is a modified version of Section 8.30(e) of the Model Business Corporation Act,  
20 a plain reading of both texts demonstrates that the Nevada Legislature **intentionally omitted** the  
21 Model Act's "reasonableness" standard for judging whether a director's conduct should be  
22 protected. "This signals legislative rejection of a substantive evaluation of director conduct." *Id.*  
23 at 343 (citing *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994)).  
24 The *Wynn* court also "reiterate[d] that the business judgment rule goes beyond shielding directors  
25 from personal liability in decision-making. Rather, it also ensures that courts defer to the business  
26 judgment of corporate executives and prevents courts from substituting their own notions of what  
27 is or is not sound business judgment if the directors of a corporation acted on an informed basis, in  
28

1 good faith and in the honest belief that the action taken was in the best interests of the company.”  
2 *Id.* at 344 (internal quotations and citations omitted).

3 Through recent amendments to NRS §§ 78.138 and 78.139, the Nevada Legislature has  
4 also emphasized their intention to protect director and officer decision-making through the  
5 statutory business judgment rule. For example, NRS § 78.138(7)), which defines the threshold  
6 necessary to establish director or officer liability, now includes an additional element establishing  
7 that a director or officer cannot be held liable for damages unless: “(a) The trier of fact determines  
8 that the presumption established by subsection 3 has been rebutted . . .” The referenced  
9 subsection, NRS § 78.138(3), provides that “directors and officers, in deciding upon matters of  
10 business, are presumed to act in good faith, on an informed basis and with a view to the interests  
11 of the corporation.” Thus, in addition to the ample protections already provided by NRS  
12 § 78.138(7) (*e.g.*, that the director or officer’s breach involve “intentional misconduct, fraud or a  
13 knowing violation of law”), this amendment to the statute requires a plaintiff to overcome a  
14 statutory presumption that an officer or director acted in good faith in order to bring a claim  
15 against corporate directors or officers.

16 Here, for reasons discussed below and in Moving Defendants’ original motions for partial  
17 summary judgment, there is no triable issue of fact regarding whether or not Plaintiff has  
18 successfully rebutted the presumption that Moving Defendants acted in good faith and subject to  
19 the protections of the business judgment rule, let alone that they committed the intentional  
20 misconduct, fraud or a knowing violation of law that would subject them to individual liability.  
21 Their conduct falls squarely within Nevada law’s protections, and Plaintiff’s claims fail as a  
22 matter of law.

23  
24 **B. The Court Should Grant Partial Summary Judgment on Plaintiff’s Claims**  
25 **Related to the Purported Unsolicited Offer (Motion for Partial Summary**  
26 **Judgment No. 3)**

27 **I. *Moving Defendants are protected by the business judgment rule***

28 As the original briefing demonstrates, the decision of whether or not to sell a company is  
one the law commits to the sound discretion of a board of directors. *Horwitz v. Sw. Forest Indus.*,

1 *Inc.*, 604 F. Supp. 1130, 1135 (D. Nev. 1985) (“Traditionally, the board’s managerial function  
2 includes making the decision whether to welcome or oppose a proposed merger or takeover.”).  
3 Here, it is undisputed that the Board met to discuss Patton Vision’s letter (the “Indication of  
4 Interest”); the Board considered a presentation by RDI’s management about the value of the  
5 Company; and, after a thorough deliberation, the Board determined that RDI’s interests would be  
6 best served in the long-term by not pursuing Patton Vision’s inadequate Indication of Interest.  
7 Indeed, Director Coddington testified at her deposition that “Reading has enormous possibilities to  
8 bring shareholder value, and we need to stick” with the Company’s existing plan to grow.  
9 Helpert Decl., Exh. B, at 172:10-173:9.

10 The Nevada Legislature—in addition to its amendments to NRS § 78.138—recently  
11 amended § 78.139, which sets forth the standard a board must follow in considering a change of  
12 control transaction. The Legislature added the following language:

13 Without limiting the provisions of NRS 78.138, a director may resist a change or  
14 potential change in control of the corporation if the board of directors determines that  
15 the change or potential change is opposed to or not in the best interest of the  
16 corporation upon consideration of any relevant facts, circumstances, contingencies  
or constituencies pursuant to subsection 4 of NRS 78.138 . . .  
NRS § 78.139(4)). Subsection 4 of NRS § 78.138, referenced above, states:

17 Directors and officers, in exercising their respective powers with a view to the  
18 interests of the corporation, may:

19 (a) Consider all relevant facts, circumstances, contingencies or constituencies,  
including, without limitation:

20 (1) The interests of the corporation's employees, suppliers, creditors or  
customers;

21 (2) The economy of the State or Nation;

22 (3) The interests of the community or of society;

23 (4) The long-term or short-term interests of the corporation, including the  
possibility that these interests may be best served by the continued  
24 independence of the corporation; or

25 (5) The long-term or short-term interests of the corporation's stockholders,  
including the possibility that these interests may be best served by the  
26 continued independence of the corporation.

27 (b) Consider or assign weight to the interests of any particular person or group, or  
to any other relevant facts, circumstances, contingencies or constituencies  
28



1 In reaching its decision to not pursue Patton Vision's Indication of Interest, the Board  
2 indisputably considered relevant facts and circumstances relating to the Company's long-term or  
3 short-term interests, including the possibility that these interests may be best served by the  
4 continued independence of the corporation, as required by NRS §§ 78.138 and 78.139. For  
5 example, at the June 23, 2016 Board meeting, RDI's management presented the Board with an  
6 overview of the Company's cinema and real estate assets. See Motion for Partial Summary  
7 Judgment No. 3 at 5-6. When appropriate multiples were applied, RDI's net asset value was  
8 determined to be somewhere between [REDACTED] more  
9 than the \$400 million valuation assessed by Patton Vision. See *id.* at 6. Thus, in reaching its  
10 ultimate decision, the Board properly informed itself with information available to the Company,  
11 as well as with the Directors' own knowledge of RDI. While Plaintiff asks this Court to second-  
12 guess the Board's decisions, the Nevada Legislature has made clear that its courts should not  
13 substitute their own notions of what is or is not sound business judgment. Indeed, such a  
14 "substantive evaluation" of director conduct has been rejected. *Wynn*, 399 P.3d at 343 (citation  
15 omitted).

16 Plaintiff has failed to rebut the statutory presumption of good faith under recently amended  
17 NRS § 78.138(7). It is *Plaintiff's burden* to rebut NRS § 78.138(3), which provides that "directors  
18 and officers, in deciding upon matters of business, are presumed to act in good faith, on an  
19 informed basis and with a view to the interests of the corporation." Here, the undisputed facts  
20 demonstrate that RDI's Board is entitled to the statutory presumption of good faith. Even if  
21 Plaintiff could point to an undisputed fact rebutting the presumption that Moving Defendants'  
22 conduct falls under the ambit of Nevada's business judgment rule (he cannot), a director cannot be  
23 personally liable for breaching their fiduciary duties unless "the breach of those duties involved  
24 intentional misconduct, fraud or a knowing violation of law." NRS § 78.138(7). Here, Plaintiff  
25 cannot cite any cognizable evidence (beyond his own speculation) to support a finding of  
26 intentional misconduct, fraud or a knowing violation of the law. Accordingly, this Court should  
27 grant Individual Defendants' Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims  
28 Related to the Purported Unsolicited Offer.

1 In reaching its decision to not pursue Patton Vision's Indication of Interest, the Board  
2 indisputably considered relevant facts and circumstances relating to the Company's long-term or  
3 short-term interests, including the possibility that these interests may be best served by the  
4 continued independence of the corporation, as required by NRS §§ 78.138 and 78.139. For  
5 example, at the June 23, 2016 Board meeting, RDI's management presented the Board with an  
6 overview of the Company's cinema and real estate assets. *See* Motion for Partial Summary  
7 Judgment No. 3 at 5-6. When appropriate multiples were applied, RDI's net asset value was  
8 determined to be somewhere between \$590 million and \$725 million—\$190-325 million more  
9 than the \$400 million valuation assessed by Patton Vision. *See id.* at 6. Thus, in reaching its  
10 ultimate decision, the Board properly informed itself with information available to the Company,  
11 as well as with the Directors' own knowledge of RDI. While Plaintiff asks this Court to second-  
12 guess the Board's decisions, the Nevada Legislature has made clear that its courts should not  
13 substitute their own notions of what is or is not sound business judgment. Indeed, such a  
14 "substantive evaluation" of director conduct has been rejected. *Wynn*, 399 P.3d at 343 (citation  
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17 NRS § 78.138(7). It is *Plaintiff's burden* to rebut NRS § 78.138(3), which provides that "directors  
18 and officers, in deciding upon matters of business, are presumed to act in good faith, on an  
19 informed basis and with a view to the interests of the corporation." Here, the undisputed facts  
20 demonstrate that RDI's Board is entitled to the statutory presumption of good faith. Even if  
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24 intentional misconduct, fraud or a knowing violation of law." NRS § 78.138(7). Here, Plaintiff  
25 cannot cite any cognizable evidence (beyond his own speculation) to support a finding of  
26 intentional misconduct, fraud or a knowing violation of the law. Accordingly, this Court should  
27 grant Individual Defendants' Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims  
28 Related to the Purported Unsolicited Offer.

1                   2.     *There are no damages, as a matter of law, from a decision not to pursue a*  
2                             *nonbinding expression of interest*

3             Summary judgment is also appropriate on this claim because, as a matter of law, Plaintiff  
4 cannot demonstrate any injury from the Board's decision not to pursue the **nonbinding** Indication  
5 of Interest. To avoid summary judgment, Plaintiff must produce cognizable evidence showing  
6 damages, an essential element of a breach of fiduciary duty claim. *Brown v. Kinross Gold U.S.A.,*  
7 *Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (A claim for breach of fiduciary duty requires a  
8 plaintiff to demonstrate "the existence of a fiduciary duty, the breach of that duty, and that the  
9 breach proximately caused the damages.") (applying Nevada law). Where a company receives a  
10 nonbinding proposal subject to conditions, such as due diligence and the execution of definitive  
11 agreements, that does not "constitute[] [an] offer[] the acceptance of which would bind the offeror  
12 to acquire [the company,]" a plaintiff cannot demonstrate an injury. *See Cooke v. Oolie*, No. CIV.  
13 A. 11134, 2000 WL 710199, at \*13 n. 38 (Del. Ch. May 24, 2000).

14             At his recent deposition, Plaintiff [REDACTED]  
15 [REDACTED]  
16 [REDACTED] Helpern Decl., Exh. C, at 940:12-18. [REDACTED]  
17 [REDACTED]  
18 [REDACTED] *Id.* at 941:13-19. The Indication of Interest merely  
19 communicated a proposal that was contingent upon (1) negotiation and execution of a definitive  
20 merger agreement and (2) due diligence. Thus, because the Indication of Interest was nonbinding,  
21 Plaintiff cannot demonstrate injury—a deficiency fatal to all claims to the extent they are based on  
22 the unsolicited Indication of Interest.

23             C.     **The Court Should Grant Partial Summary Judgment on Plaintiff's Claims**  
24                   **Related to the Issue of Director Independence (Motion For Partial Summary**  
25                   **Judgment No. 2)**

26             At the October 27 hearing, in connection with Motion for Partial Summary Judgment No.  
27 2, the Court requested that Plaintiff provide additional information so that each director could be  
28 evaluated on an "action-by-action basis[.]" *See* Helpern Decl., Exh. A, at 84:22; Exh. D, at 3.  
Plaintiff has not provided the Court with any supplemental factual or legal authority since that

1                   2.     *There are no damages, as a matter of law, from a decision not to pursue a*  
2                             *nonbinding expression of interest*

3             Summary judgment is also appropriate on this claim because, as a matter of law, Plaintiff  
4 cannot demonstrate any injury from the Board's decision not to pursue the **nonbinding** Indication  
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9 breach proximately caused the damages.") (applying Nevada law). Where a company receives a  
10 nonbinding proposal subject to conditions, such as due diligence and the execution of definitive  
11 agreements, that does not "constitute [] [an] offer[] the acceptance of which would bind the offeror  
12 to acquire [the company,]" a plaintiff cannot demonstrate an injury. *See Cooke v. Oolie*, No. CIV.  
13 A. 11134, 2000 WL 710199, at \*13 n. 38 (Del. Ch. May 24, 2000).

14             At his recent deposition, Plaintiff conceded Patton Vision's Indication of Interest was  
15 nonbinding. When asked if Patton Vision's letter was nonbinding, Plaintiff responded: "Well, the  
16 last paragraph states that this letter represents our nonbinding indication of interest. So I would  
17 assume that's correct." Helpert Decl., Exh. C, at 940:12-18. Additionally, when asked if Patton  
18 Vision could walk away from the deal short of there being a definitive agreement, Plaintiff  
19 answered: "By virtue of this letter, correct." *Id.* at 941:13-19. The Indication of Interest merely  
20 communicated a proposal that was contingent upon (1) negotiation and execution of a definitive  
21 merger agreement and (2) due diligence. Thus, because the Indication of Interest was nonbinding,  
22 Plaintiff cannot demonstrate injury—a deficiency fatal to all claims to the extent they are based on  
23 the unsolicited Indication of Interest.

24             C.     **The Court Should Grant Partial Summary Judgment on Plaintiff's Claims**  
25                   **Related to the Issue of Director Independence (Motion For Partial Summary**  
26                   **Judgment No. 2)**

27             At the October 27 hearing, in connection with Motion for Partial Summary Judgment No.  
28 2, the Court requested that Plaintiff provide additional information so that each director could be  
evaluated on an "action-by-action basis[.]" *See* Helpert Decl., Exh. A, at 84:22; Exh. D, at 3.  
Plaintiff has not provided the Court with any supplemental factual or legal authority since that

1 hearing or the conclusion of discovery. Plaintiff's generalized allegations that certain Directors  
2 lack independence, by virtue of their friendship with members of the Cotter family, also misses the  
3 mark. Plaintiff cannot point to any cognizable evidence that any Director lacks independence, or  
4 more importantly—and as evaluated by Nevada courts—that any Director stood on both sides of a  
5 transaction.

6 For none of the challenged Board decisions is there a disputed fact that would create a  
7 triable issue regarding independence of Moving Defendants. "No issue of self-interest exists  
8 where directors did not stand on both sides of the transaction or receive any personal financial  
9 benefit." *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, No. 2-12-cv-509 JCM, 2014 WL 994616, at  
10 \*4 (D. Nev. Mar. 13, 2014) (applying Nevada law); NRS 78.140(1)(a)) (defining "interested  
11 director"). Here, there are no allegations, let alone evidence, that any director stood on both sides  
12 of any transaction. Instead, Plaintiff manufactured a theory that certain non-Cotter directors—as a  
13 result of friendship or economic ties—are somehow " beholden " to Ellen and Margaret Cotter.  
14 However, that is not the standard. "Allegations of mere personal friendship or mere outside  
15 business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's  
16 independence." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040,  
17 1050 (Del. 8 2004).

18 Furthermore, Plaintiff's belief that the Moving Defendants [REDACTED]  
19 [REDACTED]  
20 [REDACTED] (see Helpern Decl., Exh. C, at 971:6-14; 975:7-20) is contrary to the law. The mere fact  
21 of a director's service and compensation—sometimes higher than their normal salaries—does not  
22 alone "lead to a reasonable doubt as to the[ir] independence." See *In re Walt Disney Co.*  
23 *Derivative Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998), *aff'd in part, rev'd in part and remanded sub*  
24 *nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Indeed, to hold otherwise would call into  
25 question anytime a director voted against a potential acquisition, no matter how inadequate the  
26 terms.

27 Part of Plaintiff's request for Rule 56(f) relief relating to this motion was a need for more  
28 time to depose Moving Defendants. Tellingly, Plaintiff has *never* sought the deposition of

1 hearing or the conclusion of discovery. Plaintiff's generalized allegations that certain Directors  
2 lack independence, by virtue of their friendship with members of the Cotter family, also misses the  
3 mark. Plaintiff cannot point to any cognizable evidence that any Director lacks independence, or  
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14 However, that is not the standard. "Allegations of mere personal friendship or mere outside  
15 business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's  
16 independence." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040,  
17 1050 (Del. 8 2004).

18 Furthermore, Plaintiff's belief that the Moving Defendants received a "personal benefit"  
19 from voting against Patton Vision's Indication of Interest in the form of "continuing services as a  
20 director" (see Helpern Decl., Exh. C, at 971:6-14; 975:7-20) is contrary to the law. The mere fact  
21 of a director's service and compensation—sometimes higher than their normal salaries—does not  
22 alone "lead to a reasonable doubt as to the[ir] independence." See *In re Walt Disney Co.*  
23 *Derivative Litig.*, 731 A.2d 342, 360 (Del. Ch. 1998), *aff'd in part, rev'd in part and remanded sub*  
24 *nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Indeed, to hold otherwise would call into  
25 question anytime a director voted against a potential acquisition, no matter how inadequate the  
26 terms.

27 Part of Plaintiff's request for Rule 56(f) relief relating to this motion was a need for more  
28 time to depose Moving Defendants. Tellingly, Plaintiff has *never* sought the deposition of

1 Director/Defendant Michael Wrotniak. At the deposition of Director/Defendant Judy Coddington,  
2 taken by Plaintiff since the original summary judgment hearing, Ms. Coddington stated in no  
3 uncertain terms that she acts independently: "What my job is as an independent director is to [ ] do  
4 the best I can to bring the most shareholder value to all shareholders. I'm very clear about what  
5 my obligation is. . . . I have to make an independent judgment. And that's what I've done."  
6 Helpern Decl., Exh. B, at 174:5-18. Plaintiff has neither obtained nor proffered to the Court any  
7 additional evidence or authority that creates a triable issue of fact as to Moving Defendants'  
8 independence.

9           D.     **The Court Should Grant Partial Summary Judgment on Plaintiff's Claims**  
10               **Relating to the Appointment of Ellen Cotter as CEO, Approval of the Option**  
11               **Exercise, Hiring of Margaret Cotter, Approval of Market Compensation**  
12               **Packages to Ellen and Margaret Cotter, and Approval of One-Time**  
                  **Compensation Paid to Margaret Cotter and Guy Adams (Motions for Partial**  
                  **Summary Judgment Nos. 5 and 6)**

13           Plaintiff's remaining claims, which were the subject of Individual Defendants' Motions for  
14 Partial Summary Judgment Nos. 5 and 6, were heard together, as the Court determined these  
15 issues were "all interrelated[.]" See Helpern Decl., Exh. A, at 140:12; Exh. D, at 3. Since the time  
16 that the Court granted Plaintiff's requested Rule 56(f) relief, Plaintiff has not obtained any new  
17 evidence—and no evidence exists—to create a triable issue of fact on these issues.

18           As discussed above (*supra* Section III.A.), the Nevada Supreme Court recently confirmed  
19 that the business judgment rule goes beyond shielding directors from personal liability in decision-  
20 making—it also prevents courts from substituting their own notions of what is or is not sound  
21 business judgment. See *Wynn*, 399 P.3d at 344. Moreover, NRS § 78.138(7), as amended, puts  
22 the burden on derivative plaintiffs to rebut NRS 78.138(3)'s presumption that directors and  
23 officers acted in good faith, on an informed basis, and with a view to the interests of the  
24 corporation. Plaintiff has not come close to meeting the high threshold that is required under NRS  
25 § 78.138(7).

26           For example, the evidence demonstrates that the Board's decision to appoint Ellen Cotter  
27 as CEO was made on an informed basis, in good faith, and with the honest belief that Ms. Cotter's  
28 leadership was in the best interest of the Company—there is no triable issue here. Ms. Cotter's

1 appointment was attributable to many rational business purposes, including without limitation her  
2 extensive experience in the cinema industry, her unique knowledge of the Company's assets, her  
3 familiarity with the Company's goals and existing management, and more. *See* Moving  
4 Defendants' Motion for Partial Summary Judgment No. 5 at 8-9. While Plaintiff seeks to create a  
5 supposed disputed issue through the "Position Specification" created by Korn Ferry for the initial  
6 CEO search, which emphasized real estate experience, [REDACTED]  
7 [REDACTED]  
8 [REDACTED] Helpern Decl., Exh.  
9 C, at 877:22-878:20.

10 Additionally, while Plaintiff alleges that the certain Directors were "beholden" to Ellen  
11 Cotter by reason of her status as a controlling stockholder, such a fact had no effect on the Board's  
12 decision. Ms. Codding testified at her deposition that it did not occur to her that it might be  
13 difficult not to support the candidacy of someone who might be a controlling shareholder. *See*  
14 Helpern Decl., Exh. B, at 95:20-23. Ms. Codding stated that she has a "fiduciary responsibility to  
15 all shareholders, and that's our obligation to select the best person for the job." *Id.* at 95:25-96:3.  
16 Beyond his own speculation, Plaintiff has not proffered any evidence that any Moving Defendants  
17 acted with improper motivation.

18 Plaintiff's remaining claims regarding the exercise of the option by the Estate of James  
19 Cotter, Sr., Margaret Cotter's employment as a full-time RDI employee, Ellen and Margaret  
20 Cotter's market compensation, and Margaret Cotter and Guy Adam's one-time additional  
21 compensation are also defeated by application of Nevada's business judgment rule. Discovery is  
22 closed, and Plaintiff has yet to identify evidence of bad faith on the part of RDI's Board such that  
23 the statutory presumption afforded by the business judgment rule could be rebutted. Instead, the  
24 facts demonstrate that Moving Defendants acted on an informed basis, in good faith, and in the  
25 honest belief that the action taken was in the best interest of the Company.

26 **E. The Court Should Grant Partial Summary Judgment on Plaintiff's Claims**  
27 **Related to His Termination (Motion For Partial Summary Judgment No. 1)**

28 Nevada's statutory protections for Board of Director decision-making—including the  
clarification to the scope of the business judgment result and amendments to NRS § 78.138—



1 appointment was attributable to many rational business purposes, including without limitation her  
2 extensive experience in the cinema industry, her unique knowledge of the Company's assets, her  
3 familiarity with the Company's goals and existing management, and more. *See* Moving  
4 Defendants' Motion for Partial Summary Judgment No. 5 at 8-9. While Plaintiff seeks to create a  
5 supposed disputed issue through the "Position Specification" created by Korn Ferry for the initial  
6 CEO search, which emphasized real estate experience, **Plaintiff now concedes that the Board**  
7 **can come to its own decisions about what criteria are required for the CEO position at RDI,**  
8 **and most importantly, that directors are allowed to change their minds.** Helpern Decl., Exh.  
9 C, at 877:22-878:20.

10 Additionally, while Plaintiff alleges that the certain Directors were "beholden" to Ellen  
11 Cotter by reason of her status as a controlling stockholder, such a fact had no effect on the Board's  
12 decision. Ms. Codding testified at her deposition that it did not occur to her that it might be  
13 difficult not to support the candidacy of someone who might be a controlling shareholder. *See*  
14 Helpern Decl., Exh. B, at 95:20-23. Ms. Codding stated that she has a "fiduciary responsibility to  
15 all shareholders, and that's our obligation to select the best person for the job." *Id.* at 95:25-96:3.  
16 Beyond his own speculation, Plaintiff has not proffered any evidence that any Moving Defendants  
17 acted with improper motivation.

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20 Cotter's market compensation, and Margaret Cotter and Guy Adam's one-time additional  
21 compensation are also defeated by application of Nevada's business judgment rule. Discovery is  
22 closed, and Plaintiff has yet to identify evidence of bad faith on the part of RDI's Board such that  
23 the statutory presumption afforded by the business judgment rule could be rebutted. Instead, the  
24 facts demonstrate that Moving Defendants acted on an informed basis, in good faith, and in the  
25 honest belief that the action taken was in the best interest of the Company.

26 **E. The Court Should Grant Partial Summary Judgment on Plaintiff's Claims**  
27 **Related to His Termination (Motion For Partial Summary Judgment No. 1)**

28 Nevada's statutory protections for Board of Director decision-making—including the  
clarification to the scope of the business judgment result and amendments to NRS § 78.138—

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1 apply equally to the Board's decision to terminate Plaintiff as President and CEO. For the reasons  
2 previously articulated in Moving Defendants' Motion for Partial Summary Judgment No. 1,  
3 Plaintiff cannot meet the showing required to avoid summary judgment on claims relating to his  
4 termination. While the Court previously stated its view that "there are genuine issues of material  
5 fact and issues related to interested directors participating in a process," (*see* Helpert Decl., Exh.  
6 A, at 117:9-11; Exh. D, at 3), new issues of law presented in this Motion merit reconsideration of  
7 any previously-issued order regarding Motion for Partial Summary Judgment No. 1. *See, e.g.,*  
8 *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737  
9 (1997); *Moore v. City of Las Vegas*, 92 Nev. 402, 405 (1976). Specifically, as discussed *supra*,  
10 recent clarification to Nevada law make clear that suggestions of a purported lack of independence  
11 cannot rebut that statutory presumption that "directors and officers, in deciding upon matters of  
12 business, are presumed to act in good faith, on an informed basis and with a view to the interests  
13 of the corporation." NRS § 78.138(3). It was Plaintiff's burden to rebut this statutory  
14 presumption and he failed to do so. Here, as with the Board's other decisions, the undisputed facts  
15 demonstrate that the Moving Defendants thoroughly reviewed, deliberated, and ultimately decided  
16 what they believed was in the best interest of the Company. Accordingly, absent any contrary  
17 evidence from Plaintiff (beyond a supposed lack of ill-defined "independence" based only on  
18 Plaintiff's suspicions and speculation), the Moving Defendants are entitled to the statutory  
19 presumption of good faith.

20           **F.     Plaintiff Cannot Demonstrate a Triable Issue of Fact Exists Regarding Any**  
21                   **Supposed Intentional Misconduct, Fraud, or Knowing Violation of the Law by**  
22                   **Moving Defendants**

23           Even if Plaintiff could proffer evidence rebutting the statutory presumption that the  
24 business judgment rule applies (he cannot), and even if Plaintiff could identify evidence showing  
25 that any of Moving Defendants breached a fiduciary duty (he cannot), Moving Defendants'  
26 motions should still be granted because they are statutorily immune to individual liability where,  
27 like here, the purported breaches did not involve intentional misconduct, fraud, or a knowing  
28 violation of law. NRS § 78.138(7) provides, in relevant part:

1 [A] director or officer is not individually liable to the corporation or its stockholders  
2 or creditors for any damages as a result of any act or failure to act in his or her  
3 capacity as a director or officer unless it is proven that: ... (b) The breach of those  
duties involved intentional misconduct, fraud or a knowing violation of law.

4 In other words, "directors and officers may only be found personally liable for breaching their  
5 fiduciary duties if that breach involves intentional misconduct, fraud, or a knowing violation of the  
6 law." *Shoen*, 122 Nev. at 640 (citing NRS § 78.138(7)).

7 Even after Rule 56(f) relief was granted, there is still no cognizable evidence showing that,  
8 in connection with the Board's termination of Plaintiff, consideration of the Indication of Interest,  
9 the appointment of Ellen Cotter as CEO, the Estate's Option exercise, the employment of  
10 Margaret Cotter as a full-time employee, Ellen or Margaret Cotter's compensation packages, or  
11 the additional one-time compensation paid to Margaret Cotter and Guy Adams, Moving  
12 Defendants engaged in any intentional misconduct, fraud, or knowing violation of the law. After  
13 almost years of discovery, Plaintiff cannot not point to a shred of evidence to support his bare  
14 allegations. Additional discovery in this matter has proved fruitless and has not changed the fact  
15 that Plaintiff has offered nothing but his own speculation to support his claims that Moving  
16 Defendants lacked independence. Summary judgment is therefore appropriate.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Moving Defendants respectfully request that the Court grant  
19 summary judgment as to the First, Second, Third, and Fourth Causes of Action set forth in  
20 Plaintiff's Second Amended Complaint, to the extent that they assert claims and damages related  
21 to (1) a purported unsolicited offer to buy all of the outstanding stock of RDI; (2) the appointment  
22 of Ellen Cotter as CEO; (3) the Estate's Option exercise; (4) the hiring of Margaret Cotter as a  
23 full-time RDI employee; (5) Ellen and Margaret Cotter's market compensation packages; and  
24 (6) the additional, one-time compensation paid to Margaret Cotter and Guy Adams.

25  
26 ///

27 ///

1 Dated: November 9, 2017

2 **COHEN|JOHNSON|PARKER|EDWARDS**

3 By: /s/ H. Stan Johnson

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**CERTIFICATE OF SERVICE**

I hereby certify that, on November 9, 2017, I caused a true and correct copy of the foregoing **DEFENDANTS MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTONIAK'S SUPPLEMENT TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT NOS. 1, 2, 3, 5 AND 6** 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 A

# Exhibit A

TRAN

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

JAMES COTTER, JR.

Plaintiff

vs.

MARGARET COTTER, et al.

Defendants  
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CASE NO. A-719860  
A-735305  
P-082942

DEPT. NO. XI

**Transcript of  
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON MOTIONS**

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:

JILL HAWKINS  
District Court

TRANSCRIPTION BY:

FLORENCE HOYT  
Las Vegas, Nevada 89146

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

JA4972

1           Okay.  What else?

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

T 21           THE COURT:  Okay.  The request for 56(f) relief on  
22 the motion for partial summary judgment on the claims related  
23 to purported unsolicited offer is granted because the  
24 depositions have not been completed and the document has not  
25 yet been produced.  I'm going to continue that motion till



1

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

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

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

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

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

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

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

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

16 THE COURT: All right. Thank you.

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

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

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

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

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

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

9 MR. TAYBACK: Yes.

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

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

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

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

25 THE COURT: Not the question, questions.

I

1 plaintiff. There's no wrong to the company for the company  
2 following the bylaws, following Nevada law, following the  
3 terms of the contract, and on these facts, taking them as he  
4 said, where people are fighting and its infecting the  
5 operation of the company for the board to say, I'm picking  
6 these two over that one. It's literally that simple.

7 THE COURT: Okay. Are you done?

8 MR. FERRARIO: Yes.

9 THE COURT: All right. The motion's denied, as  
10 there are genuine issues of material fact and issues related  
11 to interested directors participating in a process.

12 If I could go to the motion in limine related to  
13 plaintiff's experts.

14 So, for the record, in September of 2013 I spoke on  
15 a panel called Multijurisdiction Case Management Litigation  
16 Being Pursued in Multiple Forums with Chief Justice Myron  
17 Steele. I don't think it affects my ability to be fair and  
18 impartial, but I make that disclosure to you just in case you  
19 need it.

20 MR. SEARCY: Thank you, Your Honor. I'll try and go  
21 through the four experts that were touched upon in our motion  
22 in limine fairly briefly, because it's getting late.

23 THE COURT: And I've got to find them in the book.  
24 So you keep going.

25 MR. SEARCY: Okay. If the Court has any questions,

I

1 MR. RHOW: Understood.

2 THE COURT: But I'm running out of time.

3 MR. KRUM: Your Honor, what's going to be next? I'm  
4 running out of gas. I need to prepare.

5 THE COURT: I'm going to go to the Ellen Cotter  
6 appointment as CEO and compensation motion.

7 MR. KRUM: Okay. Thank you.

8 (Court recessed at 4:27 p.m., until 4:40 p.m.)

9 THE COURT: So we're on the issues related to  
10 appointment of Ellen Cotter, compensation of Ellen and  
11 Margaret Cotter, and those issues. And I think there's two or  
12 three different motions that are all interrelated on these.

13 MR. TAYBACK: These would be Motions 5 and 6, and  
14 there is a number of issues that are all interrelated.

15 THE COURT: Okay.

16 MR. TAYBACK: So I'll --

17 THE COURT: I'm not big on numbers, I'm big on  
18 subjects.

19 MR. TAYBACK: I understand. And I'll --

20 THE COURT: So it's hard for me on numbers.

21 MR. TAYBACK: I'll address them. There's probably  
22 four or five issues.

23 THE COURT: Okay.

24 MR. TAYBACK: Our motion that we entitled Number 5  
25 was the CEO search and appointment ultimately hiring of Ellen

1 I got stuck helping manage one, so I don't ever want to do it  
2 again.

3 MR. FERRARIO: Because this is not --

4 THE COURT: But I do want parties to be accountable  
5 and perform in a manner that appears to be consistent with  
6 Nevada law. So there may be something the parties decide to  
7 do between now and when I see them next.

8 MR. FERRARIO: It's the Nevada law we're waiting  
9 for, though.

10 THE COURT: But the Nevada law is the Nevada Supreme  
11 Court. And I keep telling you what I think the Schoen case  
12 says when you have interested directors.

13 MR. FERRARIO: Well, we're going to go back and read  
14 that. This isn't --

15 THE COURT: Interested directors, lots of -- you  
16 lose a lot of protections.

17 MR. FERRARIO: I think we'll be back.

18 THE COURT: And interested directors is a very  
19 intense factual analysis.

20 Go.

21 MR. KRUM: Thank you, Your Honor.

22 THE COURT: Are you going to ask for 56(f) relief?

23 MR. KRUM: Yes, Your Honor.

24 THE COURT: All right. It's granted on Motions 5,  
25 6, and there was one other one related to --

1 MR. TAYBACK: It's 3, Your Honor. It was related to  
2 the unsolicited offer I believe is the one you identified  
3 previously.

4 THE COURT: No. 5 and 6 were the only two we're  
5 talking about right now; correct?

6 MR. TAYBACK: Oh. Yes. Got it. Yeah. 5 and 6.

7 THE COURT: Okay. So 5 and 6. So there. It's  
8 4:54.

9 So here's the question. What do you want to do with  
10 the rest of them? Is everybody agreeable the motions to seal  
11 that are on calendar today can be granted because they include  
12 confidential and significant financial information that needs  
13 to remain protected given the company's activities?

14 MR. FERRARIO: Yes, Your Honor.

15 MR. KRUM: Yes.

16 THE COURT: Okay. So all the motions to seal are  
17 granted. Or redact. Seal and/or redact.

18 So what do you want to do next? Because I've got  
19 through in almost four hours not much.

20 MR. RHOW: Everyone's looking at me. I would love  
21 to. I hope we're last and least in terms of liability.

22 THE COURT: Well, it's 4:55.

23 MR. RHOW: Yeah. So, look, I want it to be heard  
24 and I do want to argue it, but --

25 THE COURT: Okay. Well, but you're not the last

# Exhibit B

# Exhibit B



1

2

DISTRICT COURT

3

CLARK COUNTY, NEVADA

4

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

7

Plaintiff, )

Case No. A-15-719860-B

8

vs. )

Coordinated with:

9

MARGARET COTTER, et al., )

Case No. P-14-082942-E

10

Defendants. )

11

and )

12

READING INTERNATIONAL, )  
INC., a Nevada )  
corporation, )

13

14

Nominal Defendant )

15

16

VIDEOTAPED DEPOSITION OF JUDY CODDING

17

TAKEN ON MARCH 1, 2017

18

19

20

21

22

23

24

REPORTED BY:

25

PATRICIA L. HUBBARD, CSR #3400

1 candidate?

2 A. I mean I would have said that to anyone  
3 who called me to tell me that they were going to be  
4 a candidate for any position that they would be  
5 considered.

6 Q. Does that mean that you were being  
7 polite but that you were not pleased?

8 A. I thought Ellen, up to that point I had  
9 observed her doing -- you know, I wasn't on the  
10 board for a long period of time, so I didn't have  
11 the kind of first-hand information that -- others  
12 who had worked with her.

13 So I felt like having someone who knew  
14 Reading well would be a good step of consideration.

15 I did not know Ellen Cotter well at that  
16 time.

17 Q. Did you say or intimate to her that you  
18 would support her candidacy?

19 A. No.

20 Q. Did it occur to you that it was -- it  
21 would be difficult not to support the candidacy of  
22 someone who might be a controlling shareholder?

23 A. No.

24 Q. That didn't occur to you?

25 A. No. Does not. I think anyone has a

1 fiduciary responsibility to all shareholders, and  
2 that's our obligation to select the best person for  
3 the job.

4 Q. Did you ever say to Ellen Cotter or  
5 anyone else in words or substance that you thought  
6 someone from the Cotter family should be the C.E.O.?

7 A. No.

8 Q. Were there any other internal  
9 candidates?

10 A. I don't think they -- I think someone  
11 had thought about it, but I don't think there were  
12 any other internal candidates, at least to the best  
13 of my knowledge.

14 Q. You recall that there was a meeting in  
15 early January of 2016 at which the board accepted  
16 the recommendation from the C.E.O. selection  
17 committee and made Ellen Cotter the permanent  
18 C.E.O., right?

19 A. Yes.

20 Q. At any time prior to that RDI board of  
21 directors meeting in early January 2016, did you  
22 have any communications with anyone about any other  
23 person or persons employed at RDI as a candidate or  
24 potential candidate?

25 A. I don't -- I don't -- I don't recall

1 of Reading without some of the things that we're  
2 focused on in terms of strategy.

3 Q. To what analyst are you referring?

4 A. I don't recall their names. But --

5 Q. But you believe that was prior to June  
6 of 2016?

7 A. I'm not sure. I'm not sure the timing  
8 of it really.

9 Q. So --

10 A. But from my point of view, I think  
11 Reading has enormous possibilities to bring  
12 shareholder value, and we need to stick with it.

13 Q. If the -- if the price had been  
14 \$30 instead of \$17, would that have impacted your  
15 decision-making or analysis?

16 MR. SEARCY: Objection. Lacks  
17 foundation.

18 THE WITNESS: I don't think so. It  
19 could have, but I don't -- I'd have to know much  
20 more, and I don't think so.

21 I think that the direction we're heading  
22 is going to bring more value to the shareholders  
23 than that.

24 BY MR. KRUM:

25 Q. More than \$30 a share --

1 A. Uh-huh.

2 Q. -- in 2016 dollars?

3 A. Yeah.

4 Q. When do you think that's going to  
5 happen?

6 A. I don't know. But, you know, I don't --  
7 I don't -- I'm not focused on selling the company.  
8 I'm focused on executing on the strategy and making  
9 sure that that is executed on.

10 Q. Well, what's the -- what is your  
11 anticipated time horizon for -- for bringing more  
12 value to the shareholders than \$30 a share?

13 A. As I said to you, I'm not sure. That  
14 depends on how Theaters 1, 2 and 3 -- how they  
15 develop.

16 It could be over the next five years.  
17 It could be over the next ten years. But I think  
18 that there will be a lot more value to this company,  
19 because it's not going to stand still where it is.  
20 You know, they've been out looking at other theater  
21 complexes and evaluating them. And this is a  
22 growing company.

23 Q. At the -- at the board meeting in June  
24 of 2016, at which the decision was made to follow  
25 the strategy and, in effect, reject the third-party

1 offer or expression of interest, whatever you care  
2 to call it, who said what, if anything, regarding  
3 what any controlling shareholder wished to do or did  
4 not wish to do?

5 A. Well, I think that there's the -- I mean  
6 the controlling shareholders were each asked their  
7 opinion about it. And, you know, again from my  
8 point of view, that's their opinion.

9 What my job is as an independent  
10 director is to bring -- do the best I can to bring  
11 the most shareholder value to all shareholders. I'm  
12 very clear about what my obligation is.

13 And so, you know, not that Ellen and  
14 Margaret and Jim wouldn't be able to determine one  
15 way or the other, but we have to make an independent  
16 judgment, and I have to make an independent  
17 judgment. And that's what I've done. I mean  
18 clearly --

19 Q. When the -- go ahead. I'm sorry.

20 A. Never mind. Go ahead.

21 Q. When you made that judgment, was it at  
22 the board meeting in June 2016 or prior to the board  
23 meeting?

24 A. No. It was -- it was -- again you're  
25 looking at the direction of the company and a growth

1 MR. TAYBACK: I did, too.

2 THE COURT: Okay.

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

22 THE COURT: Okay. Anything else?

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

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

1 them.

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

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

22 MR. KRUM: Yes.

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

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



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

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

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

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

17 THE COURT: I know.

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

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

1           Okay. What else?

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

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

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

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

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

1 -- was affected by a specific board member's interest in that  
2 transaction to get -- to raise that as an issue that would get  
3 him to a breach of fiduciary duty and that it caused harm to  
4 the company. And here the plaintiff cannot do that. And he's  
5 had certainly ample opportunity, put aside the grant of a  
6 56(f) motion with respect to the unsolicited offer.

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

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

17           MR. TAYBACK: What's that?

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

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

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

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

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

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

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

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

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

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

25           May I just grab my other binder?

1 THE COURT: Sure.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

12 MR. TAYBACK: Anything else? No other questions?

13 THE COURT: Those are all my questions for you.

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

16 THE COURT: You want to say something, Mark?

17 MR. FERRARIO: Just very briefly.

18 MR. KRUM: Your Honor --

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

21 MR. KRUM: They're a nominal defendant.

22 THE COURT: Mr. Krum.

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

25 MR. FERRARIO: I can tell you that --

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

2 MR. FERRARIO: I'm not.

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

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: He's part of the family.

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

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

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

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

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

3 MR. FERRARIO: No.

4 THE COURT: It's not like that?

5 MR. FERRARIO: No.

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

8 MR. FERRARIO: Absolutely not.

9 THE COURT: Okay.

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

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

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

17 THE COURT: Never mind. Keep going.

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

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

1 plaintiffs that resolved most of those claims.

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

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

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

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

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

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

12 THE COURT: I'm aware of that.

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

19 THE COURT: Anything else?

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

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

24 THE COURT: Yes.

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



1 and argue other motions, as well.

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

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

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

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

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

5           MR. KRUM: Thank you, Your Honor.

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

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

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

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

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

12 Mr. Adams. Now, I was prepared to make this  
13 argument without talking about any numbers, because I've been  
14 told to treat that information as confidential. So here's how  
15 I'm going to do it. There was a number mentioned about his  
16 supposed net worth. You saw our papers. He's 65 years old.  
17 He has no income, effectively no income other than the income  
18 from RDI and other companies controlled by the Cotter sisters.  
19 And if you'll look, Your Honor, for example, at our Exhibit  
20 16, which is his sworn declaration from his Los Angeles  
21 Superior Court divorce, and you'll see on the appendix page  
22 261 -- I'm very proud of my team for this; I will convey your  
23 comment, thank you -- and 262 it shows aggregate expenses of  
24 Mr. Adams and his then wife. Now, I acknowledge you have to  
25 go through those and try to figure out what he took and what

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

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

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

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

13           THE COURT: Okay.

14           MR. KRUM: And so --

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

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

19           THE COURT: Anything else?

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

21           THE COURT: Briefly, please.

22           MR. TAYBACK: Briefly, yes.

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

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

1 repeat myself.

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

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

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

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

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

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

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

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

16 THE COURT: All right. Thank you.

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

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



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

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

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

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

9 MR. TAYBACK: Yes.

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

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

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

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

25 THE COURT: Not the question, questions.

1 MR. TAYBACK: Questions.

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

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

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

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

19 With that I can sit down.

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

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

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

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

6 THE COURT: [Inaudible].

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

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

11 MR. FERRARIO: All right. So --

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

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

22 THE COURT: Now Mr. Krum.

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

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

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

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

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

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

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

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



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

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

9 THE COURT: Thank you.

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

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

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

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

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

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

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

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

9 THE COURT: Absolutely.

10 MR. KRUM: Very well.

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

13 MR. KRUM: Understood.

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

17 MR. KRUM: Understood.

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

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

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

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

24 THE COURT: I know.

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

1 or the other first?

2 THE COURT: I don't care.

3 MR. TAYBACK: I'll start.

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

8 MR. TAYBACK: You can mind the fact that I know Your  
9 Honor's very familiar and has read it. And in fact I'll say  
10 --

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

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

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

6 In Nevada law nothing comes close to a case that  
7 finds that there's a breach of fiduciary duty for terminating  
8 an officer. How could it violate a duty to the corporation  
9 when the termination of an officer is specifically authorized  
10 by Nevada law, specifically authorized by the bylaws,  
11 specifically authorized by the contract with that executive?  
12 In point of fact the -- given that there's no such case and in  
13 fact the termination for no cause is specifically contemplated  
14 and allowed at the discretion of the board, it can never --  
15 terminating an officer can never meet the standard of  
16 liability for a director under the Nevada Revised Statute  
17 78.138(7). All of that, all of those arguments, those legal  
18 arguments why it's just not actionable are totally 100 percent  
19 independent of the business judgment presumption. As a matter  
20 of law it's just not actionable.

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

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

25           The third point here goes to the undisputed facts.

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

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

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

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

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

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

13 THE COURT: Thank you.

14 Mr. Ferrario.

15 MR. FERRARIO: Very briefly, Your Honor.

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

25 THE COURT: An emergency motion for a hearing on the



1 probate case that we never had.

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

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

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

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

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

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

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

12 MR. FERRARIO: Delaware law.

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

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

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

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

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

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

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

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

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

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

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

1 make 'sure when you said the --

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

4 MR. RHOW: Understood.

5 THE COURT: Is that okay?

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

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

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

10 THE COURT: I do have it someplace else.

11 MR. RHOW: Understood, Your Honor.

12 THE COURT: Okay.

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

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

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

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

25           So when the business judgment rule is rebutted, as

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

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

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

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

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



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

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

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

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

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

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

25           So, you know, the briefing was somewhat like ships

1 passing in the night. I wrote far less when I listened to the  
2 arguments than I normally did, but I do have one more thing.  
3 And that's on the remedy. This is on page 27 of our reply  
4 brief, and we've briefed it before. You've seen it. Courts  
5 may fashion any form of equitable relief as may be  
6 appropriate. When they aborted the CEO search and made Ellen  
7 Cotter the CEO I was dumbfounded, Your Honor. If I was -- you  
8 know, it was a good thing for the company that they were going  
9 to do a CEO search, they're going to bring in a CEO, they're  
10 going to act like a public company. And then they didn't do  
11 that. And as a practical matter it's no big deal. As a legal  
12 matter the Court absolutely can provide that equitable relief.  
13 Chief Justice Steele was asked about that, and he said the  
14 saying in equity, for every wrong there is a remedy. And with  
15 respect to this he said, it is void the action and order  
16 reinstatement.

17           And so the last thing on this particular motion to  
18 which I want to speak is the contention that, well, no, you  
19 can't order -- you can't or at least you shouldn't provide  
20 equitable relief because, you know, the Cotter sisters are  
21 controlling shareholders, they'll just undo it. Your Honor,  
22 that is a very, very telling statement. Because what it is is  
23 an unequivocal announcement that the Cotter sisters don't view  
24 themselves as having an fiduciary obligations as controlling  
25 shareholders. That's wrong as a matter of law, but clearly

1 the manner in which they've conducted themselves throughout.

2 And, yes, the answer is were they to do that we'd be  
3 back and we'd be entitled to relief again. It's not a matter  
4 of the board substituting its judgment, it's a matter of the  
5 -- excuse me, the Court substituting its judgment for the  
6 board, it is a matter of protecting the interests of all RDI  
7 shareholders, the minority shareholders, who obviously don't  
8 exist in the decision-making minds of Kane and Adams and  
9 Margaret and Ellen Cotter. And that the brief says, well, you  
10 know, we're going to act like they don't exist again, simply  
11 confirms why it is equitable relief can and should be ordered.  
12 Thank you.

13 THE COURT: Thank you.

14 MR. TAYBACK: There are no other shareholders who  
15 are seeking to have the plaintiff reinstated or undo his  
16 termination. And to answer the question -- that's telling, by  
17 the way, and we make an argument about the plaintiff's  
18 inadequacy of understanding for this case based in part on  
19 that. But I'll say -- I'll start with this. If everything  
20 that Mr. Krum said is true were true, this motion should still  
21 be granted. And it's not --

22 THE COURT: I disagree with you, Counsel. Anything  
23 else?

24 MR. TAYBACK: Well, I would say yes. I would say  
25 why I think that that's true, which is to say that as -- from

1 the first principles it's true that if it's the -- if it's the  
2 -- just because it is the -- one of the most important powers  
3 that a board has, it is one that there is a long record of  
4 allowing boards the entire latitude to terminate for no reason  
5 at all. And how it can ever be a breach of fiduciary duty  
6 when the law provides unequivocally that right to boards of  
7 directors is the reason that there is no case that supports  
8 the plaintiff's claim. The best case that he cites concludes  
9 with the language, "Plaintiffs have neither articulated a  
10 theory as to how the plaintiff's removal as president and  
11 director could be a basis for fiduciary duty claims, nor  
12 proved any such breach." And that's the best case they cite.  
13 The fact is the law is clear and unequivocal that there is no  
14 basis for a breach of fiduciary duty claim in Nevada and  
15 frankly or any other jurisdiction for this action.

16 MR. FERRARIO: Your Honor, just very quickly.

17 The bylaws parrot the employment contract, clearly  
18 states that Mr. Cotter held the position at the pleasure of  
19 the board of directors, could be terminated with or without  
20 cause at any time by a vote of not less than the majority of  
21 the entire board at any meeting thereof by written consent.  
22 This whole nonsense about process that we've been hearing is  
23 inconsistent with the bylaws. I don't know what process Mr.  
24 Krum thinks should be invoked. We haven't been able to get  
25 that from him. When we asked Mr. Storey what he was talking

1 about in terms of process he was saying, well, he thought that  
2 the -- this mentoring process that had to be employed by the  
3 board prior to Mr. Cotter's termination should have been  
4 allowed to run its course. The fact that you have to mentor a  
5 CEO or ombudsman a CEO kind of tells you what was really going  
6 on there. And this is before the May event.

7           But I think the thing that's missing from Mr. Krum's  
8 argument -- and he talks about this unprecedented effort by  
9 the board to try to resolve this familial dispute, and he  
10 talks about that, but he doesn't go to the next step. The  
11 familial dispute was impacting the operation of the company.  
12 When that happens the board then has to deal with that. And  
13 that's what they did here. But he doesn't say that. He acts  
14 like the board came in as mediator for no reason to try to  
15 settle the Trust case. That's not what happened. He concedes  
16 that this familial dispute was impacting the operation of the  
17 company. So the board looked at its options and then what is  
18 in the record happened. And at the end of the day the board  
19 made a very basic decision, I'm going -- because the family  
20 dispute would not resolve despite the parties' best efforts,  
21 despite Mr. Krum's client at once agreeing to the terms of the  
22 deal and then reneging, despite his client enlisting the  
23 services of Uncle Ed and trying his damndest to get this  
24 thing resolved, he couldn't do it. So the board then is left  
25 with the same situation that occurred before all of these

1 meetings, three siblings who are fighting. And the board  
2 picks two Cotters over one. That's it. And that -- there's  
3 no case that he's -- he always talks about law, law. Where's  
4 the law that that decision could ever be challenged? And then  
5 what's the remedy he says that the Court could fashion?  
6 Because no matter how you cut it you would be substituting  
7 your judgment for the judgment of the board there, who is  
8 sitting there living with this day to day. And they look at  
9 it and because the underlying dispute doesn't resolve, they  
10 cannot afford, consistent with their fiduciary duties, to let  
11 that dispute impact the operation of this company. Had they  
12 done that, they would have probably gotten sued by T2 or by  
13 other folks, because then you would have heard the claim, you  
14 should have taken action. The only action that's left when  
15 the parties can't voluntarily resolve it is you have to do  
16 what they did, fire one, fire two, or fire all three. I  
17 submit they made the prudent decision. They took the ones  
18 with the most experience.

19           So matter how Mr. Krum wants to sidestep the bylaws,  
20 no matter how he wants to sidestep Nevada law, no matter how  
21 many times he's says there law to support this and then  
22 doesn't cite it, the simple fact of the matter is the board  
23 could have done this by simply calling a meeting and saying  
24 nothing other than, Mr. Cotter, you're terminated without  
25 cause, we don't have to have a reason to do it.

1           And so the only way this claim could survive is for  
2 this Court to rewrite the bylaws, rewrite Nevada law, and  
3 import a doctrine into this case, the entire fairness, that  
4 has no application -- I can't find a case in Nevada, and I  
5 argued this in a case in front of Judge Scann a couple years  
6 ago, whether that doctrine even has any application in Nevada.  
7 It's an open question. He cites to 78.140 that deals with  
8 restrictions on transactions involving interested directors.  
9 What he doesn't say, that even in that context in Nevada if  
10 those holding a majority of the voting power approve or ratify  
11 the interested transaction, it's good. Nevada's adopted that  
12 statute. So even if this was an interested party -- even if  
13 there was lack of independence, the majority of those  
14 controlling the voting power voted to ratify that act. So  
15 there's just nowhere for him to turn here.

16           So, you know, again, Judge, these decisions have to  
17 apply just beyond this case. And, you know, of all the things  
18 that he's alleged here, from the beginning we've been saying  
19 this isn't a derivative case, there's no case he cites.  
20 Justice Steele certainly didn't come up with any. I don't  
21 remember Justice Steele saying for every wrong there's a  
22 remedy, because I don't know what the wrong is here. You got  
23 fired. You signed a contract that said they could fire you.  
24 That's not a wrong. And if he thinks it's wrong, he's got a  
25 remedy. Go to the arbitration. Here he's a derivative



1 plaintiff. There's no wrong to the company for the company  
2 following the bylaws, following Nevada law, following the  
3 terms of the contract, and on these facts, taking them as he  
4 said, where people are fighting and its infecting the  
5 operation of the company for the board to say, I'm picking  
6 these two over that one. It's literally that simple.

7 THE COURT: Okay. Are you done?

8 MR. FERRARIO: Yes.

9 THE COURT: All right. The motion's denied, as  
10 there are genuine issues of material fact and issues related  
11 to interested directors participating in a process.

12 If I could go to the motion in limine related to  
13 plaintiff's experts.

14 So, for the record, in September of 2013 I spoke on  
15 a panel called Multijurisdiction Case Management Litigation  
16 Being Pursued in Multiple Forums with Chief Justice Myron  
17 Steele. I don't think it affects my ability to be fair and  
18 impartial, but I make that disclosure to you just in case you  
19 need it.

20 MR. SEARCY: Thank you, Your Honor. I'll try and go  
21 through the four experts that were touched upon in our motion  
22 in limine fairly briefly, because it's getting late.

23 THE COURT: And I've got to find them in the book.  
24 So you keep going.

25 MR. SEARCY: Okay. If the Court has any questions,

1 please --

2 THE COURT: You keep going. No. There are no Post-  
3 It notes on this one.

4 MR. SEARCY: All right. I'll start --

5 THE COURT: I went through the Post-It notes  
6 already.

7 MR. SEARCY: I'll start with Justice Steele. His  
8 name has come up a couple of times today. I took the  
9 deposition of Mr. -- of Chief Justice Steele, the former chief  
10 justice.

11 THE COURT: They get to keep their titles when they  
12 retire here in Nevada.

13 MR. SEARCY: And by his own admission Chief Justice  
14 Steele agreed that he was submitting a legal opinion. It's  
15 not meant to assist a jury. What Chief Justice Steele did is  
16 he took the facts that were given to him by plaintiff and he  
17 assumed that they were true, and then he provided a legal  
18 analysis under Delaware law as to how he thought that might  
19 come out in a Chancery Court. He didn't look to Nevada law,  
20 he doesn't claim any expertise in Nevada law, he didn't  
21 conduct any research of Nevada law. His opinion in short,  
22 Your Honor, is really a research memo that's aimed to assist  
23 you, the Court, and not the jury. And because of the fact  
24 that Chief Justice Steele in a prior opinion simply assumed  
25 the facts, didn't have any expertise on the facts, didn't

1 offer any opinion on the facts, didn't even go to ultimate  
2 facts, another court has already excluded an opinion just like  
3 the one he submitted here.

4           Now, Your Honor, if I may, from his deposition  
5 testimony Chief Justice Steele wrote -- or he said -- he  
6 testified about his opinion, "I'm definitely not impertinent  
7 enough to suggest what the Nevada court should do, nor am I  
8 suggesting that they would follow this pattern that's used in  
9 Delaware, just that this opinion is designed to be helpful to  
10 the court should the court choose to look at it and understand  
11 how the analysis would occur in Delaware. That's all. That's  
12 all I was asked to do." So, Your Honor, he's not providing  
13 anything that would be helpful to a finder of fact, and he's  
14 not providing anything to the Court that the Court can't do on  
15 its own. That's Chief Justice Steele.

16           THE COURT: So let's do all of them together.

17           MR. SEARCY: Okay.

18           THE COURT: Okay. Because then I'm going to ask Mr.  
19 Krum questions. Because I was wrong. I did have a Post-It  
20 note. Luckily, I found it.

21           MR. SEARCY: Moving now to the damages expert that  
22 plaintiff has put forth, that's Dr. Duarte-Silva, Dr. Silva --  
23 or Duarte-Silva has literally just thrown out numbers. He's  
24 thrown out two numbers to say that the EBITDA of the company  
25 and the share price of the company haven't risen as much as he

1 thought that they might if you compare them to what he  
2 considers to be the comparable companies. He doesn't engage  
3 in any sort of statistical methodology here, Your Honor. But  
4 more importantly, he doesn't seek to opine on any causal  
5 connection between the numbers that he throws out and what is  
6 being examined, namely, that is the term of Ellen Cotter as  
7 CEO. And when he was asked at his deposition, do you have any  
8 opinion on causation, he said, no. Do you agree that your  
9 opinion is not statistically significant; he agreed with that,  
10 Your Honor. So he has literally just thrown out large numbers  
11 without any causation connecting those numbers to any  
12 allegations in this case that will have no other purpose than  
13 to prejudice the jury. And, Your Honor, for those numbers to  
14 be presented to a jury plaintiff has to show that they  
15 encompass, they involve some sort of causation of damages.  
16 Otherwise it's just prejudicial. Otherwise it's irrelevant.  
17 And, Your Honor, that's Dr. Duarte-Silva. Do you have any  
18 questions on Dr. Silva?

19 THE COURT: Nope. So let's go to Spitz.

20 MR. SEARCY: Spitz. He's the expert on the CEO  
21 search. Mr. Spitz does not provide anything more in his  
22 opinion other than a subjective opinion. He doesn't cite to  
23 any literature about CEO searches, he doesn't cite to any  
24 standards, he doesn't even cite to his own personal  
25 experience, other than the occasional anecdotal way about how

1 a CEO search would be conducted. Instead, what Mr. Spitz does  
2 is he provides credibility determinations, questioning the  
3 motives of various persons on the CEO search committee,  
4 various persons on the board, of Ellen Cotter that he's -- he  
5 has no expertise and shouldn't be able to provide those types  
6 of opinions anyway about the credibility of witnesses for a  
7 jury. He wasn't there, he wasn't involved in the CEO search.  
8 That's completely inadmissible. And in terms of what he  
9 opines on for the CEO search, notwithstanding his prior  
10 experience at Korn Ferry, he doesn't provide you with any  
11 standards, any methodologies, anything that shows a basis of  
12 expertise by which to judge the CEO search that was conducted.

13 Finally, Your Honor, that's expert Nagy. He was  
14 offered as a rebuttal expert. He is clearly, however, just a  
15 late-submitted report. His opinion went to the qualifications  
16 and salary of Margaret Cotter. That's not anything that was  
17 submitted in Mr. Osborne's report that he is supposedly  
18 rebutting. Mr. Osborne's report was instead confined to a  
19 one-time payment that was made to Margaret Cotter. Mr. Nagy's  
20 report clearly is not a rebuttal to that, and therefore should  
21 also be excluded as untimely. Thank you.

22 THE COURT: Are we still talking about Mr. Finnerty?

23 MR. SEARCY: Mr. Finnerty -- we've withdrawn our  
24 motion with regard to Mr. Finnerty.

25 THE COURT: Thank you.

1           For what purpose are you offering Chief Justice  
2 Steele's conclusions?

3           MR. KRUM: The very same purposes for which they are  
4 offering two defendants -- two experts, Mr. Osborne and Mr.  
5 Klausner. And the difference between Chief Justice Steele on  
6 one hand and those two gentlemen on the other is that the  
7 analytical framework Chief Justice Steele offers is based on  
8 Delaware, and the analytical framework their experts offer is  
9 based on, so they say, industry practice. So Chief Justice  
10 Steele is not opining about Nevada law, he's not opining about  
11 the ultimate facts. The assertion that he was unfamiliar with  
12 the facts is incorrect, staggering, because he testified about  
13 what he did, which was read depositions, including the four  
14 half-day volumes of Mr. Kane and read the summary judgment  
15 motions. But, of course, that postdated his initial report.  
16 But what he does, Your Honor, is he explains an analytical  
17 framework based on Delaware law that could have been used by  
18 the director defendants at the time they were engaging in the  
19 activities in which they engaged, and could be helpful to the  
20 finder of fact, I submit, Your Honor, far more so than some  
21 assertion that, the boards on which I haven't done it this  
22 way, or, I haven't heard about it, or, this is what industry  
23 practice is, which is what Osborne and Klausner are saying.

24           It's undisputed that Nevada courts, like many other  
25 jurisdictions, may and do look to Delaware corporate law and

1 jurisprudence for guidance in the absence of a Nevada law on  
2 point. You're going to -- we're going to have instructions  
3 about what Nevada law is, presumably, right?

4 THE COURT: Yes, we are.

5 MR. KRUM: And this is in effect opinions with  
6 respect to how it might have been done using a framework. But  
7 that doesn't go to the instructions, and as our summary  
8 judgment papers demonstrated, I hope, Nevada law is consistent  
9 with Delaware law insofar as there is Nevada law. It's an  
10 issue about which we've disagreed from time to time today.

11 The motion with respect to Chief Justice Steele also  
12 asserts some erroneous legal conclusions that are repeated in  
13 the summary judgment motion. And they challenge his opinions  
14 that are not about what Nevada law is by erroneous assertions  
15 of Nevada law. But the short answer, Your Honor, is he's  
16 speaking to exactly the same issues as Osborne and Klausner,  
17 which is what should the directors have considered, did they  
18 do it in a manner consistent with one case Delaware law and  
19 practice and another case industry practice, whatever that is,  
20 which I'll find out, I hope, when I take their depositions.

21 THE COURT: Okay. Anything else?

22 MR. KRUM: Not with respect to Chief Justice Steele.

23 THE COURT: Okay. Duarte-Silva.

24 MR. KRUM: Duarte-Silva. Exact same thing. He  
25 analyzed the same set of events, namely, the performance of

1 RDI stock following the termination of plaintiff and under the  
2 guidance of Ellen Cotter as CEO that were analyzed by  
3 defendants' expert Richard Roll. The two of them reached  
4 different conclusions about what that performance showed.  
5 According to Professor Roll, based on his conclusions about  
6 that performance, there were no damages, there was no  
7 irreparable harm. Dr. Duarte-Silva says otherwise. In point  
8 of fact, he comes up with a number, which obviously has  
9 troubled the defendants.

10 So what we have here, Your Honor, is clearly expert  
11 testimony that the defendants acknowledge is appropriate,  
12 because they're offering the very same testimony but using a  
13 different methodology and reaching a different conclusion.  
14 And it's not appropriate, I respectfully submit, to make a  
15 decision on a motion of this nature that a methodology is  
16 unacceptable without hearing the witness himself describe it.  
17 And we haven't had that happen. So that's Dr. Duarte-Silva.

18 Richard Spitz. This is -- this is pretty easy,  
19 except for I don't have Mr. Osborne's report here, so I can't  
20 cite you to the exact line and page. But I can certainly  
21 provide it, because it's highlighted sitting in my office or  
22 my litigation bag or perhaps my closet when I unpacked the bag  
23 and got on the next plane.

24 Defendants effectively have invoked NRS 78.138.2(b)  
25 with respect to the CEO search by their use of an outside



1 search firm, Korn Ferry. Setting aside the factual issues  
2 about whether they themselves undermine that by effectively  
3 firing Korn Ferry and aborting the search, Mr. Spitz is  
4 offered to testify about whether the search was conducted in a  
5 manner in which he as a search executive, a former Korn Ferry  
6 executive, would have conducted it and ultimately as to  
7 whether as a search process it succeeded or failed. And, yes,  
8 Mr. Ferrario's right, process is important. That's the basis  
9 on which the individual defendants are going to claim they  
10 fulfilled their duty of care. And in this instance Mr. Spitz  
11 is going to speak to the failed process. So he's going to go  
12 to the issue of their invocation of NRS 78.138.2(b). And I'm  
13 sure they're going to claim -- I know they're going to claim,  
14 we've seen it in the briefing, well, we didn't really  
15 terminate the process and it was all fine and we just made a  
16 decision and so we stopped. Well, okay. He's going to speak  
17 to how CEO searches go. We have percipient witness testimony  
18 from the Korn Ferry witness, which is, interestingly, pretty  
19 consistent with Mr. Spitz's opinions, but he goes to an issue  
20 that they're going to raise in this case. They have raised  
21 it. That's the point -- that was the very point from the  
22 outset of hiring a search firm.

23           Mr. Nagy -- I misspoke, Your Honor. It's not Mr.  
24 Spitz, it's Mr. Nagy who responds to a particular paragraph or  
25 two in the Osborne report. Mr. Nagy's an expert on real

1 estate matters, including with respect to the qualifications  
2 of executives with responsibilities for development of real  
3 estate. As of March 2016 that's Margaret Cotter.

4           One of the matters as to which the director  
5 defendants' conduct is challenged is their decision to hire  
6 Margaret Cotter in March 2016 as the senior executive at RDI,  
7 a public company, responsible for the development of its  
8 valuable New York state -- New York City real estate. And  
9 this is in one of their summary judgment motions, Your Honor,  
10 under 6, I think, to compensate her in a manner that  
11 apparently reflects those responsibilities. And the Osborne  
12 report does in fact have a paragraph or two that refers to  
13 hiring Margaret Cotter in that position and paying her the  
14 money she's being paid. And the director defendants are going  
15 to defend their decision by relying on a third-party  
16 compensation consultant that advised the compensation  
17 committee regarding salary for the position. They, you know,  
18 had committees do it, they had the board approve it, and Mr.  
19 Osborne talks at length about this wonderful process. So Mr.  
20 Osborne's with Mr. Krum and not Mr. Ferrario about how  
21 important process is. And he talks about the process, he  
22 talks about the position, and among other conclusions Osborne  
23 reaches in his original expert report is that the compensation  
24 paid to Margaret Cotter is appropriate.

25           Well, that's -- what am I going to do, hire somebody

1 that says the compensation committee exercise was a ruse? No.  
2 But how about this? Starting in the fall of 2014 all the way  
3 up to March of 2015 when they made the decision there had been  
4 discussions about what role, if any, Margaret Cotter would  
5 have in terms of the city's [sic] valuable New York City real  
6 estate. And from the fall of 2014 through at least the spring  
7 of 2015 most, if not all, of the five non-Cotter director  
8 defendants had articulated, orally and in contemporaneous  
9 emails, the view that Margaret Cotter did not have the  
10 qualifications to be the senior person in that role. As a  
11 matter of fact, undisputed fact, Your Honor, she has no prior  
12 real estate development experience. What is her job? She  
13 supervises their live theater operations, which amount to next  
14 to nothing. It's not even in the company's description of its  
15 two principal businesses. And she was there with her father,  
16 now deceased, in the early pre-development stages.

17           So Mr. Nagy's opinion is that Margaret Cotter is not  
18 qualified to hold the position she holds and that the  
19 compensation paid to her therefore is not appropriate. And he  
20 says, as to Osborne, Osborne neglects to address and analyze  
21 her qualifications or lack of qualifications. He says it's  
22 industry custom and practice for the two, qualifications and  
23 compensation, to be closely linked, it's my opinion that she's  
24 not qualified, and because she's not qualified -- I'm  
25 paraphrasing -- her compensation is not proper. He directly

1 disagrees with one of the conclusions of Mr. Osborne.

2 THE COURT: Anything else?

3 MR. KRUM: No. Thank you.

4 THE COURT: Okay. Anything else?

5 MR. SEARCY: Yes, Your Honor.

6 A couple of points that lack of foundation raised in  
7 their argument just now in just responding to my reply, first  
8 there was the statement that Chief Justice Steele, the former  
9 Vice Chancellor, was familiar with the facts of the case. The  
10 deposition showed otherwise. And if I may also just read to  
11 you this portion of his deposition testimony, he assumed  
12 simply for this purpose, for his expert analysis that the  
13 allegations in the complaint were true. It's Exhibit A to our  
14 reply, Your Honor, at page 44, 19, through 45, 2, where I  
15 asked him the question, "I take it that in looking at the  
16 pleadings you assumed that the allegations contained in the  
17 pleadings were true; correct?" Answer, "Yes, that's correct."  
18 "As you might on a motion to dismiss, in other words?" "Very  
19 similar perhaps in Delaware, not quite as strict as a motion  
20 to dismiss, but very similar."

21 So it's clear that what Chief Justice Steele did is  
22 he provided a legal opinion based upon assumed facts about  
23 Delaware law. It's not going to assist a jury, and, to be  
24 honest, Your Honor, I don't think it will assist you any more  
25 than having a clerk do the same research if you're called upon

1 to look at an issue of Delaware law for this case. So Chief  
2 Justice Steele's opinions should be excluded. He should not  
3 be able to provide testimony in this case.

4 With respect to Dr. Duarte-Silva there was never any  
5 statement made in the opposition just now or otherwise that  
6 Dr. Duarte-Silva has any information about causation. He  
7 doesn't show any causation, any connection between the big  
8 numbers that he throws out and any of the allegations in this  
9 case. And he doesn't even purport to. He admits that he  
10 doesn't have any information and not offering any opinion  
11 about causation of any damages.

12 With respect to Mr. Spitz you heard the argument.  
13 Mr. Spitz doesn't offer any analysis, he doesn't offer any  
14 methodology. You heard Mr. Krum make reference to a failed  
15 process. There's nothing, however, in Mr. Spitz's report that  
16 would lead you to know what a successful process would be,  
17 what's the methodology for that, what's the analysis for how a  
18 CEO search under Mr. Spitz's view is supposed to go. There's  
19 no comparison there. It's strictly for Mr. Spitz a  
20 credibility determination that he's making on the witnesses in  
21 this case. That's inappropriate. Mr. Spitz's opinions should  
22 also be excluded.

23 Finally, Mr. Nagy, notwithstanding the fact that  
24 plaintiff said he didn't have the papers here to show that it  
25 was actually a rebuttal, there wasn't a showing in their

1 opposition, either, Your Honor, that Mr. Nagy's opinion was  
2 anything other than a late opinion and not a rebuttal to  
3 anything that was in Mr. Osborne's report. And so, as a  
4 result, Mr. Nagy's opinion should also be excluded.

5 THE COURT: Thanks.

6 The motion is granted in part. With respect to  
7 Chief Justice Steele, he may testify the limited purpose of  
8 what appropriate corporate governance activities would have  
9 been, included activities where directors are interested.  
10 It's on his list of things. He's got it in his list. Let me  
11 read it. Because I read it from your motion.

12 MR. FERRARIO: Did you read his report?

13 THE COURT: I didn't read his whole report. I read  
14 your motion. So here's what you say in your motion. I'm on  
15 page -- hold on, let me get there -- the one you did in small  
16 type. It's on page 6. To the extent he is talking about the  
17 interested and disinterested directors and the process that  
18 would be followed based upon the governance of an appropriate  
19 company for disinterested and interested directors, that  
20 testimony is permitted. And every one of these goes to that.  
21 I'm on page 6.

22 MR. KRUM: That's from his report, Your Honor.  
23 That's what they're quoting.

24 THE COURT: I know it's from his report. That's why  
25 I read that. Because it says, "Based on the facts as I

1 understand them," which I assume to be Chief Justice Steele  
2 and not Mr. Ferrario.

3 MR. FERRARIO: We're lost here, Judge. Sorry.

4 THE COURT: Okay.

5 MR. FERRARIO: Where are you at?

6 THE COURT: So you understand how at least today  
7 I've told you that the issues as to whether people are  
8 interested or disinterested on particular actions or  
9 transactions is a factual issue that we may have to resolve  
10 later. The framework of what the appropriate activities for  
11 someone who is interested or disinterested are appropriate for  
12 Chief Justice Steele to talk about, and they appear to appear  
13 here on 1(a), 1(b), 2, 3, and 4. Because every single one of  
14 those talks about independent and disinterested or interested.

15 MR. FERRARIO: What Justice Steele says is if the  
16 jury finds that --

17 THE COURT: That is correct.

18 MR. FERRARIO: -- then --

19 THE COURT: "So here's an appropriate corporate  
20 governance activity for a corporation to find if directors are  
21 interested. You don't have the interested directors  
22 participate." Next step. "Okay. So how do you evaluate if  
23 they're interested or not?" "You do an evaluation to  
24 determine if they have a financial interest, if they have some  
25 other binding interest.

1 MR. FERRARIO: That's under Delaware law, though.

2 THE COURT: It's under Nevada law, too.

3 MR. FERRARIO: No. He's only testified under  
4 Delaware law.

5 THE COURT: Then tell me why these conclusions are  
6 not the same as what they'd be under Nevada law. I understand  
7 your problem and your concern, but the framework is --

8 MR. FERRARIO: Well, I'll tell you what. There's  
9 not a case in Nevada that uses the entire fairness doctrine.  
10 Not one.

11 THE COURT: It doesn't use that term. It says you  
12 evaluate the entire transaction.

13 MR. FERRARIO: What's the transaction?

14 THE COURT: In this case there are multiple  
15 different activities that we may be submitting questions to  
16 the jury on.

17 MR. FERRARIO: What's the transaction? Just speak  
18 to terminating the CEO. Is that a transaction?

19 THE COURT: Yes.

20 MR. FERRARIO: Then who's on --

21 THE COURT: It's an activity.

22 MR. FERRARIO: Who's on what -- wow. Where does  
23 activity show in the statute or in a case? This is part of  
24 the problem, Judge.

25 THE COURT: So, Mr. Ferrario, I'm back to the we're



1 going to give the jury special interrogatories, I'm going to  
2 let Chief Justice Steele and your expert testify about what  
3 the appropriate activities for a company to use when they are  
4 faced with a situation of interested or disinterested  
5 shareholders and how they should govern themselves if we get  
6 to that point.

7 MR. FERRARIO: I think the problem I'm having here  
8 -- and I listened in for most of Justice Steele -- all of his  
9 deposition, quite frankly, and Mr. Searcy took it. It's this  
10 Court's role to say what law applies, not Justice Steele, and  
11 not an expert.

12 THE COURT: So do you want me to exclude your  
13 experts who are talking about industry practices? Because  
14 it's exactly the same thing on what appropriate corporate  
15 governance is.

16 MR. FERRARIO: Ah. No, that's different.

17 THE COURT: No, it's not different.

18 MR. FERRARIO: It's a completely different inquiry,  
19 because Justice Steele only opined on Delaware law, not  
20 specific practices employed -- Justice Steele's never been on  
21 a board. The only board he said he was on was some volunteer  
22 board, I think it was a volunteer board for what, a hospital  
23 or something?

24 MR. TAYBACK: Right.

25 MR. FERRARIO: He didn't come at this from an

1 industry practice standpoint. He didn't say, I serve on a  
2 number of boards. He said, I am giving you --

3 THE COURT: It doesn't have to be industry practice.  
4 What I'm trying to say is I am comparing this to your industry  
5 practice experts. If you don't want any of them to testify,  
6 then I'm happy to go there. If your position is that I  
7 shouldn't let any of those folks testify, then we'll handle it  
8 through jury instructions. But that's not the position you're  
9 presenting me. You're presenting me in a case where you have  
10 experts on industry standards, and am I going to exclude  
11 someone who has information that may be of assistance to the  
12 jury in a limited framework, not the entire framework, not the  
13 memo, not what the law is, but what the options for a board  
14 are under the law.

15 MR. FERRARIO: But, again, the threshold issue there  
16 is what's the law. That's Your Honor's job.

17 THE COURT: Absolutely it's my job.

18 MR. FERRARIO: Okay. So he -- not Justice Steele.

19 THE COURT: I understand that.

20 MR. FERRARIO: So Your Honor has to say what the law  
21 is, then Justice Steele would then have to give his opinion.  
22 We're not there yet. That's what I'm saying. That was the  
23 problem with his --

24 THE COURT: No. Let me see if I can say it a  
25 different way. Boards and companies have certain corporate

1 governance structures that they're supposed to follow when  
2 they have a --

3 MR. FERRARIO: I read the bylaws to you earlier.

4 THE COURT: Yeah. Well, okay. And when we are  
5 faced with a situation where a board has interested members,  
6 whether they're directors or shareholders participating in a  
7 vote, there are certain things that need to happen.

8 MR. FERRARIO: Depending on what the deal is.

9 THE COURT: Sometimes.

10 MR. FERRARIO: I mean, we have NRS 78.140 that talks  
11 about interested party transactions.

12 THE COURT: Yes, there are some --

13 MR. FERRARIO: That Justice Steele never read, by  
14 the way.

15 THE COURT: There are some interested-party  
16 transactions that are permissible under bylaws, but they have  
17 to be disclosed interested-party transactions; right?

18 MR. FERRARIO: 78.140 dictates exactly what --

19 THE COURT: Right.

20 MR. FERRARIO: -- has to happen, and they can become  
21 void or voidable.

22 THE COURT: Right. But --

23 MR. FERRARIO: I agree that that's Nevada law. He  
24 didn't even read this.

25 THE COURT: But let's go back to the Schoen case,

1 okay. The Schoen case we have interested parties who may not  
2 be interested in a way that people would find under NASDAQ or  
3 SEC reporting requirements. But the Nevada Supreme Court  
4 found that for purposes of us discussing that case, at least  
5 at the pleading stage, those individuals were interested or at  
6 least were alleged to be interested, where it was very  
7 different than what you would see in a publicly traded case.  
8 You have a similarities here with people being called Uncle  
9 Ed, you have similarities in the way people are receiving  
10 their primary compensation. There are similarities here that  
11 lead me to believe that there are factual issues on  
12 interested-disinterested which may cause many of the  
13 activities that have occurred to be drawn into evaluation by  
14 an ultimate finder of fact.

15 My position is that they need to have expert  
16 opinions if they're going to evaluate what an appropriate  
17 board would do when they're faced with those interested-  
18 disinterested conflicts in making a decision. We can either  
19 have experts testify, or you can not have experts testify. If  
20 you don't want to have experts testify, then I won't let  
21 Justice Steele testify, and we won't have your guys testify.  
22 If you want experts to testify, he's going to testify, too;  
23 but he's going to be limited to appropriate corporate  
24 governance options when faced with interested-disinterested  
25 transactions, because that's what he talks about in his

1 report.

2 MR. FERRARIO: I followed you all the way --

3 It's their experts, so they'll decide whether they  
4 want to call these other fellows.

5 -- until you got to the point of [unintelligible].

6 If you're saying that the actions of the board will now be  
7 evaluated under 78.140 --

8 THE COURT: I didn't say that.

9 MR. FERRARIO: I know. But that's where -- that's  
10 where -- I'm with --

11 THE COURT: You're making me pull out books.

12 Because, see, I don't remember numbers. Hold on.

13 MR. FERRARIO: I was with you up to the point where  
14 what law is going to govern here. Because if it's 78.140, I  
15 have a framework of which I can look and we can then argue  
16 that.

17 THE COURT: Hold on a second. Let me go to 78.140  
18 so you and I are talking about the same thing.

19 78.140 is not exclusive. Remember, the Schoen case  
20 goes beyond that. It's not exclusive. Or Americo or whatever  
21 we call it in the second or third case.

22 MR. FERRARIO: Americo, Schoen, whatever. I don't  
23 think --

24 THE COURT: Whichever decision of the group of  
25 multiple decisions it is.

1 MR. FERRARIO: But that was a completely -- that was  
2 a different fact pattern. It had --

3 THE COURT: Absolutely.

4 MR. FERRARIO: It had nothing to do with hiring and  
5 firing of a CEO.

6 THE COURT: It was a very different fact pattern.  
7 I'm not saying it's the same. I don't have a lot of law in  
8 Nevada. I have to be instructed on the law I have, and then  
9 I've got to make a jump to where I'm going to get based on the  
10 law I have. And --

11 MR. FERRARIO: Well, actually, I mean, you could  
12 take another contrary position. I know you heard this in the  
13 Wynn-Okada case, but Nevada actually does have a pretty robust  
14 statutory scheme that was put in place to be more protective  
15 than Delaware, to actually shield decisions from courts, you  
16 know, back in '91 and I think '97.

17 THE COURT: Uh-huh. We did.

18 MR. FERRARIO: So we actually do have a robust body  
19 of law here, and it's called NRS 78. So that's why I point to  
20 78.140. If we're talking about --

21 THE COURT: Mark, we all look at that, because  
22 that's what we look at. That's what governs our corporations.  
23 That's our corporate --

24 MR. FERRARIO: I agree.

25 THE COURT: But we have case decisions from our

1 Nevada Supreme Court that supplement the statutory language.

2           So I've made my ruling on that. If there's  
3 something else you want to talk about, I can talk about it as  
4 soon as I finish my 4:30 conference call with whichever group  
5 of folks needs to talk to me.

6           MR. SEARCY: Your Honor, if I may, we did have an  
7 additional point on Chief Justice Steele. However, I don't  
8 believe you rendered an opinion or gave a ruling on any of the  
9 other experts.

10           THE COURT: It's denied on all the other experts.

11           MR. SEARCY: Denied on all the others. All right.

12           THE COURT: So did you want to ask me another  
13 question on Justice Steele?

14           MR. SEARCY: No. But go ahead.

15           MR. RHOW: I was just going to say we -- actually,  
16 Mr. Gould, on Mr. Gould's --

17           THE COURT: You joined in that motion.

18           MR. RHOW: I know. But he also has his separate  
19 motion for summary judgment.

20           THE COURT: I'm not on your motion for summary  
21 judgment yet. It's still on my list.

22           MR. RHOW: Okay. I'm just making sure. You're  
23 asking if there's other things.

24           THE COURT: Well, yeah. There's a lot of other  
25 things.

1 MR. RHOW: Understood.

2 THE COURT: But I'm running out of time.

3 MR. KRUM: Your Honor, what's going to be next? I'm  
4 running out of gas. I need to prepare.

5 THE COURT: I'm going to go to the Ellen Cotter  
6 appointment as CEO and compensation motion.

7 MR. KRUM: Okay. Thank you.

8 (Court recessed at 4:27 p.m., until 4:40 p.m.)

9 THE COURT: So we're on the issues related to  
10 appointment of Ellen Cotter, compensation of Ellen and  
11 Margaret Cotter, and those issues. And I think there's two or  
12 three different motions that are all interrelated on these.

13 MR. TAYBACK: These would be Motions 5 and 6, and  
14 there is a number of issues that are all interrelated.

15 THE COURT: Okay.

16 MR. TAYBACK: So I'll --

17 THE COURT: I'm not big on numbers, I'm big on  
18 subjects.

19 MR. TAYBACK: I understand. And I'll --

20 THE COURT: So it's hard for me on numbers.

21 MR. TAYBACK: I'll address them. There's probably  
22 four or five issues.

23 THE COURT: Okay.

24 MR. TAYBACK: Our motion that we entitled Number 5  
25 was the CEO search and appointment ultimately hiring of Ellen



1 Cotter. You know, I'll be relatively succinct here, which is  
2 to say it's the -- it's the tag-along to the firing of Jim  
3 Cotter, Jr. Like that, there's no case which finds a board  
4 liable for hiring a long-time executive who runs -- who has  
5 run for 16 years at the time of her hiring one of the primary  
6 two business lines of the company and had served as an interim  
7 CEO such that the board actually saw how she performed. And  
8 every director, excluding the plaintiff and Ellen Cotter  
9 herself, supported her hiring. The only attack on that  
10 decision is this kind of ongoing what I'll call amorphous and  
11 shifting claim that directors lacked independence. He hasn't  
12 articulated, other than the general claims of lack of  
13 independence, that a majority of the directors had some  
14 specific interest in the hiring of Ellen Cotter or lacked  
15 independence.

16 THE COURT: It's the majority of directors  
17 participating in --

18 MR. TAYBACK: Yes.

19 THE COURT: -- in a process, whether it's a decision  
20 or an action, that I have to evaluate --

21 MR. TAYBACK: Correct.

22 THE COURT: -- not the majority of all the  
23 directors.

24 MR. TAYBACK: Correct.

25 THE COURT: Okay.

1           MR. TAYBACK: And so you're excluding only plaintiff  
2 and Ellen Cotter. The remainder of the directors -- okay.  
3 And the question, though, is what's the allegations that say  
4 that the vote of Michael Wrotniak, to take an example, or any  
5 director on any issue -- and now I'm going to look at this  
6 particular issue -- amounted to a breach of fiduciary duty.  
7 And there just isn't -- there isn't fact -- there aren't facts  
8 that have been proffered that say, you know what, with respect  
9 to this decision this director was -- lacked independence  
10 because of this. We've heard the generalized allegations that  
11 Guy Adams supported Margaret and Ellen Cotter because he  
12 thought that he might get paid, we've heard generalized  
13 allegations about some of the others, Uncle Ed Kane; but those  
14 generalized allegations of interest don't relate to the  
15 transaction that is being looked at. And I'll call it a  
16 transaction even though it's not a transaction, it's a  
17 decision.

18           THE COURT: And that's why I tried to use all sorts  
19 of different words, and I don't know which word to use, but  
20 it's an activity of some sort.

21           MR. TAYBACK: I agree with that. I do think that  
22 there's a difference, and so I've tried to be careful to not  
23 call it a transaction, because I think the law --

24           THE COURT: Yeah. Because they're not really  
25 transactions.

1 MR. TAYBACK: Because they're not. And I think the  
2 law is different when it's a transaction, because the  
3 framework for evaluating interestedness, frankly, has more  
4 applicability when it's a transaction. That's what I say.  
5 And I see you shaking your head, but I do --

6 THE COURT: Yeah. I agree with you. It's a hard  
7 issue. That's why we're having this long afternoon and I  
8 didn't make you come on a motion calendar where you had  
9 10 minutes to argue all 40 or so motions you filed.

10 MR. TAYBACK: The second point that I would make,  
11 and really the last point I would make, on the identification  
12 and hiring of Ellen Cotter is that the -- that the nature of  
13 the claim really only sounds, I think, in corporate waste.  
14 And the standard for determining corporate waste, that is to  
15 say, the decision I think is really I think inarguable that  
16 there's the kind of latitude one would have on these  
17 undisputed facts given who she was and her connection to the  
18 company that that's a reasonable decision.

19 The only question is this hiring and then  
20 termination of the external search firm, Korn Ferry. And  
21 there's an argument that's --

22 THE COURT: In mid search.

23 MR. TAYBACK: In mid search -- well, not mid search.  
24 At the point of which they made the decision.

25 THE COURT: Near the end of the search, yeah.

1           MR. TAYBACK: At the point at which they made a  
2 decision. And whether there's -- I mean, I don't -- haven't  
3 seen any case or I haven't seen any theory where a company  
4 ever has an obligation to hire a search firm or to conclude  
5 the search once they've identified a candidate that they want  
6 to hire. The fact is that happens all the time. But whether  
7 it does or doesn't doesn't matter. Because, if you look back  
8 even to the plaintiff's hiring, there was no search. There  
9 wasn't a search firm at all. He was hired because he was the  
10 son of the founder. And he doesn't seem to be complaining  
11 about that. And so I don't know that the legal term is a pot-  
12 kettle issue, but it's definitely the pot calling the kettle  
13 black. The fact is they engaged an indisputably reputable  
14 search firm, they engaged in a search, and they decided on the  
15 sitting CEO, who they always are going to know better than an  
16 external candidate. That's not something that can be second  
17 guessed. And I don't think on these facts it should be second  
18 guessed. And to the extent it's a corporate waste claim the  
19 standard, as you well know, is quite high for that.

20           Do you want me to address the other issues, as well,  
21 while I'm up here?

22           THE COURT: Yeah. Because they're all interrelated.

23           MR. TAYBACK: Okay. The I'll call them the other  
24 four issues which are really the subject of our Motion  
25 Number 6 is the estate's exercise of options, the appointment

1 of Margaret Cotter, compensation for Ellen Cotter and Margaret  
2 Cotter, and the -- there was an additional compensation voted  
3 for Margaret Cotter and Guy Adams.

4 Just to take them in order, with respect to the  
5 exercise of the -- the estate's exercise of options plaintiff  
6 really cites zero evidence. There's additional evidence that  
7 he's seeking regarding the advice of counsel upon which two  
8 directors sought. I don't know whether Your Honor's ruling  
9 with respect to 56(f) is going to apply here, but it would  
10 seem logically that your prior rulings probably dictate how  
11 you're going to come out on this one.

12 THE COURT: Maybe.

13 MR. TAYBACK: So I'm not going to spend much time on  
14 that -- or any more time. But I think that in fact the  
15 evidence, the undisputed evidence that's proffered supports  
16 summary adjudication of that as an issue.

17 With respect to the appointment of Margaret Cotter  
18 if you now say that it's the board's ultimate fiduciary duty  
19 to shareholders, including in this case this one shareholder  
20 who's been the terminated CEO, to not only evaluate the  
21 board's exercise of its fiduciary duties with respect to the  
22 hiring of the CEO or firing of a CEO, but now to subordinate  
23 executives, I think you're really entering the realm of  
24 micromanagement of a company.

25 The challenge here is she wasn't qualified because

1 she hadn't engaged in sufficient real estate-related  
2 activities. The fact is, and the undisputed facts are, she'd  
3 been affiliated with the company as a consultant through her  
4 own -- her own consulting entity that was by contract with the  
5 company had been running their live theater business for  
6 years, for 15 years, I think. Even though he just -- said in  
7 a prior motion plaintiff's lawyer said, well, the live theater  
8 business isn't even one of the two main lines, the fact is  
9 when he tried to go around or fire Margaret Cotter because he  
10 believed she mismanaged other litigation related to a show  
11 called "Stomp," the fact is he described -- plaintiff describe  
12 it as one of the most significant lines of business that the  
13 company had, which was why he was so agitated with how he  
14 perceived she handled that litigation, which ultimately came  
15 out successful and vindicated her position all along.

16 THE COURT: And that was the litigation over the  
17 lease of the theater; right?

18 MR. TAYBACK: Exactly.

19 THE COURT: Okay.

20 MR. TAYBACK: My point is with respect to the hiring  
21 of Margaret Cotter she -- the record shows and we identified  
22 in our motion three or four relevant documents and facts that  
23 show she had ample qualifications to be responsible for the  
24 real estate side of the business. It's a reasonable decision.  
25 The generalized attacks on the independence of the directors

1 who voted on that, who approved that don't warrant piercing  
2 into the facts to justify, you know, this decision is right or  
3 this decision is wrong at that level of decision making. It's  
4 a reasonable decision under the circumstances. It doesn't  
5 rise to the level of corporate waste, and it definitely does  
6 not satisfy -- based on the evidence that the plaintiff has  
7 proffered satisfy the high standard for director liability.  
8 And that's true for all of these.

9           With respect to the compensation decisions obviously  
10 the argument is the same. These are decisions made by and  
11 endorsed by a subdivision or subcomponent compensation  
12 committee, and it's done through ordinary channels. The  
13 undisputed evidence is with respect to Ellen Cotter and  
14 Margaret Cotter's compensation they hired an external firm,  
15 Towers Watson. Willis Towers Watson is actually the full  
16 name. And they came in they do a study and they say, we've  
17 looked at these companies and we think that for this purpose  
18 they are comparable and they should be -- kind of give you a  
19 guide for what range you fall within. And they fall well  
20 within that range. I think it's the 25th percentile. Just  
21 objectively looking at that determination and the process in  
22 which it made, the general allegations that a director was  
23 more or less favorable to one of them on that issue doesn't  
24 say that everything that happened then goes to a trial. I  
25 think the undisputed facts on that issue, the compensation

1 decisions, warrant summary judgment.

2           The same is true with the one-time payment of  
3 \$200,000 the Margaret Cotter which was intended and identified  
4 in the minutes, undisputed and not debated -- or rather  
5 debated, but not disputed, to compensate her for work that she  
6 did outside the consulting arrangement. She did work for a  
7 period of time with respect to -- ironically, given the  
8 plaintiff's contention that she didn't have experience -- with  
9 the land entitlements to one of the historical buildings  
10 that's being redeveloped in New York under her oversight.

11           And the same is true with respect to the single  
12 payment to Guy Adams. Interestingly, plaintiff himself  
13 approved a single payment to all the directors based on the  
14 extraordinary work they had done up to a point in time while  
15 he was the CEO. He approved that, including \$75,000 to Tim  
16 Storey and \$25,000 to the other directors because the tumult  
17 within the company and the family upon the death of the father  
18 warranted the directors frankly spending a lot more time on  
19 the business of the company than they had ever had to so  
20 before, and it justified that payment. Not extraordinary,  
21 well within the board's discretion. The generalized  
22 allegations that he's put forward about people be interested  
23 don't warrant overturning that. And the fact is this payment  
24 to Mr. Adams, who undertook a lot of other activities later  
25 on, the only difference between this one the one that he



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 WROTONIAK,

Respondents,

and

READING INTERNATIONAL, INC., a  
Nevada Corporation,

Nominal Defendant.

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JOINT APPENDIX IN SUPPORT OF  
APPELLANT'S OPENING BRIEF

VOLUME XX (JA4738-4987)

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# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

## CHRONOLOGICAL INDEX

Date	Description	Vol. #	Page Nos.
2015-06-12	Complaint	I	JA1-JA29
2015-06-16	AOS William Gould	I	JA30-JA31
2015-06-18	Amended AOS – Timothy Storey	I	JA32-JA33
2015-06-18	Amended AOS - Guy Adams	I	JA34-JA35
2015-06-18	Amended AOS - Edward Kane	I	JA36-JA37
2015-06-18	Amended AOS - Ellen Cotter	I	JA38-JA39
2015-06-18	Amended AOS - RDI	I	JA40-JA41
2015-06-18	Amended AOS - Margaret Cotter	I	JA42-JA43
2015-06-18	Amended AOS - Douglas McEachern	I	JA44-JA45
2015-10-22	First Amended Verified Complaint	I	JA46-JA95
2015-11-10	Scheduling Order and Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call	I	JA96-JA99
2016-03-14	Answer to First Amended Complaint filed by Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, and Edward Kane	I	JA100-JA121
2016-03-29	Reading International, Inc. (“RDI”)’s Answer to James J. Cotter, Jr.’s First Amended Complaint	I	JA122-JA143
2016-04-05	Judy Coddington and Michael Wrotniak’s Answer to First Amended Complaint	I	JA144-JA167
2016-09-02	Second Amended Verified Complaint	I	JA168-JA224
2016-09-23	Defendant William Gould’s MSJ (pages 1 through 19)	I	JA225-JA250
2016-09-23	Defendant William Gould’s MSJ (pages 20 through 39)	II	JA251-JA263

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-09-23	Appendix of Exhibits to Defendant William Gould’s MSJ (through Exhibit 23)	II	JA264-JA268
2016-09-23	Exhibit A – Declaration of William Gould ISO MSJ	II	JA269-JA272
2016-09-23	Exhibit B – Declaration of Shoshana E. Bannett ISO William Gould’s MSJ	II	JA273-JA279
	Exhibits 1-46 ISO Declaration of Shoshana E. Bannett ISO William Gould’s MSJ	II, III, IV, V	JA280-JA1049
2016-09-23	Individual Defendants’ Motion for Summary Judgment (No. 1) Re: Plaintiff’s Termination and Reinstatement Claims	V, VI, VII, VIII	JA1050-JA1862 (Under Seal)
2016-09-23	Individual Defendants’ Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence (“Partial MSJ No. 2”)	VIII, IX, X	JA1863-JA2272 (Under Seal)
2016-09-23	Individual Defendants’ Motion for Partial Summary Judgment (No. 3) On Plaintiff’s Claims Related to the Purported Unsolicited Offer (“Partial MSJ No. 3”)	X	JA2273-JA2366
2016-09-23	Individual Defendants’ Motion for Partial Summary Judgment (No. 4) On Plaintiff’s Claims Related to the Executive Committee (“Partial MSJ No. 4”)	X	JA2367-JA2477 (Under Seal)
2016-09-23	Individual Defendants’ Motion for Partial Summary Judgment (No. 5) On Plaintiff’s Claims Related to the Appointment of Ellen Cotter as CEO (“Partial MSJ No. 5”)	X, XI	JA2478-JA2744 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams ("Partial MSJ No. 6")	XI, XII, XIII, XIV	JA2745-JA3275 (Under Seal)
2016-09-23	Plaintiff James Cotter Jr.'s Motion for Partial Summary Judgment	XIV	JA3276-JA3310
2016-09-23	Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.'s Motion for Partial Summary Judgment	XIV	JA3311-JA3315
2016-09-23	Appendix of Exhibits and Table of Contents re Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.'s Motion for Partial Summary Judgment	XIV	JA3316-JA3318
2016-09-23	Exhibits 1-46 ISO Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.'s Motion for Partial Summary Judgment	XIV, XV	JA3319-JA3726 (Under Seal)
2016-10-03	RDI's Joinder to Individual Defendants' Partial MSJ No. 1	XV	JA3725-JA3735
2016-10-03	RDI's Joinder to the Individual Defendants' MSJ No. 2 re The Issue of Director Independence	XV, XVI	JA3736-JA3757
2016-10-03	RDI's Joinder to the Individual Defendants' MSJ No. 4 re Plaintiff's Claims Related to The Executive Committee	XVI	JA3758-JA3810
2016-10-13	Individual Defendants' Opposition to Plaintiff James J. Cotter Jr.'s Motion for Partial Summary Judgment	XVI	JA3811-JA3846

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-10-23	Declaration of Counsel Noah S. Helpert ISO the Defendants' Opposition to Plaintiff James J. Cotter Jr.'s Motion for Partial Summary Judgment with Exhibits 1-18	XVI	JA3847-JA3930 (Under Seal)
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 1) re Plaintiff's Termination and Reinstatement Claims	XVI	JA3931-JA3962
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) re The Issue of Director Independence	XVI	JA3963-JA3990
2016-10-13	Individual Defendants' Opposition to Plaintiff James J. Cotter Jr.'s Motion for Partial Summary Judgment	XVI, XVII	JA3991-JA4009
2016-10-13	RDI's Joinder to Individual Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment	XVII	JA4010-JA4103
2016-10-13	Plaintiff James J. Cotter Jr.'s Opposition to Defendant Gould's Motion for Summary Judgment	XVII	JA4104-JA4140
2016-10-17	Appendix of Exhibits ISO Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 1) re Plaintiff's Termination and Reinstatement Claims	XVII, XVIII	JA4141-JA4328 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-10-17	Appendix of Exhibits ISO Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: The Issue of Director Independence	XVIII, XIX	JA4329-JA4507 (Under Seal)
2016-10-17	Appendix of Exhibits ISO Cotter, Jr.'s Opposition to Gould's MSJ	XIX	JA4508-JA4592 (Under Seal)
2016-10-21	Individual Defendants' Reply ISO of their Partial MSJ No. 1	XIX	JA4593-JA4624
2016-10-21	Reply ISO Individual Defendants' Motion for Partial Summary Judgment (No. 2) re the Issue of Director Independence	XIX	JA4625-JA4642
2016-10-21	RDI Reply ISO Individual Defendants' MSJ No. 1	XIX	JA4643-JA4652
2016-10-21	RDI Reply ISO Individual Defendants' MSJ No. 2	XIX	JA4653-JA4663
2016-10-21	RDI's Reply ISO William Gould's MSJ	XIX	JA4664-JA4669
2016-10-21	Defendant William Gould's Reply ISO Motion for Summary Judgment (including decl. and exhibits)	XIX	JA4670-JA4695
2016-10-21	Declaration of Shoshana E. Barnett ISO Defendant William Gould's Reply ISO MSJ	XIX	JA4696-JA4737
2016-10-26	Individual Defendants' Objections to the Declaration of James J. Cotter, Jr. Submitted in Opposition to all Individual Defendants' Motions for Partial Summary Judgment	XX	JA4738-JA4749
2016-11-01	Transcript of Proceedings re: Hearing on Motions, October 27, 2016	XX	JA4750-JA4904
2016-12-20	RDI's Answer to Plaintiff's Second Amended Complaint	XX	JA4905-JA4930

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-12-21	Order Re Individual Defendants' Partial MSJ Nos. 1–6 and MIL to Exclude Expert Testimony	XX	JA4931-JA4934
2016-12-22	Notice of Entry of Order on Partial MSJ Nos. 1-6 and MIL to Exclude Expert Testimony	XX	JA4935-JA4941
2016-10-04	1st Amended Order Setting Civil Jury Trial, Pre-Trial Conference, and Calendar Call	XX	JA4942-A4945
2017-11-09	Individual Defendants’ Supplement to Partial MSJ Nos. 1, 2, 3, 5, and 6	XX, XXI	JA4946-JA5000 (Under Seal)
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
2017-11-28	Individual Defendants’ Answer to Plaintiff’s Second Amended Complaint	XXI	JA5021-JA5050
2017-12-01	Request For Hearing On Defendant William Gould's Previously-Filed MSJ	XXI	JA5051-JA5066
2017-12-01	Cotter Jr.’s Supplemental Opposition to Partial MSJ Nos. 1 and 2 and Gould MSJ	XXI	JA5067-JA5080
2017-12-01	Declaration of Akke Levin ISO SUPP OPPS to Motions for Summary Judgment Nos. 1 and 2 and Gould Summary Judgment	XXI	JA5081-JA5091
2017-12-01	Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 5 and Gould Summary Judgment Motion	XXI	JA5092-JA5107
2017-12-01	Declaration of Akke Levin ISO Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 5 and Gould Summary Judgment Motion	XXI	JA5108-JA5225 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2017-12-01	Plaintiff’s Supplemental OPPS to MMSJ Nos. 2 and 6 and Gould Summary Judgment Motion	XXI	JA5226-JA5237
2017-12-01	Declaration of Akke Levin ISO Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 6 and Gould Summary Judgment Motion	XXII	JA5238-JA5285
2017-12-01	Plaintiff James Cotter Jr’s Supplemental Opposition to So-Called Summary Judgment Motions Nos. 2 and 3 and Gould Summary Judgment Motion	XXII	JA5286-JA5306
2017-12-01	Declaration of Akke Levin ISO Plaintiff James Cotter Jr’s Supplemental Opposition to So-Called Summary Judgment Motions Nos. 2 and 3 and Gould Summary Judgment Motion	XXII, XXIII	JA5307-JA5612
2017-12-04	Defendant William Gould’s Supplemental Reply ISO of MSJ	XXIII	JA5613-JA5629
2017-12-05	Declaration of Shoshana E. Bannett ISO William Gould’s Supplemental Reply ISO MSJ	XXIII, XXIV	JA5630-JA5760
2017-12-04	Reply ISO Individual Defendants’ Renewed Motions for Partial Summary Judgment Nos. 1 and 2	XXIV	JA5761-JA5790
2017-12-08	Joint Pre-Trial Memorandum	XXIV	JA5791-JA5822
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
2017-12-19	Cotter Jr.’s Motion for Reconsideration or Clarification of Ruling on Partial MSJ Nos. 1, 2 and 3 and Gould’s Summary Judgment Motion and Application for Order Shortening Time (“Motion for Reconsideration”)	XXV	JA5898-JA6014



# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2017-12-26	Individual Defendants' Opposition To Plaintiff's Motion For Reconsideration or Clarification of Ruling on Motions for Summary Judgment Nos 1, 2 and 3	XXV	JA6015-JA6086
2017-12-27	Gould's Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's MSJ	XXV	JA6087-JA6091
2017-12-27	Declaration of Shoshana E. Bannett in Support of Gould's Opposition to Plaintiff's Motion for Reconsideration of Ruling on Gould's MSJ	XXV, XXVI	JA6092-JA6169
2017-12-28	Order Re Individual Defendants' Motions for Partial Summary Judgment and Defendants' Motions in Limine	XXVI	JA6170-JA6176
2017-12-28	Motion [to] Stay and Application for OST	XXVI	JA6177-JA6185
2017-12-29	Transcript of 12-28-2017 Hearing on Motion for Reconsideration and Motion for Stay	XXVI	JA6186-JA6209
2017-12-28	Court Exhibit 1-Reading Int'l, Inc. Board of Directors Meeting Agenda to 12-28-17 Hearing	XXVI	JA6210-JA6211 (Under Seal)
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
2017-12-29	Cotter Jr.'s Motion for Rule 54(b) Certification and for Stay & OST	XXVI	JA6223-JA6237
2018-01-02	Individual Defendants' Opposition to Plaintiff's Motion for Rule 54(b) Certification and Stay	XXVI	JA6238-JA6245
2018-01-03	Cotter Jr.' Reply ISO Motion for Rule 54(b) Certification and Stay	XXVI	JA6246-JA6253

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2018-01-04	Order Granting Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6254-JA6256
2018-01-04	Order Denying Plaintiff's Motion to Stay and Motion for Reconsideration	XXVI	JA6257-JA6259
2018-01-04	The Remaining Director Defendants' Motion for Judgment as a Matter of Law	XXVI	JA6260-JA6292
2018-01-04	Notice of Entry of Order Granting Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6293-JA6299 (Under Seal)
2018-01-04	Notice of Entry of Order Denying Plaintiff's Motion to Stay and Motion for Reconsideration	XXVI	JA6300-JA6306
2018-01-05	Transcript of January 4, 2018 Hearing on Plaintiff's Motion for Rule 54(b) Certification	XXVI	JA6307-JA6325
2018-02-01	Notice of Appeal	XXVI	JA6326-JA6328

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

## ALPHABETICAL INDEX

Date	Description	Vol. #	Page Nos.
2016-10-04	1st Amended Order Setting Civil Jury Trial, Pre-Trial Conference, and Calendar Call	XX	JA4942-A4945
2015-06-18	Amended AOS - Douglas McEachern	I	JA44-JA45
2015-06-18	Amended AOS - Edward Kane	I	JA36-JA37
2015-06-18	Amended AOS - Ellen Cotter	I	JA38-JA39
2015-06-18	Amended AOS - Guy Adams	I	JA34-JA35
2015-06-18	Amended AOS - Margaret Cotter	I	JA42-JA43
2015-06-18	Amended AOS - RDI	I	JA40-JA41
2015-06-18	Amended AOS – Timothy Storey	I	JA32-JA33
2016-03-14	Answer to First Amended Complaint filed by Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, and Edward Kane	I	JA100-JA121
2015-06-16	AOS William Gould	I	JA30-JA31
2016-09-23	Appendix of Exhibits and Table of Contents re Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.'s Motion for Partial Summary Judgment	XIV	JA3316-JA3318
2016-10-17	Appendix of Exhibits ISO Cotter, Jr.'s Opposition to Gould's MSJ	XIX	JA4508-JA4592 (Under Seal)
2016-10-17	Appendix of Exhibits ISO Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 1) re Plaintiff's Termination and Reinstatement Claims	XVII, XVIII	JA4141-JA4328 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-10-17	Appendix of Exhibits ISO Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: The Issue of Director Independence	XVIII, XIX	JA4329-JA4507 (Under Seal)
2016-09-23	Appendix of Exhibits to Defendant William Gould’s MSJ (through Exhibit 23)	II	JA264-JA268
2015-06-12	Complaint	I	JA1-JA29
2018-01-03	Cotter Jr.’ Reply ISO Motion for Rule 54(b) Certification and Stay	XXVI	JA6246-JA6253
2017-12-19	Cotter Jr.’s Motion for Reconsideration or Clarification of Ruling on Partial MSJ Nos. 1, 2 and 3 and Gould's Summary Judgment Motion and Application for Order Shortening Time (“Motion for Reconsideration”)	XXV	JA5898-JA6014
2017-12-29	Cotter Jr.’s Motion for Rule 54(b) Certification and for Stay & OST	XXVI	JA6223-JA6237
2017-12-01	Cotter Jr.’s Supplemental Opposition to Partial MSJ Nos. 1 and 2 and Gould MSJ	XXI	JA5067-JA5080
2017-12-28	Court Exhibit 1–Reading Int’l, Inc. Board of Directors Meeting Agenda to 12-28-17 Hearing	XXVI	JA6210-JA6211 (Under Seal)
2017-12-01	Declaration of Akke Levin ISO Plaintiff James Cotter Jr’s Supplemental Opposition to So-Called Summary Judgment Motions Nos. 2 and 3 and Gould Summary Judgment Motion	XXII, XXIII	JA5307-JA5612
2017-12-01	Declaration of Akke Levin ISO Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 5 and Gould Summary Judgment Motion	XXI	JA5108-JA5225 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2017-12-01	Declaration of Akke Levin ISO Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 6 and Gould Summary Judgment Motion	XXII	JA5238-JA5285
2017-12-01	Declaration of Akke Levin ISO SUPP OPPS to Motions for Summary Judgment Nos. 1 and 2 and Gould Summary Judgment	XXI	JA5081-JA5091
2016-10-23	Declaration of Counsel Noah S. Helpern ISO the Defendants’ Opposition to Plaintiff James J. Cotter Jr.’s Motion for Partial Summary Judgment with Exhibits 1-18	XVI	JA3847-JA3930 (Under Seal)
2016-09-23	Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.’s Motion for Partial Summary Judgment	XIV	JA3311-JA3315
2017-12-27	Declaration of Shoshana E. Barnett in Support of Gould’s Opposition to Plaintiff’s Motion for Reconsideration of Ruling on Gould’s MSJ	XXV, XXVI	JA6092-JA6169
2016-10-21	Declaration of Shoshana E. Barnett ISO Defendant William Gould’s Reply ISO MSJ	XIX	JA4696-JA4737
2017-12-05	Declaration of Shoshana E. Barnett ISO William Gould’s Supplemental Reply ISO MSJ	XXIII, XXIV	JA5630-JA5760
2016-10-21	Defendant William Gould’s Reply ISO Motion for Summary Judgment (including decl. and exhibits)	XIX	JA4670-JA4695
2016-09-23	Defendant William Gould’s MSJ (pages 1 through 19)	I	JA225-JA250
2016-09-23	Defendant William Gould’s MSJ (pages 20 through 39)	II	JA251-JA263
2017-12-04	Defendant William Gould’s Supplemental Reply ISO of MSJ	XXIII	JA5613-JA5629

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-09-23	Exhibit A – Declaration of William Gould ISO MSJ	II	JA269-JA272
2016-09-23	Exhibit B – Declaration of Shoshana E. Bannett ISO William Gould’s MSJ	II	JA273-JA279
2016-09-23	Exhibits 1-46 ISO Declaration of James J. Cotter, Jr., ISO James J. Cotter Jr.’s Motion for Partial Summary Judgment	XIV, XV	JA3319-JA3724 (Under Seal)
	Exhibits 1-46 ISO Declaration of Shoshana E. Bannett ISO William Gould’s MSJ	II, III, IV, V	JA280-JA1049
2015-10-22	First Amended Verified Complaint	I	JA46-JA95
2017-12-27	Gould’s Opposition to Plaintiff’s Motion for Reconsideration of Ruling on Gould’s MSJ	XXV	JA6087-JA6091
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence (“Partial MSJ No. 2”)	VIII, IX, X	JA1863-JA2272 (Under Seal)
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 3) On Plaintiff’s Claims Related to the Purported Unsolicited Offer (“Partial MSJ No. 3”)	X	JA2273-JA2366
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff’s Claims Related to the Executive Committee (“Partial MSJ No. 4”)	X	JA2367-JA2477 (Under Seal)
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 5) On Plaintiff’s Claims Related to the Appointment of Ellen Cotter as CEO (“Partial MSJ No. 5”)	X, XI	JA2478-JA2744 (Under Seal)

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-09-23	Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams (“Partial MSJ No. 6”)	XI, XII, XIII, XIV	JA2745-JA3275 (Under Seal)
2017-12-26	Individual Defendants' Opposition To Plaintiff's Motion For Reconsideration or Clarification of Ruling on Motions for Summary Judgment Nos 1, 2 and 3	XXV	JA6015-JA6086
2018-01-02	Individual Defendants' Opposition to Plaintiff's Motion for Rule 54(b) Certification and Stay	XXVI	JA6238-JA6245
2017-11-28	Individual Defendants’ Answer to Plaintiff's Second Amended Complaint	XXI	JA5021-JA5050
2016-09-23	Individual Defendants’ Motion for Summary Judgment (No. 1) Re: Plaintiff's Termination and Reinstatement Claims	V, VI, VII, VIII	JA1050-JA1862 (Under Seal)
2016-10-26	Individual Defendants’ Objections to the Declaration of James J. Cotter, Jr. Submitted in Opposition to all Individual Defendants’ Motions for Partial Summary Judgment	XX	JA4738-JA4749
2016-10-13	Individual Defendants’ Opposition to Plaintiff James J. Cotter Jr.’s Motion for Partial Summary Judgment	XVI	JA3811-JA3846

# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
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 Coddington 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



# JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-12-21	Order Re Individual Defendants' Partial MSJ Nos. 1–6 and MIL to Exclude Expert Testimony	XX	JA4931-JA4934
2016-09-23	Plaintiff James Cotter Jr.’s Motion for Partial Summary Judgment	XIV	JA3276-JA3310
2017-12-01	Plaintiff James Cotter Jr’s Supplemental Opposition to So-Called Summary Judgment Motions Nos. 2 and 3 and Gould Summary Judgment Motion	XXII	JA5286-JA5306
2016-10-13	Plaintiff James J. Cotter Jr.'s Opposition to Defendant Gould's Motion for Summary Judgment	XVII	JA4104-JA4140
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 1) re Plaintiff’s Termination and Reinstatement Claims	XVI	JA3931-JA3962
2016-10-13	Plaintiff James J. Cotter, Jr.'s Opposition to Individual Defendants' Motion for Partial Summary Judgment (No. 2) re The Issue of Director Independence	XVI	JA3963-JA3990
2017-12-01	Plaintiff’s Supplemental OPPS to MMSJ Nos. 2 and 6 and Gould Summary Judgment Motion	XXI	JA5226-JA5237
2017-12-01	Plaintiff’s Supplemental OPPS to MSJ Nos. 2 and 5 and Gould Summary Judgment Motion	XXI	JA5092-JA5107
2016-10-21	RDI Reply ISO Individual Defendants’ MSJ No. 1	XIX	JA4643-JA4652
2016-10-21	RDI Reply ISO Individual Defendants’ MSJ No. 2	XIX	JA4653-JA4663
2016-12-20	RDI’s Answer to Plaintiff's Second Amended Complaint	XX	JA4905-JA4930
2016-10-03	RDI’s Joinder to Individual Defendants’ Partial MSJ No. 1	XV	JA3725-JA3735

## JOINT APPENDIX IN SUPPORT OF APPELLANT’S OPENING BRIEF

Date	Description	Vol. #	Page Nos.
2016-10-03	RDI’s Joinder to the Individual Defendants’ MSJ No. 2 re The Issue of Director Independence	XV, XVI	JA3736-JA3757
2016-10-03	RDI’s Joinder to the Individual Defendants’ MSJ No. 4 re Plaintiff’s Claims Related to The Executive Committee	XVI	JA3758-JA3810
2016-10-21	RDI’s Reply ISO William Gould’s MSJ	XIX	JA4664-JA4669
2016-10-13	RDI’s Joinder to Individual Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment	XVII	JA4010-JA4103
2016-03-29	Reading International, Inc. (“RDI”)’s Answer to James J. Cotter, Jr.’s First Amended Complaint	I	JA122-JA143
2016-10-21	Reply ISO Individual Defendants’ Motion for Partial Summary Judgment (No. 2) re the Issue of Director Independence	XIX	JA4625-JA4642
2017-12-04	Reply ISO Individual Defendants’ Renewed Motions for Partial Summary Judgment Nos. 1 and 2	XXIV	JA5761-JA5790
2017-12-01	Request For Hearing On Defendant William Gould’s Previously-Filed MSJ	XXI	JA5051-JA5066
2015-11-10	Scheduling Order and Order Setting Civil Jury Trial, Pre-Trial Conference and Calendar Call	I	JA96-JA99
2016-09-02	Second Amended Verified Complaint	I	JA168-JA224
2018-01-04	The Remaining Director Defendants’ Motion for Judgment as a Matter of Law	XXVI	JA6260-JA6292

# JOINT APPENDIX IN SUPPORT OF APPELLANT'S OPENING BRIEF

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 XX (JA4738-4987)** 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 efilng service:

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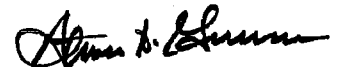
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An employee of Morris Law Group



CLERK OF THE COURT

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22 **EIGHTH JUDICIAL DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 **JAMES J. COTTER, JR.** individually and  
25 derivatively on behalf of Reading  
26 International, Inc.,

27 Plaintiffs,

28 v.

29 **MARGARET COTTER, ELLEN COTTER,**  
30 **GUY ADAMS, EDWARD KANE, DOUGLAS**  
31 **McEACHERN, WILLIAM GOULD, JUDY**  
32 **CODDING, MICHAEL WROTONIAK, and**  
33 **DOES 1 through 100, inclusive,**

34 Defendants.

35 **AND**

36 **READING INTERNATIONAL, INC.,** a Nevada  
37 corporation,

38 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'**  
**OBJECTIONS TO THE DECLARATION**  
**OF JAMES J. COTTER, JR. SUBMITTED**  
**IN OPPOSITION TO ALL INDIVIDUAL**  
**DEFENDANTS' MOTIONS FOR**  
**PARTIAL SUMMARY JUDGMENT**

Judge: Hon. Elizabeth Gonzalez  
Date of Hearing: Oct. 27, 2016  
Time of Hearing: 1:00 p.m.

1 Pursuant to Nevada Rule of Civil Procedure 56(e), Individual Defendants respectfully  
2 submit the following written objections to evidence submitted in support of Plaintiff's Opposition  
3 to All Individual Defendants' Motions for Partial Summary Judgment.

#### 4 INTRODUCTION

5 A Motion for Summary Judgment (or Opposition) depends, in part, upon the sufficiency of  
6 the affidavits filed. See Nev. R. Civ. P. 56(e). Affidavits must be made on personal knowledge  
7 and set forth facts that would be admissible into evidence and that show affirmatively that affiant  
8 is competent to testify. *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112  
9 Nev. 1161, 925 P.2d 496 (1996) (citing Nev. R. Civ. P. 56(e)).

10 Conclusory statements along with general allegations do not create issue of fact for  
11 summary judgment purposes. See Nev. R. Civ. P. 56(e); *Gunlord Corp. v. Bozzano*, 95 Nev. 243,  
12 245, 591 P.2d 1149, 1150-51 (1979) ("The [defendant's] affidavit in other respects is conclusory  
13 rather than factual and does not reflect that he had personal knowledge . . . and was competent to  
14 testify regarding it."). Moreover, "[a] genuine, triable dispute of fact is not created merely  
15 because a party's own testimony is self-contradictory or internally inconsistent, especially when  
16 no other evidence or testimony supports the non-moving party's version of events." *Rivers v.*  
17 *Lopez*, 2013 WL 8148789, at \*5 (Nev. Dist. Ct. Oct. 8, 2013).

18 Defendants object generally to Plaintiff's Declaration because it is largely based on  
19 speculation rather than personal knowledge. Such speculation is not evidence and does not, as a  
20 matter of law, create a material disputed issue of fact at the summary judgment stage. See Nev. R.  
21 Civ. P. 56(c); *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) ("The non-  
22 moving party's documentation must be admissible evidence, and he or she is not entitled to build a  
23 case on the gossamer threads of whimsy, speculation and conjecture.") (internal quotation marks  
24 and citation omitted).

25  
26 In addition, Plaintiff's speculative statements in large part contradict the well-established  
27 and undisputed evidence in this case. Plaintiff's Declaration is objectionable and should be  
28

1 stricken or excluded in its entirety. Defendants note the following non-exhaustive list of specific  
2 objections to particular statements in Plaintiff's Declaration.

3 **SPECIFIC OBJECTIONS**

MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION
<p data-bbox="342 594 906 699"><b>James J. Cotter, Jr. ("Plaintiff") Declaration, para 6, page 3, lines 21 through 25.</b></p> <p data-bbox="342 730 906 1035">"In fact, as early as 2006, James J Cotter, Sr. ('JJC, Sr. '), then the CEO and controlling shareholder of RDI, had communicated to the RDI board of directors his proposed succession plan for the positions of President and CEO. That plan was for me to work under the direction of JJC, Sr. to learn the businesses of RDI, including by functioning in a senior executive role."</p>	<p data-bbox="914 594 1468 909">A. <b>Hearsay (N.R.S. § 51.065).</b> The testimony purportedly relates to a conversation between James Cotter, Sr. and members of RDI's Board. Accordingly, the statement is inadmissible hearsay. Plaintiff has not demonstrated that the statement is subject to a recognized hearsay exception.</p>
<p data-bbox="342 1108 906 1171"><b>Plaintiff Declaration, para 8, page 4, lines 10 through 13.</b></p> <p data-bbox="342 1203 906 1444">"They also co-opted at least one employee, Linda Pham, who claimed at some point in 2014 that I had created a hostile work environment for her, which accusation was not well-taken and, in any event, moot with the passage of time by Spring 2015, as director Kane acknowledged at the time."</p>	<p data-bbox="914 1140 1468 1371">A. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Ms. Pham's accusations were "not well-taken" or "moot".</p>
<p data-bbox="342 1518 906 1581"><b>Plaintiff Declaration, para 17, page 6, lines 18 through 26.</b></p> <p data-bbox="342 1612 906 1915">"The term 'independent' as used in RDI's SEC filings do not refer to matters of Nevada law. It referred usually to the fact that, pursuant to the terms of the Company's listing agreement with NASDAQ, the stock exchange on which RDI stock trades, directors meet the standard of independence of NASDAQ. None of the director defendants have ever suggested to me that they</p>	<p data-bbox="914 1518 1468 1915">A. <b>New Evidence Not Disclosed in Discovery (N.R.C.P. 37(c)(1)).</b> When a party fails to disclose information required by Rule 16, that party is not permitted to use as evidence on a motion any information not so disclosed. Plaintiff has never previously disclosed this proffered explanation and is accordingly barred from doing so now. <i>See Tannoury v. Fernandez</i>, 2011 WL 7502238 (Nev. Dist. Ct. Nov. 30, 2011) (party's</p>

1 2 3 4 5 6 7 8 9 10 11 12	understood use of the term 'independent' in RDI's SEC filings to communicate anything other than that non-Cotter directors were not members of the Cotter family which, in one manner or another, controlled approximately 70% of the voting stock of RDI. As among members of the RDI Board of Directors, the term 'independent' was used historically to refer to directors who were not members of the Cotter family."	failure to disclose its alleged damages during discovery precluded him from later relying on such evidence at summary judgment).  B. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding what the other RDI Directors thought the term "independent" represented.  C. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief as to what other RDI Directors took "independent" to mean is speculative and therefore irrelevant.
13 14 15 16 17 18 19 20 21	<b>Plaintiff Declaration, para 20, page 7, lines 12 through 14.</b>  "Kane remains very close with my sisters, who still call him "Uncle Ed" (which I ceased doing after joining RDI). They continue to get together socially, including for family meals during holiday periods, which is what they admittedly did around the Christmas holidays in 2015."	A. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Kane, Ellen Cotter, and Margaret Cotter "continue to get together socially".  B. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief that Mr. Kane, Ellen Cotter and Margaret Cotter "continue to get together socially" is speculative and therefore irrelevant.
22 23 24 25 26 27 28	<b>Plaintiff Declaration, para 21, page 7, lines 21 through 25.</b>  "My sisters as executors of my father's estate are in position to see to it that Adams is or is not paid any monies he is owed on account of those carried interests."	A. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding how Ellen or Margaret Cotter can not pay money legally owed to Mr. Adams.



1 **Plaintiff Declaration, para 22, page 7, lines**  
2 **25 through 28, and page 8, line 1.**

3 “When I suspected that Adams had agreed  
4 with my sisters to vote to terminate me as  
5 President and CEO of RDI, that raised the  
6 issue of whether he was financially dependent  
7 on them. I now know that he is. I learned  
8 from Adams’ sworn declarations in his  
9 California state court divorce case that almost  
10 all of his income comes from RDI and from  
11 one or more companies that my sisters  
12 control. Adams is not independently  
13 wealthy.”  
14

A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Adams is “financially dependent” on Ellen or Margaret Cotter.

B. **Hearsay/Best Evidence (N.R.S. §§ 51.065, 52.235).** The testimony is purportedly based on California court documents. Accordingly, the statement is inadmissible hearsay and violates the Best Evidence Rule. Plaintiff has not demonstrated that the statement is subject to a recognized hearsay exception.

C. **Irrelevant (N.R.S. § 48.025).** Plaintiff’s unsubstantiated belief that “Adams is not independently wealthy” is irrelevant.

15 **Plaintiff Declaration, para 23, page 8, lines**  
16 **13 through 16.**

17 “I believe Margaret’s oldest child refers to  
18 Trisha and Michael as Aunt and Uncle.  
19 Michael’s communication with me as a  
20 director has been very guarded, which I  
21 understand to reflect his knowledge of the  
22 lawsuit and his close relationship with  
23 Margaret.”  
24

A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that “Margaret’s oldest child refers to Trisha and Michael as Aunt and Uncle.”

B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff’s “understanding” of why Michael’s communication with him has supposedly been “very guarded” is speculative and therefore irrelevant.

25 **Plaintiff Declaration, para 24, page 8, lines**  
26 **22 through 27.**

27 “Her reaction to the offer to purchase all of  
28 the stock of the Company at a price in excess  
of what it trades in the market (the ‘Offer’),  
first made by correspondence dated on or

A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding “Ms. Codding’s unwavering loyalty to Ellen.” Moreover, Plaintiff

JA4742

1 2 3 4 5 6 7 8	about May 31, 2015, reflected Ms. Coddington's unwavering loyalty to Ellen. Before the board meeting at which the Board was going to discuss the Offer, she indicated to me that there was no way that the Offer should even be considered (clearly having spoken to Ellen about it before the board meeting)."	has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Ms. Coddington and Ellen Cotter had "clearly" spoken before a board meeting.  B. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief that Ms. Coddington and Ellen Cotter had a conversation "before the board meeting" is speculative and therefore irrelevant.
9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<b>Plaintiff Declaration, para 28, page 9, lines 19 through 21.</b>  "It is clear to me that Bill Gould effectively has given up trying to do what he thinks is the proper thing to do as an RDI director, and is and since June 2015 has been in 'go along, get along' mode."	A. <b>Contradicts Plaintiff's Prior Testimony (N.R.C.P. 37(c)(1)).</b> Plaintiff's statement is inconsistent with his prior testimony and should be excluded. "Technically, I believe he's independent." Plaintiff's Depo., p. 79:13. <i>See Rivers</i> , 2013 WL 8148789, at *5 ("A genuine, triable dispute of fact is not created merely because a party's own testimony is self-contradictory or internally inconsistent[.]").  B. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Gould has "given up" doing what he thinks is proper.  C. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief that "Bill Gould effectively has given up trying to do what he thinks is the proper thing" is speculative and therefore irrelevant.
26 27 28	<b>Plaintiff Declaration, para 29, page 10, lines 12 through 16.</b>  "After it was activated and repopulated on June 12, 2015, it was used as a means to	A. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that

1 2 3 4 5 6	exclude me and then director Tim Storey, and to a lesser extent Bill Gould, from functioning as directors of RDI and, in some instances, even having knowledge of matters that were handled by the executive committee that historically and ordinarily were handled by RDI's Board of Directors."	the Executive Committee was "used as a means to exclude" him or any other RDI director.  B. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief that the Executive Committee was "activated" to "exclude" him or any other RDI director is speculative and therefore irrelevant.
7 8 9 10 11 12 13 14 15 16 17 18 19 20	<b>Plaintiff Declaration, para 32, page 11, lines 14 through 19.</b>  The stated reasons are reasons that [sic] no outside candidate could have met. The stated reasons are reasons that do not approximate, much less match, the criteria that the CEO search committee created and KF memorialized as the criteria to identify candidates and ultimately select a new President and CEO. The stated reasons for selecting Ellen were, as I heard them explained at the January board meeting, effectively distilled into a single consideration, namely, that Ellen and Margaret were controlling shareholders."	A. <b>Conclusory/Argumentative.</b> Without factual support, Plaintiff asserts that Ellen Cotter was made CEO because of "a single consideration, namely, that Ellen and Margaret were controlling shareholders." He says this despite the undisputed fact that Craig Tompkins drafted a seven-page memo addressed to the entire RDI Board listing over 18 reasons for why Ellen Cotter was the preferred candidate of the CEO Search Committee, including, but not limited to: she has the confidence of the existing senior management; she knows the Company, its assets, personnel, and operations; her experience as interim CEO; and the fact that the bulk of the Company's cash flow is derived from its entertainment activities, which she is very familiar with. Helpem Decl. to Mot. No. 5, ¶ 4, Ex. 3.
21 22 23 24 25 26 27 28	<b>Plaintiff Declaration, para 34, page 12, lines 11 through 13.</b>  "The point of the effort to exercise the supposed 100,000 share option was to ensure that Ellen and Margaret as executors would have more class B stock than [sic] third parties, including Mark Cuban."	A. <b>Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence to lay the foundation or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that "point of the effort to exercise" the Estate's options was to "have more class B stock than [sic] third parties[.]"  B. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's belief that "the point of the effort to exercise" the

JA4744

1		Estate's options to have more Class B stock than third parties is speculative and therefore irrelevant.
2		
3		<b>C. Contradicts Plaintiff's Own Complaint (N.R.C.P. 37(c)(1)).</b>
4		Plaintiff's statement contradicts allegations in his own complaint:
5		"Plaintiff is informed and believes that EC and MC took such actions because of a concern that, absent the exercise of the supposed option for the Estate to acquire 100,000 shares . . . EC and MC might have lacked sufficient votes to control the 2015 ASM and, in effect, unilaterally elect as RDI directors whomever they choose[.]"
6		Plaintiff's Second Amended Complaint ¶ 108. <i>See Rivers</i> , 2013 WL 8148789, at *5 ("A genuine, triable dispute of fact is not created merely because a party's own testimony is self-contradictory or internally inconsistent[.]").
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16	<b>Plaintiff Declaration, para 35, page 12, lines 26 through 28, and page 13, lines 1 through 3.</b>	<b>A. Lack of Personal Knowledge (N.R.S. § 50.025).</b> Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that the Company "in fact suffered the injury" from the Estate's options exercise or that the Company "cover[ed] the tax obligation that belong to the person or entity exercising the option."
17		
18	"I understand they did so so that the 100,000 shares supposedly could be registered with the Company in the name of Ellen and Margaret as executors prior to the record date. The Company received no benefit from this, in fact suffered the injury from replacing outstanding liquid class A stock with effectively illiquid class B stock and, I am informed and believe, from covering the tax obligation that belong to the person or entity exercising the option."	<b>B. Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's understanding as to why the executors of the Estate exercised the Estate's options is speculative and therefore irrelevant.
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26	<b>Plaintiff Declaration, para 36, page 13, lines 19 through 23.</b>	<b>A. Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff's personal belief that Margaret Cotter's additional compensation was "simply a gift" and
27		
28		

JA4745

1 2 3 4 5 6 7 8 9 10 11	<p>“Additionally, the \$200,000 paid to Margaret, ostensibly for concessions Margaret previously was willing to make for free to become an employee of the Company, and reportedly for prior services rendered which the Board year after year had not chosen to pay her, is simply a gift, presumably because Margaret made less money in 2015 due to the Stomp debacle.”</p>	<p>his guess as to why it was paid is speculative and therefore irrelevant.</p> <p>B. <b>Conclusory/Argumentative.</b> Without factual support, Plaintiff asserts that Margaret Cotter was paid additional sums “presumably because [she] made less money in 2015” despite the undisputed fact that the additional consulting fee compensation was for her services rendered to the Company in recent years including, but not limited to: predevelopment work on the Company’s NYC properties; management of the NYC properties; and management of Union Square tenant matter. <i>See</i> RDI 8-K filed March 10, 2016.</p>
12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p><b>Plaintiff Declaration, para 38, page 14, lines 3 through 4, and lines 9 through 10.</b></p> <p>“Adams in March 2016 was awarded what amounted to a \$50,000 bonus for being a director.”</p> <p>“I have no doubt that Adams was paid \$50,000 for what amounted to exemplary loyalty to Ellen.”</p>	<p>A. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff’s personal belief that Mr. Adams was “paid . . . for what amounted to exemplary loyalty to Ellen” is speculative and therefore irrelevant.</p> <p>B. <b>Conclusory/Argumentative.</b> Without factual support, Plaintiff asserts that “Adams was paid . . . for what amounted to exemplary loyalty to Ellen” despite the undisputed fact that Adams was paid the additional compensation for services rendered to the Company in 2015 including, but not limited to: assisting Ellen Cotter in an advisory capacity in her transition of roles into interim CEO and permanent CEO; advice on investor relations; and travel to New York to assist in evaluation of Union Square project. <i>See</i> Helpers Decl. to Mot. No. 6, ¶ 12, Ex. 11.</p>
26 27 28	<p><b>Plaintiff Declaration, para 40, page 14, lines 22 through 24.</b></p>	<p>A. <b>Irrelevant/Speculation (N.R.S. § 48.025).</b> Plaintiff does not know what constitutes a business plan and his “understanding” that Ellen’s supposed</p>

JA4746

1 "On or about June 7, 2016, in view of the  
2 Offer, I asked Ellen to provide me the  
3 Company's business plan. I understood that  
4 there was none and her failure to respond  
5 confirmed that."

"failure to respond" proves one does  
not exists is speculative and therefore  
irrelevant.

B. **Conclusory/Argumentative.** Without  
factual support, Plaintiff asserts that  
RDI does not have a business plan  
despite the fact that it has been  
presented numerous times at  
conferences such as the 17th Annual  
B. Riley & Co. Investor Conference  
on May 26, 2016 (Helpern Decl. to  
Mot. No. 3, ¶ 7 Ex. 6) and the Gabelli  
& Company 8th Annual Movie &  
Entertainment Conference on June 9,  
2016 (*Id.* at ¶ 8 Ex. 7). RDI's business  
plan is also included in the  
presentation titled "MISSION,  
VISION, & STRATEGY" dated  
February 18, 2016 (*Id.* at ¶ 6 Ex. 5).

13 **Plaintiff Declaration, para 41, page 15,**  
14 **lines 8 through 12.**

15 "None asked questions about whether  
16 management was preparing a business plan to  
17 do so or, for that matter, simply preparing a  
18 long-term or strategic business plan. None  
19 exists. Instead, the non-Cotter directors  
20 simply ascertained that Ellen and Margaret  
21 wanted to reject the Offer and agreed that the  
22 price offered was inadequate. They all voted  
23 to proceed in the manner Ellen  
24 recommended."

A. **Conclusory/Argumentative.** Without  
factual support, Plaintiff asserts that  
no questions were asked regarding  
RDI's business plan or the Unsolicited  
Offer despite the undisputed fact that  
multiple discussions occurred at both  
the June 2, 2016 and July 23, 2016  
board meetings—in fact, a  
comprehensive presentation was given  
by Ellen Cotter and other RDI  
executives to the entire board. *See id.*  
at ¶ 2 Ex. 1.

B. **Irrelevant/Speculation (N.R.S. §**  
**48.025).** Plaintiff does not know what  
constitutes a business plan. Moreover,  
his personal belief as to the thought  
process and reasoning of the non-  
Cotter directors in voting against the  
Offer is speculative and therefore  
irrelevant.

1 Dated: October 26, 2016

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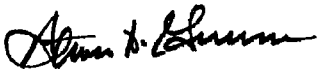
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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 26, 2016, I caused a true and correct copy of the foregoing  
**INDIVIDUAL DEFENDANTS' EVIDENTIARY OBJECTIONS TO THE DECLARATION  
OF JAMES J. COTTER, JR. SUBMITTED IN OPPOSITION TO ALL INDIVIDUAL  
DEFENDANTS' MOTIONS FOR PARTIAL 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





CLERK OF THE COURT

TRAN

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

JAMES COTTER, JR.

Plaintiff

vs.

MARGARET COTTER, et al.

Defendants  
.....

CASE NO. A-719860  
A-735305  
P-082942

DEPT. NO. XI

**Transcript of  
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON MOTIONS**

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:

JILL HAWKINS  
District Court

TRANSCRIPTION BY:

FLORENCE HOYT  
Las Vegas, Nevada 89146

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

JA4750

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MARSHALL SEARCY, ESQ.  
EKWAN RHOW, ESQ.

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

2 (Court was called to order)

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

5 THE COURT: What?

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

7 THE COURT: What order?

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

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

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

13 THE COURT: We're missing an important group.

14 MR. FERRARIO: That's true.

15 (Pause in the proceedings)

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

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

20 MR. WAITE: Correct.

21 (Pause in the proceedings)

22 THE COURT: What time were we going to start?

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

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

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

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

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

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

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

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

12 (Pause in the proceedings)

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

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

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

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

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

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

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

1 THE COURT: Do you have people attending by phone?

2 MR. FERRARIO: Excuse me?

3 THE COURT: Do you have people attending by phone?

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

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

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

9 THE COURT: Who's on the telephone?

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

12 THE COURT: Lovely. Thank you.

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

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

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

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

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

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

14           THE COURT: Maybe.

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

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

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

19           THE COURT: You should have lived it.

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

22           THE COURT: You were here, yeah.

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

1 THE COURT: Not a former CEO.

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

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

14 MR. FERRARIO: But --

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

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

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

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



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

3 MR. FERRARIO: I did.

4 THE COURT: Okay.

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

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

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

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

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

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

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

8 MR. FERRARIO: They could tell him.

9 THE COURT: Yeah.

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

17 THE COURT: Correct.

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

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

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

23 THE COURT: Well, it depends --

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

25 THE COURT: Depends upon what the testimony is.

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

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

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

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

18 MR. FERRARIO: Okay.

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

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

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

1 to "provided to"?

2 MR. FERRARIO: I think if --

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

8 MR. FERRARIO: Right.

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

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

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

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

1 them. Because it's changed over time.

2 MR. FERRARIO: Okay. But the briefing --

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

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

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

16 MR. FERRARIO: I understand.

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

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

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

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

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

13 THE COURT: Okay.

14 MR. FERRARIO: And so, you know, with that I'll  
15 answer any questions Your Honor has. Again, I think it was  
16 extensively briefed and it's -- you know.

17 THE COURT: It was extensively briefed. It was well  
18 briefed. It was very thorough. It just -- I -- there was  
19 clearly a miscommunication of some sort. And I thought I was  
20 really clear when I put that language in there, because I  
21 monkeyed with it a little.

22 MR. FERRARIO: Thank you, Your Honor.

23 THE COURT: Mr. Krum, did you want to say anything  
24 on this motion?

25 MR. KRUM: I do, Your Honor.

1 THE COURT: Okay.

2 MR. KRUM: Thank you. Of course, the issue isn't an  
3 exception, it's waiver. That's what Kane and Adams did.

4 Second, with respect to 78.138 there was no further  
5 examination necessary. We have other evidence from a  
6 contemporaneous email from Mr. Kane in which he expresses  
7 reservations about whether Mr. Tompkins has answered the  
8 questions posed by the third compensation committee member,  
9 Mr. Storey. That's it for the law and the matters of that  
10 respect.

11 I want to make clear, however, Your Honor, that from  
12 our perspective this is not the same issue as it was from the  
13 perspective of the intervenor plaintiffs. For them the  
14 100,000 share option was about whether they could secure  
15 control at the annual shareholders meeting. For us the  
16 developments of the 100,000 share option, meaning the  
17 communications that Tompkins had with directors, occurred at a  
18 point in time when Ellen Cotter and Margaret Cotter commenced  
19 the course of conduct, enlisted the agreement of Kane and  
20 Adams and McEachern that carry on to this day. So Tompkins,  
21 according to evidence in this case, chose the sisters' side.  
22 The evidence, by the way, is Mr. Kane's contemporaneous email.  
23 Mr. Kane also repeatedly expresses in email reservations about  
24 Mr. Tompkins serving in any significant role with the company.  
25 Mr. Tompkins, as it turned out, effectively became the

1 consigliere to Ms. Cotter and starting with his advice to  
2 Ellen Cotter in March or April that she needed to exercise  
3 this option to ensure control of the company because there was  
4 the possibility that the shares held in the name of the Trust  
5 could not be voted or should not be counted. That was the  
6 beginning of this whole scheme to secure control.

7           So the point of these communications, Your Honor, is  
8 not confined to a question of whether there was a fiduciary  
9 breach by Kane and Adams in approving that option, which it  
10 is, it concerns that, but it goes to the bigger part of the  
11 case. And the reason for that, Your Honor, is the timeline.  
12 Because in March the five non-Cotter directors made Mr. Storey  
13 ombudsman with the charge to work with the three Cotters and  
14 report back periodically, and then they'd revisit the  
15 situation in June. But Storey quickly alienated Ellen and  
16 Margaret Cotter, prompting Kane to intervene. And Ellen and  
17 Margaret Cotter conferred with Tompkins, and we have these  
18 developments of the 100,000 share option and at more or less  
19 the same time Kane and Adams and McEachern agreed with Ellen  
20 to vote to terminate plaintiff. So it's actually a big, big  
21 part of the case in terms of what transpired at the outset.  
22 It's not just the issue that I think we perhaps led you to  
23 believe it was previously.

24           The legal issues I think I just spoke to briefly.  
25 And unless you have questions, I will step down.



1 THE COURT: Thank you.

2 The motion for clarification is granted in part. If  
3 document or information was not provided to Mr. Kane and  
4 Adams, it does not fall within the delineated items that are  
5 included on the October 3rd order, okay.

6 Now, whoever's on the phone, we may lose you,  
7 because Kevin's now going to call in to my 1:15.

8 When you return from your five-minute recess we are  
9 going to go to Cotter's motion to vacate and reset pending  
10 dates and reopen discovery on order shortening time, fourth  
11 request.

12 (Court recessed at 1:22 p.m., until 1:26 p.m.)

13 THE COURT: Okay. Mr. Krum, you're up.

14 MR. KRUM: This is the motion to vacate, correct,  
15 Your Honor?

16 THE COURT: That is -- it's essentially a motion to  
17 continue trial.

18 MR. KRUM: Right. Thank you.

19 Well, as you saw, Your Honor, fact discovery isn't  
20 complete, and based on what's transpired in terms of how the  
21 defendants have failed to produce documents in response to  
22 your orders of March 30, it's not going to be complete.  
23 Expert discovery, were that the only thing we had to do, might  
24 be complete. We have some witness conflicts, and I may have a  
25 conflict. So let me talk about those four items.

1 Well, August 3 one of the motions you granted was a  
2 motion to compel discovery regarding the offer. That included  
3 directing the defendants to produce a pretty finite set of  
4 documents and of the company to produce a Rule 30(b)(6)  
5 witness. The individual defendants other than Mr. Gould  
6 promptly represented that they would produce the documents and  
7 offered deposition dates a couple weeks hence, to which our  
8 response was, great, when will we get the documents because we  
9 need to review them to prepare, and, oh, by the way, when will  
10 we get the documents in response to the other order, which, of  
11 course, was the advice of counsel order that was just the  
12 subject of the last motion. There were no answers to that.  
13 And then ultimately those individual defendants didn't produce  
14 a single document regarding the offer. They said, well, the  
15 company will produce the documents.

16 So on September 15 the company produced a modest set  
17 of documents, but in our view, Your Honor, that production is  
18 incomplete for at least two reasons, one, the documents  
19 produced include board minutes of the of the single meeting  
20 from June, I think it was, at which the directors supposedly  
21 deliberated about how to respond to the offer. Those board  
22 minutes, Your Honor, include fairly detailed information that  
23 supposedly is taken from an oral presentation Ellen Cotter  
24 gave to the directors at that board meeting. In other words,  
25 the board members were given no written material before or at

1 the meeting. The production is incomplete because it doesn't  
2 include whatever notes or information was used by Ellen Cotter  
3 to make that presentation, which, of course, is the very kind  
4 of information one would need to meaningfully test the  
5 company's Rule 30(b)(6) witness, as well as the three director  
6 defendants whose depositions have not been completed in terms  
7 of, well, did you understand this information, was it  
8 accurate, did you think about this, did you think about that.  
9 But we don't have that documentation.

10 Also, Your Honor -- and my comments now are  
11 predicated entirely upon a news article that came out a couple  
12 weeks ago; in other words, nothing I'm about to say is  
13 predicated on anything I've learned from my client or any  
14 documents that my client has received from the company,  
15 meaning it's not non-public information. And the news article  
16 a couple weeks ago reported that the offerors were back with  
17 what apparently is a somewhat revised offer, I believe, at  
18 least in terms of the participants. And so obviously, Your  
19 Honor, that situation continues to unfold, assuming that news  
20 article is correct, and theoretically, at least, there should  
21 be additional documents, starting with whatever the new offer  
22 is or the revised offer or whatever it is and continuing with  
23 whatever communications, if any, there are as among the  
24 director defendants.

25 So the document isn't complete, and when it is

1 complete and when the documentation that's going to be  
2 produced in response to your modified order regarding advice  
3 of counsel, finally then we'll be in a position to resume or  
4 commence, as the case may be, and conclude these three  
5 director depositions, as well as the deposition of Craig  
6 Tompkins.

7           The other half of this, of course, as you full well  
8 understand given the last motion we had, is that the  
9 defendants haven't produced a single document that you ordered  
10 to be produced on the subject of advice of counsel. From our  
11 perspective there's nothing they argued in their motion to  
12 reconsider or clarify that they could not have raised  
13 following the hearing. They chose to wait until your order  
14 was signed on October 3rd and then file a motion, and it was  
15 just heard. So I don't know when we'll receive those  
16 documents. It may well be that counsel for the defendants,  
17 including the company, don't know what exactly they're going  
18 to produce, much less when. But obviously, Your Honor, I  
19 can't commence and conclude the depositions that remain, the  
20 percipient witness depositions that remain unfinished until we  
21 have that documentation and have time sufficient to prepare to  
22 use it.

23           That, Your Honor, is of no fault of plaintiff.  
24 It's -- we're in substantially the same position we were on  
25 August 30. We're in exactly the same position we were in

1 September 15, and nowhere along the way were we in a position  
2 to resume and conclude these depositions. And if you recall,  
3 Your Honor, one of those depositions you ordered to resume,  
4 that is, with Mr. McEachern, with respect to that very  
5 subject, the offer. And I omitted him before, I think. So  
6 this is no fault of ours. And we could have proceeded with  
7 the depositions, but it would have been a waste of everyone's  
8 time, because we would have been back once or twice to order  
9 the same deponents to come back after the defendants produced  
10 the documents you ordered them to produce on August 30th.

11           Respectfully, Your Honor, the manner in which  
12 they've responded to these orders that you granted, the  
13 motions to compel you granted sure smack of gaming the system  
14 with the hope that the Court will let them get away with it so  
15 that the plaintiff's required to go to trial without the  
16 discovery you have ordered plaintiff to be provided. And so,  
17 again, the director depositions are Cotting, Adams, and  
18 McEachern. There's Craig Tompkins, who is obviously going to  
19 have a much different examination now when these advice of  
20 counsel documents are produced, and there's a 30(b)(6) witness  
21 who was identified to us a week or two ago as Ellen Cotter.  
22 Obviously from our perspective, Your Honor, the missing  
23 documents, being the two categories of documents and the offer  
24 that haven't been produced are critical to conduct the  
25 Rule 30(b)(6) deposition that's now Ellen Cotter that you

1 ordered.

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

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

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

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

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

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

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

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

9 THE COURT: But he used to be a director.

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

12 THE COURT: All right.

13 MR. KRUM: Kane objects, my client objects.

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

16 MR. KRUM: Right.

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

21 MR. KRUM: I think -- unless I've forgotten, Your  
22 Honor, it's the five, the three directors, Tompkins, and the  
23 30(b)(6).

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



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

4           THE COURT: Okay.

5           MR. KRUM: The -- what happened on the experts is  
6 they just sent out a notice and said, come to Quinn Emanuel in  
7 Los Angeles, have this guy from Boston and this person from  
8 Philadelphia and this person from New York all show up. They  
9 didn't call me, they didn't email me. And, of course, that  
10 came in the midst of summary judgment papers or something, and  
11 so, of course, that didn't come fast. We didn't produce them  
12 then. We ultimately worked out a schedule, and the only  
13 delay, if you want to call it that, Your Honor, was an  
14 extension of one week in providing rebuttal reports from the  
15 18th of September to the 25th. And that was suggested by  
16 counsel for the interested director defendants, not by counsel  
17 for plaintiff. We agree.

18           We have one other extant scheduling conflict. The  
19 plaintiff and Ellen and Margaret Cotter are in trial in the  
20 California Trust action on November 14 and 15, and November  
21 28th through December 1. And then finally I'm obliged to  
22 observe that I have a potential debilitating conflict that  
23 either will arise or won't, which I've previously mentioned to  
24 counsel and the Court, and it's one over which I have limited  
25 control. I'm trying to resolve it, but it hasn't been

1 resolved. So that issue remains outstanding.

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

4 THE COURT: Those were my questions for you.

5 MR. KRUM: Thank you.

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

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

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

14 MR. KRUM: They have dates.

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

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

19 THE COURT: What is it?

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

23 THE COURT: But when do they start?

24 MR. TAYBACK: They've started.

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

1 It keeps going.

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

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

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

12 MR. TAYBACK: Correct.

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

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

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

19 THE COURT: Right. No. They --

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

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

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

1 break for a jury.

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

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

9 MR. TAYBACK: That's right.

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

12 Mr. Ferrario.

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

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

17 MR. FERRARIO: Right.

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

21 MR. FERRARIO: Right. So --

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

24 MR. FERRARIO: Who, Lenhard?

25 THE COURT: Lenhard.

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

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

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

11 THE COURT: That's a problem.

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

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

16 MR. FERRARIO: What?

17 THE COURT: I don't have a courtroom.

18 MR. FERRARIO: Where are you going?

19 THE COURT: I don't have a courtroom.

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

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

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

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

1 not the chief judge.

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

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

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

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

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

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

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

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

17 MR. FERRARIO: Do we still have the CLC?

18 THE COURT: No, we do not.

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

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

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

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

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

2 MR. FERRARIO: Okay. Then that moots it.

3 THE COURT: Okay.

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

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

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

20 THE COURT: Adams?

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

22 THE COURT: Tompkins?

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

24 THE COURT: 30(b)(6)?

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

1 UNIDENTIFIED SPEAKER: It's limited to two hours.

2 THE COURT: Five experts, all --

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

4 Excuse me.

5 THE COURT: I limited it to two hours.

6 MR. FERRARIO: And then --

7 THE COURT: Five experts all over the country.

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

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

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



1 every decision that's made by the board.

2 THE COURT: Yes.

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

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

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

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

8           MS. HENDRICKS: They're not.

9           MR. FERRARIO: They're not all set.

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

12          MR. FERRARIO: We need to get those set.

13          THE COURT: You need to get them finished.

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

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

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

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

12           THE COURT: You're not done.

13           MR. FERRARIO: Huh?

14           THE COURT: You're not done.

15           MR. FERRARIO: Your Honor --

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

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

22           THE COURT: Okay.

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

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

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

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

4 THE COURT: Great. That's easy.

5 MR. FERRARIO: That's it.

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

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

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

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

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

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

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

21 MR. FERRARIO: No, that --

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

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

3 THE COURT: Right.

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

6 THE COURT: Me, too.

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

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

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

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

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

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

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

22 MR. SEARCY: Your Honor, we blocked --

23 THE COURT: Wait. Wait, Mr. Searcy.

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

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

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

6 THE COURT: Sure. So you think --

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

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

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

13 THE COURT: Really.

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

16 MR. FERRARIO: They are short. And I know Ellen  
17 Cotter -- we've talked to her about -- because she's the  
18 30(b)(6), and that's a two-hour depo, and she's, you know, as  
19 flexible as she can be running the company and all. And then  
20 we do have to accommodate her when she's in the trust  
21 litigation. But Mr. Krum's client has that same issue. So  
22 there's a couple days, I think the 14th, 15th, 16th they may  
23 be in trial down there. We can make all that happen.

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

1 MR. FERRARIO: Yes.

2 THE COURT: Best of all possible worlds.

3 MR. FERRARIO: Best of all worlds.

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

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

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

10 MR. FERRARIO: Oh.

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

14 MR. FERRARIO: I think we can do it.

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

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

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

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

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

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

3 MR. FERRARIO: Yes.

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

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

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

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

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

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

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

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



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

2 THE COURT: So let me go to another issue. So you

3 know you took a writ; right? Or no. Mr. Krum took a writ,

4 and there's a stay related to some documents that he has. Are

5 you worried about those documents being available prior to you

6 starting trial?

7 MR. FERRARIO: We've talked amongst ourselves, and

8 if we can get the trial date, we're prepared to proceed with

9 that writ pending and the stay in place.

10 THE COURT: Okay. So you're not really worried

11 about those documents anymore.

12 MR. FERRARIO: No. I mean, we're worried about

13 them, but it's not worth forgoing the trial and having this

14 linger.

15 THE COURT: Okay. Mr. Krum --

16 Mr. Ferrario, was there anything else you wanted to

17 say before I hear from Mr. Krum again?

18 MR. FERRARIO: No. I know Mr. Searcy had some

19 things he wanted to say, Your Honor.

20 THE COURT: I've been grilling him when he's been

21 sitting there the whole time.

22 What else, Mr. Searcy?

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

24 MR. SEARCY: I don't have much to add, Your Honor.

25 You know, there was an issue that came up that Mr. Krum

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

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

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

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

12 THE COURT: Wait.

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

18 THE COURT: I understand what you're saying.

19 MR. FERRARIO: Okay.

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

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

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

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

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

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

10 MR. FERRARIO: Yeah. Jumping around.

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

13 THE COURT: All the remaining experts?

14 MR. SEARCY: That's right.

15 THE COURT: Mr. Krum.

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

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

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

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

1 the percipient witnesses.

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

7           And the other half of that, of course, is, as I  
8 mentioned earlier, these folks seem to be tremendously  
9 successful and terribly busy, because as to most of them they  
10 came up with one or two or three days or half days in a period  
11 of a month. But, you know, counsel will do what they can  
12 subject to the preexisting obligations of those experts. But  
13 to assume we're going to get those by done by December 1st or  
14 9th or whatever is I think in all likelihood wishful thinking.  
15 Thank you.

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

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

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

3 THE COURT: Okay. Anything else?

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

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

8 MR. KRUM: Correct.

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

12 THE COURT: It was.

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

14 THE COURT: And I granted it.

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

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

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

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

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

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

10 MR. KRUM: I'm sorry.

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

19 MR. KRUM: Correct.

20 THE COURT: That's a different issue.

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

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

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

1 was framed.

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

4 MR. KRUM: Okay.

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

7 MR. KRUM: Right.

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

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

15 MR. FERRARIO: We will.

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

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

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

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

23 MR. FERRARIO: Oh, that's all?

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



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

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

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

13 MR. FERRARIO: Okay. So --

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

16 MR. FERRARIO: Right.

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

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

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

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

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

8 THE COURT: We all know that.

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

19 THE COURT: I can't tell you that right now. I can  
20 tell you that I will see you for a status check on December  
21 1st, and you may appear by phone if you are out and about  
22 taking depositions. We can do a telephonic appearance to find  
23 out where you are on the deposition trail, where you are  
24 finishing, and what it looks like both from my side and from  
25 your side about that issue. But I can't tell you right now

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

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

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

6 MR. FERRARIO: We understand that.

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

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

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

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

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

19 MR. FERRARIO: I think we are.

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

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

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

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

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

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

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

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

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

2 THE COURT: I know.

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

5 THE COURT: I know.

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

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

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

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

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

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

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

1 fiduciary duties?

2 MR. TAYBACK: Yes.

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

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

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

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

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



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

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

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

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

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

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

19 THE COURT: Uh-huh.

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

24 THE COURT: Yes.

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

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

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

8 MR. TAYBACK: That's correct.

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

11 MR. TAYBACK: That's absolutely correct.

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

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

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

23 MR. TAYBACK: If I'm --

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