

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.

Electronically Filed  
Jan 22 2019 01:19 p.m.  
Supreme Court Case No: A75053  
Clerk of Supreme Court

JOINT APPENDIX IN SUPPORT OF  
APPELLANT'S OPENING BRIEF

VOLUME XXIV (JA5737-5897)

Steve Morris, Esq. (#1543)  
Akke Levin, Esq. (#9102)  
Morris Law Group  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, NV 89101  
Telephone: (702) 474-9400

Attorneys for Appellant  
James J. Cotter, Jr.

# 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 Coddling 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. Helpen 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. Barnett 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 XXIV (JA5737-5897)** 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:

Stan Johnson  
Cohen-Johnson, LLC  
255 East Warm Springs Road, Ste. 110  
Las Vegas, NV 89119

Christopher Tayback  
Marshall Searcy  
Quinn Emanuel Urquhart & Sullivan LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, CA 90017  
[christayback@quinnemanuel.com](mailto:christayback@quinnemanuel.com)  
[marshallsearcy@quinnemanuel.com](mailto:marshallsearcy@quinnemanuel.com)

*Attorneys for Respondents Edward Kane,  
Douglas McEachern, Judy Coddling, and  
Michael Wrotniak*

Ara H. Shirinian, Settlement Judge  
10651 Capesthorpe Way  
Las Vegas, Nevada 89135  
[arashirinian@cox.net](mailto:arashirinian@cox.net)

Mark Ferrario  
Kara Hendricks  
Tami Cowden  
Greenberg Traurig, LLP  
10845 Griffith Peak Dr.  
Las Vegas, NV 89135  
*Attorneys for Nominal  
Defendant Reading  
International, Inc.*

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

# Exhibit B

CONFIDENTIAL

JA5737  
[REDACTED]

Proposed Executive Compensation and Appointments - Recommended by Compensation Committee Board of Directors Meeting - March 10, 2016						
Name	Proposed or Existing Executive Title	Proposed 2016 Base Salary	Proposed 2016 Short-Term Incentive Bonus Potential	Proposed 2016 Long-Term Incentive**	Proposed 2016 Potential Maximum Compensation (Total)	Section 16 Officer
Ellen Cotter	President & Chief Executive Officer*	\$450,000†	\$427,500 (95% of Base Salary)	\$900,000	X	X
Dev Glöse	Executive Vice President, Chief Financial Officer & Treasurer	\$400,000***†	\$380,000**†	\$0	X	X
S. Craig Tompkins	Executive Vice President, General Counsel & Corporate Secretary	\$410,000	\$392,500 (95% of Base Salary)	\$100,000	X	X
Andrzej Matczynski	Executive Vice President - Global Operations	\$335,000†	\$318,000 (95% of Base Salary)	\$75,000	X	X
Robert Smerling	President - US Chemicals	\$375,000†	\$352,500 (95% of Base Salary)	\$100,000	X	X
Wayne Smith	Managing Director - Australia & New Zealand*	AUS\$70,000†	AUS\$66,500 (95% of Base Salary)	AUS\$15,000		X
Margaret Colter	Executive Vice President - Real Estate Management & NYC Development	\$350,000	\$332,500 (95% of Base Salary)	\$100,000		X
Matthew Bourke	Managing Director - Real Estate - Australia & New Zealand	AUS\$115,000	AUS\$109,250 (95% of Base Salary)	AUS\$15,000		X

We are proposing that the Board approve the following Executives' titles:

Gilbert Avanes	Vice President - Finance, Planning & Analysis
Mark Douglas	Director - Property Development - Australia & New Zealand
Teri Majore	Vice President - Chemical Operations (US)
Doug Hawkins	Vice President - Construction & Facilities Management (US)
Keri Lee	Vice President - Food & Beverage (US)

\*No proposed changes. Existing title reflected in red.

\*\*Proposed includes 50% Non-Qualified Options and 50% Restricted Share Units.

\*\*\*Required by Employment Agreement

† The Committee is recommending the elimination of car allowances. Management will work towards this goal in 2016.

## **EXHIBIT 8**

JA5739

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Plaintiff, )

vs. )

Index No. A-15-179860-B

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

Defendants. )

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

Nominal Defendant. )  
----- )

VIDEOTAPED DEPOSITION OF ELLEN COTTER

New York, New York

Thursday, June 16, 2016

Reported by:  
MICHELLE COX  
JOB NO. 316936



1 construction agreement. There's something  
2 called an "early start agreement" that dealt  
3 with abatement and demolition.

4 I don't know if, at this point, they had  
5 actually picked the contractor, but I know that  
6 they had worked on evaluating the different  
7 contractors, and ultimately selected CNY to  
8 pursue the project.

9 I think at this point they were still  
10 working on getting the variance done to provide  
11 us with the appropriate office and retail  
12 zoning. They were working on the plans with  
13 BKSK, the architect. And we had obviously  
14 started talking to real estate brokers. I'm  
15 sure, at this point they had talked to a number  
16 of real estate brokers and ultimately selected  
17 Newmark.

18 Q What was the range of anticipated costs of  
19 all the activities you just described?

20 A Well, ultimately, the project will cost  
21 us -- we're seeking financing for \$85 million.

22 Q Was it your view that -- was it your view  
23 in July of 2015 that RDI would not benefit from  
24 the input of someone with the real estate  
25 development experience and expertise as the --

1 as any of the director of real estate  
2 candidates possessed, in terms of planning and  
3 executing all these activities with the cost at  
4 least financed of 85 million?

5 MR. TAYBACK: Object to the form of the  
6 question.

7 You can answer.

8 A I believe at this point I put the search  
9 on hold, because we were looking for a  
10 permanent CEO, that the specification required  
11 somebody with a real estate background. So I  
12 thought it would be better if we were hiring a  
13 CEO to be able to let him or her choose who  
14 they would be working with.

15 At this point, with respect to the real  
16 estate projects in New York, I was very  
17 comfortable with Margaret and the team that she  
18 had been working with. Michael Buckley from  
19 Edifice, who's referred to, he's the developer  
20 who we were getting the development management  
21 agreement done with, is an experienced real  
22 estate developer, had built buildings in  
23 New York City, understood the process, and  
24 probably was the best person because he was on  
25 the ground and had a team on the ground to get

1 it done properly.

2 Q Well, as a practical matter, then, this is  
3 the -- some of the responsibilities of a person  
4 holding the position of director of real estate  
5 at RDI had been mooted or completed, as the  
6 case may be, in the time that passed between  
7 July 2015 and the selection of this new CEO in  
8 January of 2016, right?

9 MR. TAYBACK: Object the form of the  
10 question.

11 You can answer.

12 A Between -- between this period of time and  
13 when I became the CEO, I became very  
14 comfortable with Margaret and what she was  
15 doing in New York, together with the consultant  
16 team.

17 MR. KRUM: I'll ask the court reporter to  
18 read the question back.

19 Q It was about, Ms. Cotter, what happened  
20 during the approximate six-month period from  
21 July of 2015 to January of 2016, at least  
22 that's what I think it was, but we'll see when  
23 the court reporter reads it.

24 MR. TAYBACK: I'm not sure.

25 If you want to ask her that question, I

1 won't have an objection.

2 (Record read.)

3 MR. TAYBACK: Restate my objection. Vague  
4 and confusing. Vague is for a practical  
5 matter.

6 You can answer.

7 A Some of the work that a director of real  
8 estate would have done was actually -- we  
9 couldn't stop the process. So the whole  
10 management team was working on moving the  
11 projects forward.

12 Q And the projects moved forward, correct?

13 A Yes.

14 Q And insofar as the director of real estate  
15 might have expressed a view different than the  
16 view that was accepted and implemented, that  
17 didn't happen because he or she wasn't hired,  
18 right?

19 A Well, we didn't have a new person hired,  
20 but all of the work we've done to date,  
21 together with Margaret and Edifice and the  
22 architects, the contractor, the leasing agent,  
23 I think that we've done a very good job  
24 positioning this project.

25 Q The arch- -- excuse me.

1           The contractor was CNY, right?

2     A     CNY.

3     Q     The contractor was hired when?

4     A     I don't remember exactly when they were  
5     hired. They -- so far, they've been hired  
6     under an early start agreement to conduct  
7     abatement and demolition, internal demolition  
8     work.

9           The actual construction management  
10    agreement that will govern the -- you know,  
11    broader construction hasn't been signed yet.

12    Q     Has the leasing agent been hired?

13    A     Yes.

14    Q     When was the leasing agent hired?

15    A     I'm not sure exactly when they were hired.  
16    I would think sometime during the summer of  
17    2015.

18    Q     Was the fact that those activities that  
19    had been completed in the July through  
20    December 2015 time period, were now done and  
21    behind, a consideration in your decision to  
22    give Margaret, your sister, a job as the senior  
23    person at RDI responsible for development of  
24    these New York City real estate projects or  
25    properties?

1 A I don't know if that factored into my  
2 decision.

3 But as we worked on this project through  
4 the year, it was clear to me that she was doing  
5 everything that anybody else would have done.  
6 So -- and she cared so much about the project  
7 and making sure that the project was done, was  
8 done correctly, and was done in a way that we  
9 would have a satisfactory return.

10 Q Directing your attention, Ms. Cotter, to  
11 the July 27 executive committee meeting minutes  
12 that are part of Exhibit 329, those are the  
13 pages that are numbered ending in 107 to 110 in  
14 the lower right.

15 Do you have those?

16 A Yes.

17 Q Was there any reason that any of the items  
18 discussed on those minutes of the executive  
19 committee from July 27, 2015, could not have  
20 been raised with the full board of directors of  
21 RDI, rather than simply the executive  
22 committee?

23 MR. TAYBACK: Objection. Assumes facts.

24 You can answer.

25 A If you read these minutes, they are really

1 A Prior to June 12th, there was no  
2 discussion about me being interim CEO.

3 Q By the time of the first meeting  
4 concerning the subject of termination of  
5 Jim Cotter, Jr. as CEO, by which I'm referring  
6 to May 21, 2015, did you understand that each  
7 of Doug McEachern, Ed Kane and Margaret Cotter  
8 were agreeable to Guy Adams serving as interim  
9 CEO?

10 A That's my recollection.

11 Q That's based on conversations you had with  
12 each of them, correct?

13 A Yes.

14 Q And as you sit here today, it's your best  
15 recollection that the first time the notion of  
16 you serving as interim CEO arose was at the  
17 meeting of June 12, 2015, following the vote to  
18 terminate Jim Cotter, Jr. as CEO?

19 A Yes.

20 THE VIDEOGRAPHER: Mr. Krum, sorry to  
21 interrupt, but try not to touch the cord,  
22 thanks. It's making noise.

23 MR. KRUM: Sorry.

24 Q Who said what at that time about Guy Adams  
25 serving as interim CEO or not?

1           **"At the time" being June 12th.**

2     A     My recollection of the board meeting was  
3     that we were discussing who would be the  
4     interim CEO. I was in New York on a conference  
5     call with my sister. People were different  
6     places. It was a telephonic meeting. And I  
7     don't remember the exact conversation, but  
8     somehow it came up that I should take on the  
9     role as the interim CEO for a limited period of  
10    time so that we can consider this a little bit  
11    further, and determine who would be the "real  
12    interim CEO."

13           So I was -- I was surprised, but I told  
14    the board that I would take on that role.

15    Q     Who raised the subject of you being the  
16    interim CEO on June 12th?

17    A     I don't recall.

18    Q     You became the interim CEO on June 12,  
19    2015, correct?

20    A     Yes.

21    Q     And what's the first time on or after  
22    June 12, 2015, when you thought about the  
23    subject of a permanent CEO?

24    A     When I thought about hiring a permanent  
25    CEO?



1 C E R T I F I C A T E

2 STATE OF NEW YORK )

3 :ss

4 COUNTY OF NEW YORK )

5

6 I, MICHELLE COX, a Notary Public within  
7 and for the State of New York, do hereby  
8 certify:

9 That ELLEN COTTER, the witness whose  
10 deposition is hereinbefore set forth, was duly  
11 sworn by me and that such deposition is a true  
12 record of the testimony given by the witness.

13 I further certify that I am not related to  
14 any of the parties to this action by blood or  
15 marriage, and that I am in no way interested in  
16 the outcome of this matter.

17 IN WITNESS WHEREOF, I have hereunto set my  
18 hand this 29th day of June 2016.

19

20


21

22

23

24

25

  
MICHELLE COX, CLR

## **EXHIBIT 9**

JA5750

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

DEPOSITION OF: EDWARD KANE

TAKEN ON: MAY 2, 2016

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

1 middle of that. So let me actually restate it.

2 What experience does Margaret Cotter  
3 have in predevelopment with respect to real estate,  
4 if any?

5 MR. SEARCY: Objection. Vague.

6 THE WITNESS: I don't know all of her  
7 experience. I know that she worked with her father  
8 in that area. They worked together.

9 And she has been instrumental -- I  
10 forgot one other thing that she's been instrumental  
11 in is we have a piece of property, the  
12 Cinema 1, 2, 3. We've been trying to figure out  
13 ways of developing that. It is much more valuable  
14 if we make a deal with the owners of the Greek  
15 restaurant next door.

16 It went back and forth. Margaret has  
17 come to some general understanding with them also on  
18 a joint venture with them for that Cinema 1, 2, 3  
19 property.

20 I'm very impressed with the work she's  
21 done.

22 BY MR. KRUM:

23 Q. To your knowledge, Mr. Kane, what  
24 experience does Margaret Cotter have in real estate  
25 development?

1 Q. Then we'll go on.

2 Directing your attention, Mr. Kane, back  
3 to your prior testimony regarding your assessment of  
4 Margaret Cotter's abilities to handle real estate  
5 development matters, were you of the view on  
6 June 12, 2015 when Mr. Jim Cotter, Jr., was  
7 terminated as president and C.E.O. that Margaret  
8 Cotter was competent to be the senior executive in  
9 charge of real estate development activities for  
10 RDI?

11 A. Was I confident?

12 Q. Were you -- in June 12, 2015, when Jim  
13 Cotter, Jr., was terminated as president and C.E.O.,  
14 was it your view then that Margaret Cotter was  
15 competent to be the senior executive at RDI in  
16 charge of its real estate development activities in  
17 New York?

18 A. Yes.

19 Q. How long before June 12, 2015 did you  
20 come to that conclusion?

21 A. It evolved over period of time. I can't  
22 say when.

23 I do know that I was very impressed with  
24 what she had done with the Landmark Commission,  
25 making development of that property possible and

1 work on it. And I was impressed, as I said, with  
2 Michael Buckley, and that would be a terrific team  
3 going forward.

4 Q. Did you ever share that view with anyone  
5 else at RDI including Jim Cotter, Jr.?

6 MR. SEARCY: Objection. Vague as to  
7 time.

8 THE WITNESS: I don't -- I don't know.  
9 I don't recall.

10 BY MR. KRUM:

11 Q. You recall that in and before May 2015 a  
12 search was being conducted for a director of real  
13 estate for RDI, right?

14 MR. SEARCY: Objection. Vague.

15 THE WITNESS: I just don't recall.

16 BY MR. KRUM:

17 Q. Well, did you -- did you ever hear or  
18 learn or were you ever told that a search was being  
19 conducted to hire a person with real estate  
20 experience or expertise at a senior executive level  
21 at RDI?

22 A. I don't recall if there was. There was  
23 some talk, but I don't recall anything specific.

24 Q. So it was your understanding from  
25 September of 2014 on that Margaret Cotter was going

1 That the foregoing pages contain a full,  
2 true and accurate record of the proceedings and  
3 testimony to the best of my skill and ability;

4

5 I further certify that I am not a relative  
6 or employee or attorney or counsel of any of the  
7 parties, nor am I a relative or employee of such  
8 attorney or counsel, nor am I financially interested  
9 in the outcome of this action.

10

11 IN WITNESS WHEREOF, I have subscribed my  
12 name this 4th day of May, 2016.

13

14



15

PATRICIA L. HUBBARD, CSR #3400

16

17

18

19

20

21

22

23

24

25

## **EXHIBIT 10**

JA5756



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

VIDEOTAPED DEPOSITION OF DOUGLAS McEACHERN  
TAKEN ON MAY 6, 2016

REPORTED BY:  
PATRICIA L. HUBBARD, CSR #3400

1 Chicago, there were three in New York. One of them  
2 in New York was located in the Union Square  
3 Building.

4 BY MR. NATION:

5 Q. Which theater is that?

6 A. I don't know the name of it. It was the  
7 Union Square Theater.

8 Q. Okay. And Margaret wanted to be in  
9 charge of developing the Union Square Theater is  
10 your understanding?

11 A. My understanding is that Margaret has  
12 been involved in the Union Square Building as -- the  
13 shows and the theater production activities and  
14 acting as our representative, and in addition on an  
15 uncompensated basis worked through the process of  
16 getting the Union Square Building through the  
17 Landmark Commission, which, by the way, was a  
18 12-year period for which she was paid no money to  
19 get it entitled and get the building expanded by  
20 some 25,000 square feet.

21 The mere ability to get that -- and  
22 these will be rough numbers -- created enormous  
23 value in that building by getting it entitled for  
24 redevelopment from the Landmark Commission and  
25 getting the -- I think we went from 45,000 square

1 feet to close to 70,000 square feet approval from  
2 that Landmark Commission.

3 And then the building and safety  
4 group -- somebody else just recently gave us  
5 permission to continue and go forward with our  
6 plans.

7 So the enormous amount of value that was  
8 created in that building was Margaret Cotter working  
9 with her father, as I understand it, and getting the  
10 entitlements.

11 MR. NATION: Could you please read me  
12 the question that started that.

13 (Whereupon the question was read  
14 as follows:

15 "Question: And Margaret wanted to  
16 be in charge of developing the  
17 Union Square Theater is your  
18 understanding?")

19 BY MR. NATION:

20 Q. All right. So, at the time that --  
21 picking up our narrative here, at the time that Jim  
22 Cotter came in as C.E.O. --

23 A. Junior?

24 Q. Jim Cotter, Jr., came in as C.E.O. --

25 A. Okay.

1 That the foregoing pages contain a full,  
2 true and accurate record of the proceedings and  
3 testimony to the best of my skill and ability;

4  
5 I further certify that I am not a relative  
6 or employee or attorney or counsel of any of the  
7 parties, nor am I a relative or employee of such  
8 attorney or counsel, nor am I financially interested  
9 in the outcome of this action.

10

11 IN WITNESS WHEREOF, I have subscribed my  
12 name this 10th day of May, 2016.

13

14

15



16

PATRICIA L. HUBBARD, CSR #3400

17

18

19

20

21

22

23

24

25



**RIS**  
**COHEN|JOHNSON|PARKER|EDWARDS**  
H. STAN JOHNSON, ESQ.  
Nevada Bar No. 00265  
sjohnson@cohenjohnson.com  
375 E. Warm Springs Rd., Suite 104  
Las Vegas, Nevada 89119  
Telephone: (702) 823-3500  
Facsimile: (702) 823-3400

**QUINN EMANUEL URQUHART & SULLIVAN, LLP**  
**CHRISTOPHER TAYBACK, ESQ.**  
California Bar No. 145532, *pro hac vice*  
christayback@quinnemanuel.com  
**MARSHALL M. SEARCY, ESQ.**  
California Bar No. 169269, *pro hac vice*  
marshallsearcy@quinnemanuel.com  
865 South Figueroa Street, 10<sup>th</sup> Floor  
Los Angeles, CA 90017  
Telephone: (213) 443-3000

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

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

MARGARET COTTER, *et al.*,  
Defendants.

AND

READING INTERNATIONAL, INC., a Nevada  
corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

**BUSINESS COURT**

**REPLY IN SUPPORT OF THE  
INDIVIDUAL DEFENDANTS' RENEWED  
MOTIONS FOR PARTIAL SUMMARY  
JUDGMENT NOS. 1 AND 2**

Judge: Hon. Elizabeth Gonzalez  
Date of Hearing: December 11, 2017  
Time of Hearing: 8:30 a.m.

JA5761

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

INTRODUCTION .....	1
ARGUMENT .....	3
I.    RECENT SUPPLEMENTAL AUTHORITY CONFIRMS THAT PLAINTIFF CANNOT STATE AN ACTIONABLE BREACH OF FIDUCIARY DUTY CLAIM RELATING TO HIS TERMINATION UNDER NEVADA LAW .....	3
II.   PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT EXISTS REGARDING THE INDEPENDENCE OF A MAJORITY OF THE DIRECTORS WHO VOTED TO TERMINATE HIM .....	8
A.   Contrary to the Court's Directive, Plaintiff Did Not Address Independence on an Action-by-Action Basis .....	8
B.   Plaintiff's Supplemental Opposition Confirms That Directors McEachern, Kane, and Adams Were Independent With Respect to the Decision to Terminate Plaintiff .....	10
1.    Director Douglas McEachern .....	11
2.    Director Ed Kane .....	13
3.    Director Guy Adams .....	15
III.  PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT EXISTS REGARDING WHETHER HIS TERMINATION WAS ENTIRELY FAIR .....	19
IV.  PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT EXISTS REGARDING ANY SUPPOSED INTENTIONAL MISCONDUCT, FRAUD, OR KNOWING VIOLATION OF THE LAW .....	20
CONCLUSION .....	21

**TABLE OF AUTHORITIES**

**Page**

**CASES**

<i>Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart,</i> 845 A.2d 1040 (Del. 2004) .....	10
<i>Brehm v. Eiser,</i> 746 A.2d 244 (Del. 2000) .....	17, 18
<i>Carlson v. Hallinan,</i> 925 A.2d 506 (Del. Ch. 2006).....	6
<i>Cinerama, Inc. v. Technicolor, Inc.,</i> 663 A.2d 1156 (Del. 1995) .....	6
<i>Datto Inc. v. Braband,</i> 856 F. Supp. 2d 354 (D. Conn. 2012).....	6
<i>Gesoff v. IIC Indus., Inc.,</i> 902 A.2d 1130 (Del. Ch. 2006).....	6
<i>Grobow v. Perot,</i> 539 A.2d 180 (Del. 1988) .....	17
<i>Hackett v. Marquardt &amp; Roche/Meditz &amp; Hackett, Inc.,</i> No. X02CV990166881S, 2002 WL 31304216 (Conn. Sup. Ct. Sept. 17, 2002) .....	6
<i>In re Amerco Deriv. Litig.,</i> 127 Nev. 196 (2011) .....	14
<i>In re DISH Network Deriv. Litig.,</i> 401 P.3d 1081 (Nev. 2017) .....	8
<i>In re Gaylord Container Corp. S'holders Litig.,</i> 753 A.2d 462 (Del. Ch. 2000).....	11
<i>In re MFW S'holders Litig.,</i> 67 A.3d 496 (Del. Ch. 2013).....	11, 15
<i>In re Orchard Enters., Inc. S'holder Litig.,</i> 88 A.3d 1 (Del. Ch. 2014).....	7
<i>In re Transkaryotic Therapies, Inc.,</i> 954 A.2d 346 (Del. Ch. 2008).....	11
<i>In re Tri-Star Pictures, Inc. Litig.,</i> No. Civ. A. 9477, 1995 WL 106520 (Del. Ch. Mar. 9, 1995) .....	9
<i>In re Walt Disney Co. Deriv. Litig.,</i> 731 A.2d 342 (Del. Ch. 1998).....	18, 21

1	<i>In re Wheelabrator Tech., Inc. S'holder Litig.</i> , No. Civ. A. 11495, 1992 WL 212595 (Del. Ch. Sept. 1, 1992).....	9
2		
3	<i>Ingle v. Glamore Motor Sales, Inc.</i> , 73 N.Y.2d 183 (1989) .....	6
4	<i>Kahn v. M &amp; F Worldwide</i> , 88 A.2d 635 (Del. 2014) .....	10, 11
5		
6	<i>Kasper v. LinuxMall.com, Inc.</i> , No. Civ. A. 00-2019 ADM/SR, 2001 WL 230494 (D. Minn. Feb. 23, 2001).....	6
7	<i>Khanna v. McMinn</i> , No. Civ. A. 20545-NC, 2006 WL 1388744 (Del. Ch. May 9, 2006) .....	17
8		
9	<i>La. Mun. Police Emps. ' Ret. Sys. v. Wynn</i> , No. 2:12-cv-509 JCM, 2014 WL 994616 (D. Nev. Mar. 13, 2014) .....	11, 16
10	<i>McMullin v. Beran</i> , 765 A.2d 910 (Del. 2000) .....	6
11		
12	<i>Nahass v. Harrison</i> , 207 F. Supp. 3d 96 (D. Mass. Sept. 13, 2016) .....	6
13	<i>Orman v. Cullman</i> , 794 A.2d 5 (Del. Ch. 2002).....	16, 19
14		
15	<i>Paramount Commc'ns Inc. v. QVC Network Inc.</i> , 637 A.2d 34 (Del. 1994) .....	6
16	<i>Posadas v. City of Reno</i> , 109 Nev. 448 (1993) .....	13
17		
18	<i>Rales v. Blasband</i> , 634 A.2d 927 (Del. 1993) .....	10, 11
19	<i>Riblet Prods. Corp. v. Nagy</i> , 683 A.2d 37 (Del. 1996) .....	6
20		
21	<i>SEPTA v. Volgenau</i> , C.A. No. 6354-VCN, 2013 WL 4009193 (Del. Ch. Aug. 5, 2013) .....	11
22	<i>Shoen v. SAC Holding Corp.</i> , 122 Nev. 621, 137 P.3d 1171 (2006) .....	7, 8, 11
23		
24	<i>Shuck v. Signature Flight Support of Nev., Inc.</i> , 126 Nev. 434 (2010) .....	13
25	<i>Venhill Ltd. P'ship v. Hillman</i> , C.A. No. 1866-VCS, 2008 WL 2270488 (Del. Ch. June 3, 2008) .....	6
26		
27	<i>Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. In &amp; For Cnty. of Clark</i> , 399 P.3d 334 (Nev. 2017) .....	1, 3, 5
28		



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

STATUTES

NRS 78.037.....	5
NRS 78.120.....	5
NRS 78.135.....	5
NRS 78.138.....	<i>passim</i>
NRS 78.139.....	<i>passim</i>
NRS 78.140.....	1, 4, 7
NRS 78.751.....	5
NRS 78.7502.....	5
NRS SB 203 .....	<i>passim</i>

OTHER AUTHORITIES

U.S. Census Bureau, Wealth, Asset Ownership, and Debt of Households – Detailed Tables: 2013, <i>available at</i> <a href="https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html">https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset- ownership.html</a> .....	18
---	----

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7  
8  
9

10  
11  
12  
13  
14  
15  
16  
17  
18  
19

20  
21  
22  
23  
24  
25

26  
27  
28

1 and CEO were “independent” as a matter of law, thereby securing the application of the business  
2 judgment rule even under Plaintiff’s distorted view of the law. Plaintiff attempts to confuse the  
3 issues in his Supplemental Opposition (i) by attacking the independence of individuals who were  
4 either not on the RDI Board at the time of his termination and did not participate in that decision  
5 (Dr. Codding and Mr. Wrotniak) or who voted against his termination (Mr. Gould), and (ii) by  
6 asserting that subsequent board decisions with which he disagreed are somehow relevant to his  
7 would-be independence inquiry, even though they occurred after his termination. They are not.  
8 The record establishes that each of the non-Cotter directors that voted in favor of terminating  
9 Plaintiff’s employment were independent. Plaintiff admitted during his deposition that Director  
10 Douglas McEachern was independent. The undisputed facts show that Director Ed Kane had no  
11 personal relationship specific to Ellen and Margaret Cotter, but not Plaintiff, that would have  
12 affected his independence, nor do any of his actions indicate bias on his part when evaluating  
13 Plaintiff’s employment. And while Director Guy Adams does have some financial ties to the  
14 Estate of James J. Cotter, Sr. (not Ellen or Margaret Cotter directly), those ties are set by contract  
15 and pre-date his joining the RDI Board. To the extent that Plaintiff claims that Mr. Adams  
16 cannot possibly be “independent” because a portion of his current income comes from his RDI  
17 Board service or preexisting financial deals, that compensation is not material to his overall  
18 finances and the caselaw rejects Plaintiff’s notion that only millionaires can be board members.

19 Third, even adopting Plaintiff’s Delaware law standard for evaluating merger and  
20 acquisition transactions, not only was the RDI Board’s decision to terminate Plaintiff “entirely  
21 fair” given major failings in his leadership, lack of practical corporate knowledge, and inability  
22 to work with key executives, as the Individual Defendants have established in prior briefing,  
23 Plaintiff once more ignores that he has presented no evidence that any breach involving his  
24 termination involved “intentional misconduct, fraud, or a knowing violation of the law”—an  
25 essential element of his fiduciary duty claim, as reaffirmed by the Nevada Legislature when it  
26 recently amended NRS 78.138(7). The Individual Defendants pointed out this failing again in  
27 their Supplemental Motion, and Plaintiff’s Supplemental Opposition avoids the issue entirely.  
28 This alone is sufficient to warrant judgment in the Individual Defendants’ favor.

1 With no legal or factual support for Plaintiff's termination claim, the Individual  
2 Defendants are entitled to summary judgment.

3 **ARGUMENT**

4 **I. RECENT SUPPLEMENTAL AUTHORITY CONFIRMS THAT PLAINTIFF**  
5 **CANNOT STATE AN ACTIONABLE BREACH OF FIDUCIARY DUTY CLAIM**  
6 **RELATING TO HIS TERMINATION UNDER NEVADA LAW**

7 As Individual Defendants noted in their Supplemental Motion, a "recent clarification to  
8 Nevada law," which includes (i) the legislative declaration set forth in NRS SB 203, § 2, and  
9 resulting amendments to NRS 78.138 and NRS 78.139, as well as (ii) the Nevada Supreme  
10 Court's recent decision in *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. In & For Cnty. of Clark*,  
11 399 P.3d 334 (Nev. 2017), is relevant to the business judgment analysis in this case and further  
12 undermines the legal merits of Plaintiff's breach of duty claim relating to his termination. (*See*  
13 *Ind. Defs.' Supp. Mot.* at 3-4, 10-11.) Plaintiff, in response, argues unconvincingly that this  
14 intervening authority is of no moment. (Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 3-4.) Plaintiff  
15 is wrong, and he fundamentally misapprehends Nevada law.

16 Plaintiff's entire termination argument rests upon his unsupported assumption not only  
17 that "independence" is somehow a condition to the applicability of Nevada's business judgment  
18 presumption but, moreover, that if any of the directors voting for his removal were not  
19 "independent" with respect to the RDI Board's decision to end his employment, then all  
20 Individual Defendants automatically lose the presumptive application of the business judgment  
21 rule. (*See id.* at 12.) According to Plaintiff, in that event, *Delaware's* "entire fairness test"—  
22 rather than Nevada law—should be applied when evaluating any alleged breach of fiduciary duty  
23 relating to his termination. (*See id.*) The Individual Defendants have said all along that  
24 Plaintiff's legal framework is incorrect, and the recent clarifications by the Nevada Legislature  
25 and Nevada Supreme Court further support the Individual Defendants' position. (*See, e.g., Ind.*  
26 *Defs.' 10/13/16 Opp'n to Pl.'s Partial MSJ* at 20-22; *Ind. Defs.' 10/21/16 Reply in Supp. of MSJ*  
27 *No. 1* at 7-8.)

28 First, *Nevada law*—not Delaware law—governs Plaintiff's termination claim. Nevada's  
business judgment rule, codified by statute, provides that "[d]irectors and officers, in deciding

1 upon *matters of business*, are presumed to act in good faith, on an informed basis and with a  
2 view to the interests of the corporation.” NRS 78.138(3) (emphasis added). To the extent that  
3 other states (such as Delaware) have a different business judgment rule, the Nevada Legislature  
4 has now made clear that such foreign law must not be allowed to “supplant” or “modify”  
5 Nevada’s home statute, and failure of a Nevada director to “consider” or “conform the exercise  
6 of his or her powers” to such foreign law “does not constitute or indicate a breach of a fiduciary  
7 duty.” NRS SB 203, §§ 2(3)-(4). Irrespective of whatever foreign law may be, Nevada’s  
8 corporate law identifies only two situations where the business judgment presumption may be  
9 disturbed: (1) where directors take certain actions to resist “a change or potential change in  
10 control of the corporation,” NRS 78.139(1)(b), 2-4; and (2) in an “interested director transaction”  
11 which involves “self-dealing” between a director and a corporation, NRS 78.140. Plaintiff has  
12 conceded that “[b]y their terms, on their face, those two statutory provisions do not speak to  
13 circumstances other than those described” and are therefore not relevant to his termination  
14 claims. (Pl.’s 10/13/16 Opp’n to Ind. Defs.’ MSJ No. 1 at 15 n.4.) But Plaintiff has not  
15 identified any Nevada statute or legal decision that has disturbed the application of the business  
16 judgment rule outside of these two situations. Nor have the Individual Defendants been able to  
17 locate one.<sup>1</sup>

18 The conclusion is simple: the RDI Board’s business decision to remove a CEO was a  
19 purely operational decision that is one of those “matters of business” always entitled to the  
20 Nevada statutory presumption of reasonable business judgment under NRS 78.138(3). In  
21 Nevada, there is a marked contrast between “operational decisions,” such as removing an officer  
22 or changing a marketing strategy, and “transactional decisions,” where a director is on both sides  
23 of a particular transaction. The latter may be subject to closer scrutiny, including a “fairness”  
24 test (which looks at whether a deal was fair to the company), while the former retain the business  
25 judgment presumption *at all times*.

26  
27 <sup>1</sup> Indeed, the business judgment rule as codified in Nevada does not include an  
28 “independence” prerequisite or condition, nor is the lack of “independence” listed as one of the  
items that would invalidate the application of that rule. See NRS 78.138; NRS 78.139.

1           This is fully consistent with the wide discretion afforded to corporate boards under  
2 Nevada law on matters that determine the course of the company, *see* NRS 78.120, 78.135,  
3 78.138; whether or not to sell the company, *see* NRS 78.139; and the limitations on liability, *see*  
4 NRS 78.037, 78.751, 78.7502. And it is fully consistent with the parameters outlined by Nevada  
5 Supreme Court in its recent *Wynn* decision, in which it emphasized that Nevada’s business  
6 judgment rule regime “expresses a sensible policy of judicial noninterference with *business*  
7 *decisions*” and “legislative rejection of a substantive evaluation of director conduct.” 399 P.3d  
8 at 342-43 (citations omitted). As Nevada corporate policy, these statutes are designed to vest  
9 decision-making in the board, and to protect directors who are called upon to make these  
10 decisions (usually working on a part-time basis, sometimes with less-than-perfect knowledge,  
11 and typically for not much money). *See also* NRS 78.138(7) (providing additional legal  
12 protections to directors with respect to potential personal liability). Plaintiff’s suggestion that  
13 Nevada courts should involve themselves in the minutiae of corporate decision-making with  
14 respect to the termination of employees is directly contrary to the strict “policy of judicial  
15 noninterference” emphasized in *Wynn*; not only would it lead to an explosion of litigation in  
16 Nevada, in which plaintiffs would use hindsight and manufactured independence issues to  
17 second-guess any termination decision by a corporate board, it “would accomplish by the back  
18 door that which is forbidden by the front”—a substantive evaluation of directorial judgment on  
19 the most intimate of corporate concerns, officer performance. *Wynn*, 399 P.3d at 343.

20           Second, Plaintiff, in his Supplemental Opposition, continues to avoid the fact that there is  
21 not *a single case* in which *any court* (let alone a Nevada court) has subjected a board’s decision  
22 to terminate an officer to Delaware’s “entire fairness” test or even a “fairness” test. In essence,  
23 Plaintiff is trying to import “due process” concepts used in wrongful termination cases, even  
24 though *this is a derivative case*; in a derivative action, fairness—to the extent that it is at issue—  
25 must be determined from the point of view of fairness to the company, not the terminated  
26 employee. Indeed, when evaluating derivative claims, Delaware itself has applied its “entire  
27 fairness” test only in inapposite situations, such as where a board is alleged to have breached its  
28 duties when faced with a corporate merger or sale, or where there is an accusation that corporate

1 assets have been misused—noticeably absent is any case law in which the employment of an  
2 officer is at issue. *See, e.g., McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000) (proposed sale of  
3 corporation); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (two-stage  
4 tender offer/merger transaction); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34,  
5 42 (Del. 1994) (merger); *Venhill Ltd. P'ship v. Hillman*, C.A. No. 1866-VCS, 2008 WL  
6 2270488, at \*22 (Del. Ch. June 3, 2008) (partner accused of improper investments and misuse of  
7 trust assets). Even former Justice Myron Steele, Plaintiff's Delaware law expert, has been  
8 unable to find a single on-point decision that supports Plaintiff's assumed legal framework.

9 Other jurisdictions have recognized that it makes no sense to apply Delaware's "entire  
10 fairness" test to an employee termination, which is not an extraordinary transaction or a  
11 "transaction" in which one or more directors sit on the other side of the deal. *See Nahass v.*  
12 *Harrison*, 207 F. Supp. 3d 96, 104 (D. Mass. Sept. 13, 2016) (questioning how the "entire  
13 fairness" doctrine ever "would apply to employment decisions," and rejecting fiduciary duty  
14 claim by officer terminated by company's directors).<sup>2</sup> Indeed, as Plaintiff concedes (*see* Pl.'s  
15 Supp. Opp'n to MSJ Nos. 1 & 2 at 12-13), Delaware's "entire fairness" test is concerned with  
16 whether "the transaction was the product of both fair dealing and fair price." *Cinerama*, 663  
17 A.2d at 1163; *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006) (describing the  
18 "fair dealing" standard as "simulating arm's length-bargaining"). But it is difficult to image how  
19

---

20 <sup>2</sup> *See also Kasper v. LinuxMall.com, Inc.*, No. Civ. A. 00-2019 ADM/SR, 2001 WL  
21 230494, at \*3 (D. Minn. Feb. 23, 2001) ("[T]here can be no breach of fiduciary duty stemming  
22 from the termination of [an officer's] employment."); *Carlson v. Hallinan*, 925 A.2d 506, 540  
23 (Del. Ch. 2006) (holding that plaintiff could not "articulate a theory as to how Carlson's removal  
24 as President . . . could be a breach of fiduciary duty"); *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37,  
25 39-40 (Del. 1996) (no breach of fiduciary duty where stockholder was "an employee of the  
26 corporation under an employment contract with respect to issues involving that employment");  
27 *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 190 (1989) (denying fiduciary duty claims  
28 asserted by operating manager and minority shareholder upon his firing); *Hackett v. Marquardt  
& Roche/Meditz & Hackett, Inc.*, No. X02CV990166881S, 2002 WL 31304216, at \*2 (Conn.  
Sup. Ct. Sept. 17, 2002) (rejecting breach of fiduciary duty claim, and holding that "the law of  
employment relations seems to provide sufficient protection for any civil wrongs" in the event of  
a purportedly unlawful termination); *Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 384 (D. Conn.  
2012) (plaintiff's allegations of "breach of fiduciary duty" based "on her allegedly wrongful  
termination . . . fail to state a claim").

1 an “arms length-bargaining” standard would apply to a termination case (*i.e.*, whether it would  
2 extend to all employees, or just executive officers), and fairness of the price is not a relevant  
3 consideration in the removal of an officer—there is no price to review other than the price that  
4 was negotiated at the time of the executive’s hiring (*i.e.*, severance benefits).

5 Delaware’s “entire fairness” test is also not consistent with Nevada law, and therefore—  
6 as the Nevada Legislature has directed—it must be disregarded. *See* NRS SB 203, § 2(3). For  
7 instance, the Delaware test is an objective standard, *see In re Orchard Enters., Inc. S’holder*  
8 *Litig.*, 88 A.3d 1, 30 (Del. Ch. 2014) (outlining contours of the “entire fairness” test), while  
9 under Nevada law a director is bound only to exercise his or her duties in subjective good faith.  
10 *See* NRS 78.138; NRS 78.140. Moreover, the only “fairness” test recognized under Nevada’s  
11 corporate law occurs in the context of an interested director transaction (where the director is in  
12 fact on both sides of the specific transaction being reviewed), and that “fairness” test evaluates  
13 whether “[t]he contract is fair as to the corporation at the time it is authorized or approved.”  
14 NRS 78.140(2)(d). It would defy logic and run contrary to the recent instructions of the Nevada  
15 Legislature to imply a more stringent standard for operational decisions like the termination of an  
16 executive (*i.e.*, Delaware’s “entire fairness” test) than there is under existing Nevada statute  
17 where a director sits on both sides of a specific transaction (*i.e.*, the NRS 78.140 “fair as to the  
18 corporation” analysis).

19 *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), is not to the contrary.  
20 *Shoen* was confined to the NRS 78.140 context. It involved allegations by stockholders that  
21 various directors of AMERCO failed to properly supervise or willfully disregarded their duties  
22 with respect to unfair transactions between the corporation and entities owned by executive  
23 officers of the company. *See* 122 Nev. at 626-631, 137 P.3d at 1174-1179. Indeed, in *Shoen*, the  
24 Nevada Supreme Court specifically emphasized that it was addressing “when an interested  
25 fiduciary’s transactions with the corporation are challenged,” and that it was doing so “[w]hen  
26 evaluating demand futility.” *Id.* at 640, 137 P.3d at 1184 n.61. Neither situation is present here,  
27 where the merits of Plaintiff’s attempted termination claim are at issue. *Shoen* does not apply  
28 outside of “interested director” transactions (as recognized by NRS 78.140), or to situations other



1 than demand and demand futility, which applies to a procedural step and provides no basis for  
2 finding ultimate liability. Furthermore, demand futility does not look to a “business decision,”  
3 and accordingly is outside of the business judgment presumption. In short, *Shoen* does not upset  
4 the statutory business judgment presumption on regular “matters of business” (such as the firing  
5 of an officer), and it in no way adopts Delaware’s “entire fairness” in any situation.<sup>3</sup>

6 Because the business judgment rule would automatically apply under Nevada law in the  
7 event that an officer’s termination is contested, and no more stringent test exists under Nevada  
8 law to evaluate the removal of an officer by a board of directors, Plaintiff cannot show that a  
9 triable issue of fact remains with respect to his termination claim, which is unsustainable as a  
10 matter of law. Summary judgment is therefore appropriate.

11 **II. PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT**  
12 **EXISTS REGARDING THE INDEPENDENCE OF A MAJORITY OF THE**  
**DIRECTORS WHO VOTED TO TERMINATE HIM**

13 Even adopting Plaintiff’s incorrect legal framework and assuming *arguendo* that (i) a  
14 former employee, such as Plaintiff, could ever state an actionable claim for breach of a fiduciary  
15 duty stemming from his termination *and* (ii) the business judgment presumption could  
16 potentially be overcome in such a situation, Plaintiff’s termination claim would still fail as a  
17 matter of law. Discovery has confirmed that a majority of the RDI Board members who voted in  
18 favor of his termination on June 12, 2015 were independent, and no triable issue of fact exists  
19 otherwise.

20 **A. Contrary to the Court’s Directive, Plaintiff Did Not Address Independence**  
21 **on an Action-by-Action Basis**

22 At the October 7, 2016 hearing, the Court made plain that it expected “the independence  
23 issue . . . to be evaluated on a transaction or action-by-action basis, because you have to  
24 separately evaluate the independence as related to each.” (Helpern Decl. Ex. A (10/27/16 Tr.)  
25 at 84:21-85:3.) In doing so, the Court warned counsel for Plaintiff that he would need “to give

26 <sup>3</sup> The same is true of the Nevada Supreme Court’s similar decision in *In re DISH*  
27 *Network Deriv. Litig.*, 401 P.3d 1081, 1087-1092 (Nev. 2017), in which the independence of a  
28 special litigation committee was considered in deciding whether its decision to terminate a  
derivative complaint was appropriate.

1 me more information like I've asked for . . . following the completion of [discovery]." (*Id.*) The  
2 Court explicitly reemphasized this requirement in its subsequent December 20, 2016 order  
3 "continuing" the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: the  
4 Issue of Director Independence. (Helpert Decl. Ex. D (12/20/16 Order) at 3.) However, in his  
5 Supplemental Opposition to Motion for Summary Judgment Nos. 1 and 2, Plaintiff clearly fails  
6 to meet the standard set by the Court.

7       Rather than attempting to establish lack of independence on "a transaction or action-by-  
8 action basis" with respect to his termination claim, Plaintiff muddies the waters. For instance, he  
9 includes an attack on the independence of Directors Judy Coddington and Michael Wrotniak (Pl.'s  
10 Supp. Opp'n to MSJ Nos. 1 & 2 at 10-11) despite the fact that Dr. Coddington joined the RDI Board  
11 on October 5, 2015 and Mr. Wrotniak joined on October 12, 2015—months *after* the Board  
12 terminated Plaintiff on June 12, 2015. Obviously, given that Dr. Coddington and Mr. Wrotniak  
13 were not members of the RDI Board at the time of his termination, they cannot be liable for  
14 claims involving that decision and their independence is entirely irrelevant to that claim.  
15 Similarly, Plaintiff includes an extended attack on the independence of Director William Gould  
16 (*see id.* at 9-10) despite the fact that Gould voted against the termination of Plaintiff on June 12,  
17 2015 due to his belief that the Board should hold off firing Plaintiff until all of the pending  
18 litigation between the Cotters was resolved. Given that Director Gould voted against the  
19 challenged decision, the question of his independence is entirely irrelevant as to whether the  
20 majority's decision to terminate Plaintiff fell within its business judgment (or, in the alternative,  
21 was entirely fair). *See In re Tri-Star Pictures, Inc. Litig.*, No. Civ. A. 9477, 1995 WL 106520,  
22 at \*2 (Del. Ch. Mar. 9, 1995) ("[A] director who plays no role in the process of deciding whether  
23 to approve a challenged action cannot be held liable on a claim that the board's decision to  
24 approve that transaction was wrongful."); *In re Wheelabrator Tech., Inc. S'holder Litig.*, No.  
25 Civ. A. 11495, 1992 WL 212595, at \*10 (Del. Ch. Sept. 1, 1992) (similar).

26       With respect to the non-Cotter directors that were actually members of the RDI Board  
27 during the relevant time and voted in favor of Plaintiff's termination (Directors McEachern,  
28 Kane, and Adams), Plaintiff in his Supplemental Opposition attacks the independence as to each

1 by citing corporate decisions he disagrees with made months—if not years—*after* the  
2 termination of Plaintiff's employment. (Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 5-6.) For  
3 instance, Plaintiffs identifies actions taken by one or each of these directors on September 21,  
4 2015 (authorization of a 100,000 share option), December 29, 2015 (selection of Ellen Cotter as  
5 permanent CEO), March 10, 2016 (hiring of Margaret Cotter as an employee), June 24, 2016  
6 (first rejection of Patton Vision's below-market indication of interest), and December 19, 2016  
7 (second rejection of Patton Vision's inadequate indication of interest) as somehow bearing on  
8 their independence with respect to Plaintiff's June 12, 2015 termination. (*Id.*)

9 But it is well settled that conduct or events post-dating a contested board decision are *per*  
10 *se* irrelevant to the merits of that decision; a director's independence is determined by reference  
11 to the facts at the time of the relevant action, not after. *See, e.g., Kahn v. M & F Worldwide*, 88  
12 A.2d 635, 648 (Del. 2014) (claimed activity showing lack of independence “occurred months  
13 after the Merger was approved and did not raise a triable issue of fact concerning Dinh's  
14 independence from Perelman”); *Rales v. Blasband*, 634 A.2d 927, 937 (Del. 1993) (“ability of a  
15 majority of the Board to exercise its business judgment decision in a decision on a demand”  
16 determined “at the time this action was filed”); *Beam ex rel. Martha Stewart Living Omnimedia,*  
17 *Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) (in independence inquiry, court may consider  
18 “evidence that in the past the relationship caused the director to act non-independently”).  
19 Plaintiff's citation of subsequent events to try to camouflage the lack of evidence supporting the  
20 non-independence of the challenged directors at the time of his termination cannot save his  
21 failing case. As explained below, Directors McEachern, Kane, and Adams were clearly  
22 independent as a matter of law at the time of Plaintiff's termination.

23 **B. Plaintiff's Supplemental Opposition Confirms That Directors McEachern,**  
24 **Kane, and Adams Were Independent With Respect to the Decision to**  
**Terminate Plaintiff**

25 Plaintiff concedes that, even under his theory of the law, he must establish that Directors  
26 McEachern, Kane, and Adams were not independent with respect to his termination to overcome  
27 Nevada's strong business judgment presumption and have the jury consider his termination.  
28 (Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 12.) This is a difficult task (*see* Ind. Defs.' Supp. MSJ

Nos. 1 & 2 at 8 (collecting cases)), especially in light of the “presumption that directors are independent.” *In re MFW S’holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013).<sup>4</sup> None of these three directors were “interested” in Plaintiff’s termination; by definition, “[n]o issue of self-interest exists where directors did not stand on both sides of the transaction or receive any personal financial benefit.” *La. Mun. Police Emps.’ Ret. Sys. v. Wynn*, No. 2:12-cv-509 JCM, 2014 WL 994616, at \*4 (D. Nev. Mar. 13, 2014) (applying Nevada law); NRS 78.140(1)(a) (defining “interested director”).

Absent directorial interest in the transaction itself, Plaintiff must under the Delaware law standard still prove that Directors McEachern, Kane, and Adams were “beholden” to Ellen and Margaret Cotter “or so under their influence that their discretion would be sterilized” when deciding upon his removal as President and CEO. *Rales*, 634 A.2d at 936 (Del. 1993); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 639 (2006) (independence in the context of demand futility, not application of the business judgment presumption). As Plaintiff’s Supplemental Opposition makes evident, Plaintiff cannot make the required showing. Summary judgment based on the application of Nevada’s business judgment rule is therefore warranted.<sup>5</sup>

1. Director Douglas McEachern

In his Supplemental Opposition, Plaintiff identifies a number of board decisions supported by Director Douglas McEachern with which he disagrees as evidence of McEachern’s

---

<sup>4</sup> In addition, as the Individual Defendants have emphasized in previous briefing, RDI’s corporate Bylaws do not require “independence” by board members when deciding to terminate the company’s officers. Rather, the Bylaws provide that officers such as Plaintiff serve solely “at the pleasure of the Board of Directors,” and may be “removed at any time, with or without cause by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof.” (Ind. Defs.’ 9/23/16 MSJ No. 1 at 15 (quoting HD Ex. 19 (Am. & Restated Bylaws of RDI, dated Dec. 28, 2011), Art. IV, § 10).)

<sup>5</sup> Putting aside that Nevada law applies here, the Delaware Supreme Court has noted that “Delaware courts have often decided director independence as a matter of law at the summary judgment stage.” *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) and *In re Gaylord Container Corp. S’holders Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000)); see also *SEPTA v. Volgenau*, C.A. No. 6354-VCN, 2013 WL 4009193, at \*12-21 (Del. Ch. Aug. 5, 2013) (holding, on summary judgment, that directors on the special committee were disinterested and independent).

1 purported lack of independence. (Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 7-8.) Plaintiff's  
2 belated challenge to Director McEachern's independence cannot withstand scrutiny. As the  
3 Individual Defendants have repeatedly noted, but Plaintiff avoids (*see* Ind. Defs.' 9/23/16 MSJ  
4 No. 2 at 5, 15, 23; Ind. Defs.' 10/21/16 Reply in Supp. of MSJ No. 2 at 4), Plaintiff has already  
5 admitted that Director McEachern was *independent*. When asked at his deposition, "Mr.  
6 McEachern, is he independent, in your view?" Plaintiff answered: "Yes. I mean, he's -- I mean,  
7 again, he's independent. He's got no relationship with Ellen and Margaret or, you know, no  
8 business relationship with Ellen and Margaret." (HD#2<sup>6</sup> Ex. 7 (5/16/16 Cotter, Jr. Dep.)  
9 at 84:21-85:1.) When pressed as to whether, "in your view, Mr. McEachern is independent and  
10 has always been independent," Plaintiff responded "Okay. Yes." (*Id.* at 85:6-86:4.)

11 In addition to Plaintiff's critical admission, all but one of the board decisions identified  
12 by Plaintiff post-dated his termination; as noted above, such after-the-fact decisions are  
13 irrelevant with respect to Director McEachern's independence in making the termination  
14 decision. The one action Director McEachern participated in pre-dating Plaintiff's removal,  
15 which involved the RDI Board's delay of a final decision on Plaintiff's termination to consider a  
16 possible settlement that would have resolved the Cotter trust litigation and reduced Plaintiff's  
17 authority as CEO, was clearly proper based on the actual facts, as the Individual Defendants have  
18 established and which Plaintiff's conclusory Supplemental Opposition, which cites no evidence,  
19 does nothing to rebut. (*See, e.g.*, Ind. Defs.' 10/13/16 Opp'n to Pl.'s Partial MSJ at 11-14; Ind.  
20 Defs.' 10/21/16 Reply in Supp. of MSJ No. 1 at 16; Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 7-8.)

21 Moreover, the fact that Plaintiff disagrees with a decision supported by Director  
22 McEachern does nothing to alter the independence analysis. As the Nevada Legislature recently  
23 emphasized, the point of Nevada's strong business judgment rule is that its directors and officers  
24 may take corporate action "without fear of personal liability simply because of a disagreement  
25

---

26 <sup>6</sup> "HD#2" refers to the Declaration of Noah Helpert filed in support of the Individual  
27 Defendants' Motion for Partial Summary Judgment (No. 2) re: the Issue of Director  
28 Independence on September 23, 2016. Rather than inundate the Court with further duplicative  
paper, the Individual Defendants refer the Court to that previously-attached exhibit.

1 over policy or after-the-fact second-guessing of decisions.” Ex. K to the May 25, 2017 Minutes  
2 of the Meeting of the Assembly Committee on Judiciary, Senate Bill No. 203 Clarifying Nevada  
3 Corporate Law at 1.<sup>7</sup> Notwithstanding the fact that he may periodically disagree with Director  
4 McEachern, Plaintiff has introduced no facts showing that, or reasons explaining how, Director  
5 McEachern was somehow “beholden” to Ellen and Margaret Cotter in a way that “sterilized” his  
6 discretion when deciding upon Plaintiff’s employment as President and CEO of RDI. As such,  
7 Plaintiff has not met his burden of identifying “admissible evidence” showing “a genuine issue  
8 for trial” regarding McEachern’s independence with respect to Plaintiff’s termination. *Posadas*  
9 *v. City of Reno*, 109 Nev. 448, 452 (1993); *Shuck v. Signature Flight Support of Nev., Inc.*, 126  
10 Nev. 434, 436 (2010) (“bald allegations without supporting facts” are insufficient). There is no  
11 evidence that McEachern was on both sides of any transaction to which RDI was a party.

12 2. Director Ed Kane

13 Plaintiff’s Supplemental Opposition adds nothing to the record already developed as to  
14 the independence of Director Ed Kane; Plaintiff cites no new evidence and simply relies on brief,  
15 conclusory assertions. (See Pl.’s Supp. Opp’n to MSJ Nos. 1 & 2 at 8-9.) Outside of irrelevant  
16 RDI Board decisions supported by Kane that post-date Plaintiff’s removal, Plaintiff asserts that  
17 Director Kane was not independent with respect to the termination decision because of (i) his  
18 “personal relationship” with James J. Cotter, Sr. (the father of Plaintiff, as well as Margaret and  
19 Ellen Cotter), and (ii) his view that Cotter, Sr. “intended” that Margaret Cotter “control the  
20 Voting Trust and his actions to make that happen.” (*Id.*) Not only are Plaintiff’s arguments  
21 factually unsupportable in light of the actual record, they are legally insufficient to call into  
22 question Kane’s independence.

23 First, as previously established by the Individual Defendants, Director Kane’s has no  
24 “personal relationship” relevant to his independence with respect to the termination decision.  
25 (See Ind. Defs.’ 9/23/16 MSJ No. 2 at 16-17; Ind. Defs.’ 10/21/16 Reply in Supp. of MSJ No. 2  
26 at 5.) As Plaintiff concedes, the friendship of which he complains was actually between Director  
27

---

28 <sup>7</sup> Available at <https://www.leg.state.nv.us/Session/79th2017/Exhibits/Assembly/JUD/>

1 Kane and his father—not between Kane and Ellen or Margaret Cotter. (See Pl.’s Supp. Opp’n to  
2 MSJ Nos. 1 & 2 at 8.) Plaintiff has never cited any evidence indicating that Kane’s friendship  
3 with James J. Cotter, Sr. has resulted in him having a closer relationship with Cotter, Sr.’s  
4 daughters than with his son. Indeed, while Ellen and Margaret Cotter have, at times, referred to  
5 Director Kane as “Uncle Ed,” so has Plaintiff. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 29:4-35:6;  
6 HD#2 Ex. 7 (5/16/16 Cotter, Jr. Dep.) at 83:6-12.) Plaintiff does not dispute that he has known  
7 Director Kane all of his life and even visited Kane at his home as late as the spring of 2015, just  
8 weeks before his termination, to personally implore Kane to help Plaintiff resolves his disputes  
9 with his sisters and retain his position as CEO. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 35:10-22;  
10 HD#2 Ex. 8 (7/26/16 Cotter, Jr. Dep.) at 753:9-754:8.) Even if Director Kane were Ellen and  
11 Margaret’s actual “uncle” (and not Plaintiff’s), that is considered a “more remote family  
12 relationship” that is “not disqualifying” to a director’s independence as a matter of law in  
13 Nevada. *In re Amerco Deriv. Litig.*, 127 Nev. 196, 232-33 (2011).

14 Second, Plaintiff has never explained why Director Kane’s “understanding” that James J.  
15 Cotter, Sr. intended for Margaret Cotter to control his personal estate would affect his  
16 independence as an RDI Board member, especially with respect to the termination decision. (See  
17 Ind. Defs.’ 10/21/16 Reply in Supp. of MSJ No. 1 at 5-7.) As the undisputed evidence  
18 establishes, it was actually Plaintiff who involved Kane in the settlement discussions; Kane  
19 supported such a settlement because, as Kane explained to Plaintiff at the time, he—like  
20 Plaintiff—believed that a settlement would end all the “ill feelings,” “enhance the company,  
21 benefit [Plaintiff] and [his] sisters and allow [the Cotters] to work together going forward.”  
22 Further, it would give Plaintiff the time to prove “that [he] do[es] in fact have the leadership  
23 skills to run this company.” (App., Ex. 4 (5/28/16 emails between Kane and Cotter, Jr.) at 32-  
24 33.)<sup>8</sup> All evidence shows that Director Kane engaged on exactly the terms *Plaintiff* requested  
25

26 AJUD1245K.pdf.

27 <sup>8</sup> “App.” refers to the Appendix of Exhibits filed by Plaintiff in support of his  
28 Opposition to the Individual Defendants’ Motion for Partial Summary Judgment (No. 2) re: the  
Issue of Director Independence, filed on October 13, 2016. As with the HD#2 citations, the

1 prior to his termination (*see* Ind. Defs.’ 10/21/16 Reply in Supp. of MSJ No. 1 at 5-7 (collecting  
2 evidence)); none of it shows the kind of bias in favor of Ellen and Margaret Cotter (and against  
3 Plaintiff) required by law to challenge Kane’s independence with respect to Plaintiff’s  
4 termination. *See Beam*, 845 A.2d at 1050. There is no evidence that Kane was on both sides of  
5 any transaction to which RDI was a party.

6         Given the clear insufficiency of these challenges, coupled with the fact that Plaintiff—  
7 mere weeks before his termination—approved an SEC filing that identified Director Kane as  
8 “independent” (HD#2 Ex. 11 (5/8/15 RDI Form 10-K/A, Am. No. 1) at -5644 & -5665), Plaintiff  
9 has not met his burden of showing a genuine issue for trial with respect to Kane’s independence  
10 in making the termination decision.

11                 3.     Director Guy Adams

12         Plaintiff’s Supplemental Opposition offers no new evidence with respect to the  
13 independence of Director Guy Adams. Indeed, the only evidence that Plaintiff cites at all is  
14 testimony given by Adams on October 17, 2017 in which he confirmed the accuracy of financial  
15 information already in the summary judgment record. (*See* Pl.’s Supp. Opp’n to MSJ Nos. 1 & 2  
16 at 8.) While Plaintiff cites additional detail regarding Director Adams’ finances in his  
17 Opposition to the Individual Defendants’ Motion *in Limine* to Exclude Evidence That Is More  
18 Prejudicial Than Probative (*see* Pl.’s Opp’n to Ind. Defs.’ Prejudicial MIL at 6-8), that evidence  
19 was also already in the summary judgment record. (*See* Ind. Defs.’ 9/23/16 MSJ No. 2 at 22-27  
20 (citing evidence); Ind. Defs.’ 10/21/16 Reply in Supp. of MSJ No. 2 at 9-11 (same).)

21         Even in his application of the Delaware standard, Plaintiff concedes that the only way  
22 that Adams’ independence can be subject to question is if his “material ties to the person whose  
23 proposal or actions [he] is evaluating”—*i.e.*, Ellen and Margaret Cotter—“are sufficiently  
24 substantial that [he] cannot objectively fulfill [his] fiduciary duties.” *In re MFW S’holders Litig.*,  
25 67 A.3d at 509. “[T]he simple fact that there are some financial ties between the interested party  
26 and the director is not disqualifying.” *Id.* Instead, the financial ties or benefit must be “material”  
27

28         Individual Defendants refer the Court to that previously-attached exhibit to reduce confusion and



1 Even in his application of the Delaware standard, Plaintiff concedes that the only way  
2 that Adams' independence can be subject to question is if his "material ties to the person whose  
3 proposal or actions [he] is evaluating"—i.e., Ellen and Margaret Cotter—"are sufficiently  
4 substantial that [he] cannot objectively fulfill [his] fiduciary duties." *In re MFW S'holders Litig.*,  
5 67 A.3d at 509. "[T]he simple fact that there are some financial ties between the interested party  
6 and the director is not disqualifying." *Id.* Instead, the financial ties or benefit must be "material"  
7 to Adams himself, meaning that they are "significant enough *in the context of the director's*  
8 *economic circumstances* as to have made it improbable that the director could perform [his]  
9 fiduciary duties to the . . . shareholders without being influenced by [his] overriding personal  
10 interest." *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (citation omitted) (emphasis in  
11 original). Plaintiff cannot make this showing. In fact, his entire premise that Director Adams  
12 lacks independence because he is "financially dependent" on Ellen and Margaret Cotter is based  
13 on his gross mischaracterization of the actual record.

14 First, the undisputed evidence shows that, while Adams stands to receive additional  
15 compensation from the James Cotter, Sr.'s Estate due to his small interest in certain real estate  
16 ventures, Adams has the right to this compensation as part of a pre-existing contract that is  
17 unaffected by whatever Cotter sibling maintains control of the Estate of James J. Cotter, Sr.  
18 While Ellen and Margaret Cotter may currently distribute the funds as executors of the Estate,  
19 they do not have any discretion to do otherwise. (See HD#2 Ex. 2 (4/28/16 Adams Dep.)  
20 at 55:8-57:24.) Thus, this outside "business agreement" between a director and the James Cotter,  
21 Sr.'s Estate "where both parties could benefit financially" once certain properties are developed  
22 is not enough to show "with sufficient particularity that [Adams] could not form business  
23 decisions independently" with respect to RDI and, in particular, the decision to terminate  
24 Plaintiff. *La. Mun. Police Emps.' Ret. Sys.*, 2014 WL 994616, at \*7.

25 Second, contrary to Plaintiff's claims, the fact that Director Adams receives an income of  
26 [REDACTED] per year from the Cotter Family Farms (a Cotter business that is overseen by  
27 Plaintiff, ironically) is not evidence of his financial dependence on Ellen and Margaret Cotter.  
28 (See Pl.'s Opp'n to Ind. Defs.' Prejudicial MIL at 7.) Adams began earning this money in

1 to Adams himself, meaning that they are “significant enough *in the context of the director’s*  
2 *economic circumstances* as to have made it improbable that the director could perform [his]  
3 fiduciary duties to the . . . shareholders without being influenced by [his] overriding personal  
4 interest.” *Orman v. Cullman*, 794 A.2d 5, 23 (Del. Ch. 2002) (citation omitted) (emphasis in  
5 original). Plaintiff cannot make this showing. In fact, his entire premise that Director Adams  
6 lacks independence because he is “financially dependent” on Ellen and Margaret Cotter is based  
7 on his gross mischaracterization of the actual record.

8 First, the undisputed evidence shows that, while Adams stands to receive additional  
9 compensation from the James Cotter, Sr.’s Estate due to his small interest in certain real estate  
10 ventures, Adams has the right to this compensation as part of a pre-existing contract that is  
11 unaffected by whatever Cotter sibling maintains control of the Estate of James J. Cotter, Sr.  
12 While Ellen and Margaret Cotter may currently distribute the funds as executors of the Estate,  
13 they do not have any discretion to do otherwise. (*See* HD#2 Ex. 2 (4/28/16 Adams Dep.)  
14 at 55:8-57:24.) Thus, this outside “business agreement” between a director and the James Cotter,  
15 Sr.’s Estate “where both parties could benefit financially” once certain properties are developed  
16 is not enough to show “with sufficient particularity that [Adams] could not form business  
17 decisions independently” with respect to RDI and, in particular, the decision to terminate  
18 Plaintiff. *La. Mun. Police Emps.’ Ret. Sys.*, 2014 WL 994616, at \*7.

19 Second, contrary to Plaintiff’s claims, the fact that Director Adams receives an income of  
20 \$52,000 per year from the Cotter Family Farms (a Cotter business that is overseen by Plaintiff,  
21 ironically) is not evidence of his financial dependence on Ellen and Margaret Cotter. (*See* Pl.’s  
22 Opp’n to Ind. Defs.’ Prejudicial MIL at 7.) Adams began earning this money in 2012—before  
23 he joined the RDI Board—as part of a services contract with James Cotter, Sr., and he continues  
24 to receive such payment from the Cotter Family Farms as he continues to perform such services.  
25 (HD#2 Ex. 2 (4/28/16 Adams Dep.) at 16:4-17:16, 27:1-35:20.) Plaintiff has not contested that  
26 Adams is performing such services or that he is entitled to such compensation under that

27  
28 avoid duplication.

1 preexisting agreement. There is also no evidence that Ellen and Margaret Cotter have ever  
2 actually threatened Adams' position with the Cotter Family Farms. Instead, the undisputed  
3 evidence is that Adams had not had any communications with the Cotter sisters about continuing  
4 or not continuing his work for the Farms. (*Id.* at 29:3-7.) Nearly-identical facts have been held  
5 to be sufficient to rebut an attack on a director's independence. *See Grobow v. Perot*, 539 A.2d  
6 180, 188 (Del. 1988) (rejecting entrenchment attack because there were no facts "tending to  
7 show that the [] directors' positions were actually threatened"), *overruled on other grounds by*  
8 *Brehm v. Eiser*, 746 A.2d 244 (Del. 2000). Plaintiff also does not dispute that since the Estate's  
9 assets ultimately pour over into the Trust, and control of the Trust as between Plaintiff and his  
10 sisters is currently subject to dispute, there is no reason for Adams to prefer Ellen and Margaret  
11 Cotter over Plaintiff.

12 Third, the fact that Director Adams receives the typical fees and stock options as  
13 compensation for his service as an RDI Director (*see* Pl.'s Opp'n to Ind. Defs.' Prejudicial MIL  
14 at 7) is irrelevant as a matter of law to any independence inquiry. It is well-settled that "the mere  
15 fact that a director receives compensation for [his] service as a board member adds little or  
16 nothing" to the independence analysis. *Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL  
17 1388744, at \*16-17 (Del. Ch. May 9, 2006) (claim that a "director's salary . . . might influence  
18 his decision" was insufficient to disturb presumption of independence); *see also Grobow*, 539  
19 A.2d at 188 ("allegation that all GM's directors are paid for their service as directors . . . does not  
20 establish any financial interest" and did not undermine independence).

21 Ultimately, Plaintiff's entire attack on Director Adams' independence boils down to his  
22 assumption that a 66-year-old man of retirement age, who has served on at least four different  
23 corporate boards over the last decade and has an uncontested net worth of approximately  
24 \$900,000.00, must be " beholden " to Ellen and Margaret Cotter and unable to properly exercise  
25 his discretion in evaluating the decision to terminate Plaintiff because the bulk of his current  
26 yearly income comes from his RDI Board service or the above-identified antecedent business  
27 relationships with James J. Cotter, Sr., which now continue as contracts for the benefit of either  
28 the Cotter Family Farms or the Estate of James J. Cotter, Sr. (*See* Pl.'s Opp'n to Ind. Defs.')

1 exercise his discretion in evaluating the decision to terminate Plaintiff because the bulk of his  
2 current yearly income comes from his RDI Board service or the above-identified antecedent  
3 business relationships with James J. Cotter, Sr., which now continue as contracts for the benefit  
4 of either the Cotter Family Farms or the Estate of James J. Cotter, Sr. (*See* Pl.'s Opp'n to Ind.  
5 Defs.' Prejudicial MIL at 8 & n.1.)<sup>9</sup> Notwithstanding what Plaintiff may determine to be  
6 necessary to meet his lavish lifestyle needs, [REDACTED] is a significant fortune in this country.  
7 *See, e.g.,* U.S. Census Bureau, Wealth, Asset Ownership, and Debt of Households – Detailed  
8 Tables: 2013, *available at* [https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-](https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html)  
9 [ownership.html](https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html) (showing that, as of 2013, the median U.S. household net worth was \$80,039,  
10 and the median U.S. household net worth for households in the 65-69 year age bracket—like  
11 Adams—was \$193,833).

12 Moreover, not everyone was fortunate enough to be born the son of a man worth  
13 hundreds of millions of dollars, like Plaintiff. Recognizing this, courts have rejected attacks on  
14 independence similar to that attempted by Plaintiff, and have instead held that the mere fact that  
15 directors may receive “relatively substantial compensation provided by . . . board membership  
16 compared to their outside salaries” does not alone “lead to a reasonable doubt as to the[ir]  
17 independence.” *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 359-60 (Del. Ch. 1998), *aff'd*  
18 *in relevant part, rev'd in part and remanded sub non*, *Brehm v. Eisner*, 746 A.2d 244 (Del.  
19 2000). Indeed, too much emphasis on the ratio of board-related compensation to total income  
20 would “discourage the membership on corporate boards of people of less-than extraordinary  
21 means” as well as “regular folks.” *Id.* (concluding the fact that board member’s “salary as a  
22  
23

---

24 <sup>9</sup> Plaintiffs’ supposition that Director Adams, without the current RDI-related funds,  
25 would “rapidly dissipate his remaining assets” is based upon his unsupported speculation that  
26 Director Adams would not modify his 2013-level expenses without his present source of income,  
27 would not find service on any other board, would not remarry, and will live another 20 years.  
28 (Pl.’s Opp’n to Ind. Defs.’ Prejudicial MIL at 8 n.1.) Of course, Plaintiff also avoids any  
consideration of Social Security benefits and any pension to which Director Adams may be  
entitled. (*Id.*)

1 Prejudicial MIL at 8 & n.1.)<sup>9</sup> Notwithstanding what Plaintiff may determine to be necessary to  
2 meet his lavish lifestyle needs, \$900,000.00 is a significant fortune in this country. *See, e.g.*,  
3 U.S. Census Bureau, Wealth, Asset Ownership, and Debt of Households – Detailed Tables:  
4 2013, *available at* [https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-](https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html)  
5 [ownership.html](https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html) (showing that, as of 2013, the median U.S. household net worth was \$80,039,  
6 and the median U.S. household net worth for households in the 65-69 year age bracket—like  
7 Adams—was \$193,833).

8 Moreover, not everyone was fortunate enough to be born the son of a man worth  
9 hundreds of millions of dollars, like Plaintiff. Recognizing this, courts have rejected attacks on  
10 independence similar to that attempted by Plaintiff, and have instead held that the mere fact that  
11 directors may receive “relatively substantial compensation provided by . . . board membership  
12 compared to their outside salaries” does not alone “lead to a reasonable doubt as to the[ir]  
13 independence.” *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 359-60 (Del. Ch. 1998), *aff’d*  
14 *in relevant part, rev’d in part and remanded sub non*, *Brehm v. Eisner*, 746 A.2d 244 (Del.  
15 2000). Indeed, too much emphasis on the ratio of board-related compensation to total income  
16 would “discourage the membership on corporate boards of people of less-than extraordinary  
17 means” as well as “regular folks.” *Id.* (concluding the fact that board member’s “salary as a  
18 teacher is low compared to her director’s fees and stock options” did not undermine presumption  
19 of independence).

20 Here, given that Plaintiff admittedly never questioned Director Adams’ independence  
21 prior to the termination decision process, repeatedly certified him to be “independent” under the  
22 NASDAQ listing standards for his service as an RDI Board member, and cannot show that it is  
23 “improbable” that Adams can be independent due to financial circumstances (as required by  
24

---

25 <sup>9</sup> Plaintiffs’ supposition that Director Adams, without the current RDI-related funds,  
26 would “rapidly dissipate his remaining assets” is based upon his unsupported speculation that  
27 Director Adams would not modify his 2013-level expenses without his present source of income,  
28 would not find service on any other board, would not remarry, and will live another 20 years.  
(Pl.’s Opp’n to Ind. Defs.’ Prejudicial MIL at 8 n.1.) Of course, Plaintiff also avoids any  
consideration of Social Security benefits and any pension to which Director Adams may be  
entitled. (*Id.*)

1 Orman), Plaintiff has not met his burden of showing a genuine issue for trial with respect to  
2 Adams' independence in making the termination decision. (See also Ind. Defs.' 9/23/16 MSJ  
3 No. 2 at 22-27; Ind. Defs.' 10/21/16 Reply in Supp. of MSJ No. 2 at 9-11.) Because the majority  
4 of the RDI Board members voting in favor of Plaintiff's termination (McEachern, Kane, and  
5 Adams) were therefore independent as a matter of law, even under Plaintiff's legal framework  
6 the business judgment presumption attaches to the Board's decision to terminate Plaintiff and  
7 renders his termination-based fiduciary duty claims untenable as a matter of law. Summary  
8 judgment is therefore warranted.

9 **III. PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT**  
10 **EXISTS REGARDING WHETHER HIS TERMINATION WAS ENTIRELY FAIR**

11 While he mentions the standards for the Delaware "entire fairness" test in his  
12 Supplemental Opposition, Plaintiff does not offer any new evidence as to the fairness of his  
13 termination. (See Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 12-13.) As set forth in Plaintiff's  
14 previous briefing, even assuming *arguendo* that (i) a former employee, such as Plaintiff, could  
15 ever state an actionable claim for breach of a fiduciary duty stemming from his termination,  
16 (ii) the business judgment presumption could potentially be overcome in such a situation, (iii) a  
17 majority of the RDI Board was required to be "disinterested" in order to effectively remove  
18 Plaintiff as President and CEO; and (iv) a majority of the RDI Board was not "disinterested"  
19 with respect to decision to terminate Plaintiff as President and CEO, the decision to terminate  
20 Plaintiff was fair on the merits to the Company, and thus not actionable.

21 After over two years of discovery, Plaintiff has not been able to meet the minimum proof  
22 thresholds required to create a triable issue of fact as to whether his termination was fair on the  
23 merits. Rather, it is beyond reasonable dispute that Plaintiff lacked significant experience in  
24 areas critical to RDI, teamwork and morale was poor under his abusive leadership, Plaintiff  
25 lacked an understanding of key components of RDI's business, and Plaintiff could not work with  
26 key RDI executives. It is particularly ironic that Plaintiff also seeks to be reinstated on the basis  
27 that Ellen Cotter did not satisfy the Korn Ferry job description, which he likewise fails to satisfy.  
28 There is no evidence in the record that continuing Plaintiff as CEO and/or President would have

1 been in the best interests of RDI, or that he was terminated on terms that were “unfair” to RDI.  
2 Nor is there any evidence in the record that returning him to office would be in the best interests  
3 of the Company. (*See, e.g.*, Ind. Defs.’ 9/23/16 MSJ No. 1 at 18-22; Ind. Defs.’ 10/21/16 Reply  
4 in Supp. of MSJ No. 1 at 13-17.) At the summary judgment stage, this is fatal to Plaintiff’s  
5 Delaware-based “entire fairness” challenge, as he cannot show that his removal was in any way  
6 “unfair” to RDI—the actual derivative plaintiff in this action.

7 **IV. PLAINTIFF CANNOT DEMONSTRATE THAT A TRIABLE ISSUE OF FACT**  
8 **EXISTS REGARDING ANY SUPPOSED INTENTIONAL MISCONDUCT,**  
9 **FRAUD, OR KNOWING VIOLATION OF THE LAW**

10 Finally, as emphasized in the Individual Defendants’ Supplemental Motion, Plaintiff has  
11 not shown that a triable issue of fact exists as to whether the decision to terminate his  
12 employment as President and CEO involved intentional misconduct, fraud, or a knowing  
13 violation of the law. (*See* Ind. Defs.’ Supp. Mot. at 11-12.) Recent amendments to Nevada law  
14 have made clear that Plaintiff must make this showing to establish the liability of the Individual  
15 Defendants stemming from his termination even if he has already successfully rebutted the  
16 business judgment presumption *and*, if the Delaware test is applied, proven that his termination  
17 was not entirely fair (and thus a breach of fiduciary duty). *See* NRS 78.138(7)(a)-(b) (eff. Oct. 1,  
18 2017) (amending the text of subsection 7).

19 Despite the fact that the Individual Defendants explicitly raised this issue again in their  
20 Supplemental Motion, Plaintiff failed to provide *any evidence* supporting intentional misconduct,  
21 fraud, or a knowing violation of the law in his Supplemental Opposition. (*See generally* Pl.’s  
22 Supp. Opp’n to MSJ Nos. 1 & 2.) This is not the first time that Plaintiff has failed to do so; as  
23 the Individual Defendants pointed out in their Opposition to Plaintiff’s Motion for Partial  
24 Summary Judgment, “Plaintiff again completely avoids any mention—let alone discussion—of  
25 NRS 78.138(7).” (Ind. Defs.’ 10/13/16 Opp’n to Pl.’s Partial MSJ at 28-29.) Failure to address  
26 this essential statutory element is fatal to Plaintiff’s termination claim.

27 Moreover, as the Individual Defendants have argued, there can be no “knowing  
28 violation” or “intentional misconduct” where the RDI Board weighed the propriety of Plaintiff’s  
termination over several meetings, engaged outside counsel to assist it in exercising its fiduciary

1 duties, and articulated a wide variety of business-specific reasons for its removal decision. (*See*  
2 *id.*) Even the directors that voted not to terminate Plaintiff on June 12, 2015 recognized  
3 significant problems with his performance, and objected more to the timing of his removal than  
4 to the underlying basis. (*See Ind. Defs.’ 9/23/16 MSJ No. 1 at 8-12, 19.*) This is not a case  
5 where the Board is accused of making a multi-million dollar payment to make an executive go  
6 away, and even where such payments are made, that is not sufficient to establish an actionable  
7 claim. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d at 72-73. Plaintiff has not identified a  
8 single case anywhere in which directors have been held liable for breaching their fiduciary duties  
9 in the context of an employee termination, let alone under the strict requirements set forth in  
10 NRS 78.138(7). Because Plaintiff has not even attempted to (and cannot) meet the showing  
11 required under NRS 78.138(7)(b)(2) to establish individual liability, no triable issue remains and  
12 summary judgment on his termination claim is appropriate.

### 13 CONCLUSION

14 Delaware’s “entire fairness” test is not Nevada law. Under applicable Nevada law, the  
15 Individual Defendants are entitled to the benefit of Nevada’s business judgment presumption in  
16 making their business decision to terminate Plaintiff as President and CEO. Independence is not  
17 required for the benefits of the Nevada business judgment presumption in the absence of a  
18 transaction in which directors sit on both sides of the table. Moreover, RDI’s bylaws specifically  
19 vest in the board the power, by majority vote, to terminate officers of the corporation, with or  
20 without cause, and do not specify that such majority must consist of “independent directors.”  
21 Plaintiff has presented no evidence rebutting the Nevada business judgment presumption or, to  
22 the extent the Delaware standard is applied, demonstrating that the decision was “unfair” to RDI.  
23  
24  
25  
26  
27  
28



1 For the reasons set forth above, the Individual Defendants respectfully request that the  
2 Court grant their Supplemental Motion for Summary Judgment No. 1 (and, to the extent  
3 implicated, No. 2) and grant them summary judgment as to the First, Second, Third, and Fourth  
4 Causes of Action set forth in Plaintiff's Second Amended Complaint, to the extent that they  
5 assert claims, damages, and an injunction based on Plaintiff's June 12, 2015 termination as CEO  
6 and President of RDI.

7  
8 Dated: December 4, 2017

9 **COHEN|JOHNSON|PARKER|EDWARDS**

10 By: /s/ H. Stan Johnson

11 H. STAN JOHNSON, ESQ.  
12 Nevada Bar No. 00265  
13 sjohnson@cohenjohnson.com  
14 375 East Warm Springs Road, Suite 104  
15 Las Vegas, Nevada 89119  
16 Telephone: (702) 823-3500  
17 Facsimile: (702) 823-3400

18 **QUINN EMANUEL URQUHART &  
19 SULLIVAN, LLP**  
20 CHRISTOPHER TAYBACK, ESQ.  
21 California Bar No. 145532, *pro hac vice*  
22 christayback@quinnemanuel.com  
23 MARSHALL M. SEARCY, ESQ.  
24 California Bar No. 169269, *pro hac vice*  
25 marshallsearcy@quinnemanuel.com  
26 865 South Figueroa Street, 10<sup>th</sup> Floor  
27 Los Angeles, CA 90017  
28 Telephone: (213) 443-3000

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that, on December 4, 2017, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' RENEWED MOTIONS FOR PARTIAL SUMMARY JUDGMENT NOS. 1 AND 2** 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

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

Electronically Filed  
12/8/2017 4:40 PM  
Steven D. Grierson  
CLERK OF THE COURT



**JPTM**  
MORRIS LAW GROUP  
Steve Morris, Bar No. 1543  
Akke Levin, Bar No. 9102  
411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101  
Telephone: (702) 474-9400  
Facsimile: (702) 474-9422  
Email: sm@morrislawgroup.com  
Email: al@morrislawgroup.com

Mark G. Krum, Bar No. 10913  
Yurko, Salvesen & Remz, P.C.  
1 Washington Mall, 11th Floor  
Boston, MA 02108  
Telephone: (617) 723-6900  
Facsimile: (617) 723-6905  
Email: mkrum@bizlit.com

Attorneys for Plaintiff  
James J. Cotter, Jr.

(See signature page for additional counsel. )

DISTRICT COURT  
CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., ) Case No. A-15-719860-B  
derivatively on behalf of Reading ) Dept. No. XI  
International, Inc., )  
Plaintiff, ) Coordinated with:

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

MARGARET COTTER, ELLEN ) Dept. No. XI  
COTTER, GUY ADAMS, )  
EDWARD KANE, DOUGLAS ) Jointly Administered  
McEACHERN, WILLIAM )  
GOULD, JUDY CODDING, ) **JOINT PRETRIAL**  
MICHAEL WROTONIAK, ) **MEMORANDUM**

Defendants. )  
And ) **DATE: 12/11/2017**  
 ) **TIME: 10:30 a.m.**

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

JA5791

The parties, through their respective counsel of record, hereby submit the following joint pre-trial memorandum in accordance with this Court's 1<sup>st</sup> Amended Order Setting Civil Jury Trial, Pre-trial Conference and Calendar Call dated September 29, 2017 and Local Rule 2.67 after counsel for all parties<sup>1</sup> conferred regarding the same on November 15, 2017 and November 20, 2017.

**I. MATTER REFERENCED IN OCTOBER 4, 2017 ORDER, PARAGRAPH D**

**A. Motions in Limine (December 11, 2017)**

1. Plaintiff James J. Cotter Jr.'s Motion In Limine No. 1 Regarding Advice of Counsel
2. Plaintiff James J. Cotter Jr.'s Motion In Limine No. 2 Regarding the Submission of Merits-Related Evidence By Nominal Defendant Reading International, Inc.
3. Plaintiff James Cotter Jr.'s Motion In Limine No. 3 Regarding After Acquired Evidence
4. Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddington, Michael Wrotniak's Motion In Limine to Exclude Evidence that is More Prejudicial Than Probative
5. Renewed Motion In Limine to Exclude Expert Testimony of Myron Steele Based on Supplemental Authority
6. Defendant William Gould's Motion In Limine Exclude Irrelevant Speculative Evidence

---

<sup>1</sup> Counsel participating in the pretrial conference included: Mark Krum and Steve Morris on behalf of Plaintiff; Marshall Searcy and Noah Helpen on behalf of Defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Coddington and Michael Wrotniak; Shoshana Barnett on behalf of William Gould; and Kara Hendricks on behalf of Reading International, Inc.

**B. Motions for Summary Judgment (December 11, 2017)**

1. Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Coddington, Michael Wrotniak's Supplement to Motions for Partial Summary Judgment Nos. 1, 2, 3, 5 and 6

2. See also Section II. J.

**II. OTHER PRETRIAL MATTER**

**A. Statement of Facts**

**Plaintiff's Statement:**

In view of the significant prior proceedings in this case, including motions to dismiss and summary judgment motions, as well as the detail in the pending Second Amended Complaint (the particular allegations of which have been or will be admitted or denied in the individual defendants' respective answers), and the Court's resulting familiarity with this case, the parties respectfully provide the following abbreviated, summary statement of facts of the case:

Plaintiff James J. Cotter, Jr. ("Mr. Cotter" or "Plaintiff") was and is a substantial shareholder and a director of nominal defendant Reading International, Inc. ("RDI" or the "Company"), as well as a former President and Chief Executive Officer ("CEO"). Defendants Ellen Cotter and Margaret Cotter were and are members of the RDI board of directors (the "Board") and at all times relevant hereto have purported to be and/or been the controlling shareholder(s) of RDI. Each of the remaining individual defendants was at relevant times and is a member of the RDI Board, as well of certain Board committees.

The facts of this case include and concern acts and omissions of individual director defendants which the Plaintiff claims give rise to entail breaches of fiduciary duties individually and/or together with other acts

1 and omissions, including with respect to the following matters: the threat to  
2 terminate Mr. Cotter as President and CEO of RDI, the termination of  
3 Mr. Cotter as President and CEO of RDI, the demand that he resign from the  
4 Board, RDI Board governance matters, RDI SEC filings and press releases,  
5 the search for a permanent CEO that resulted in Ellen Cotter becoming  
6 permanent CEO, the hiring and compensation of Margaret Cotter as EVP  
7 RED NY, the payment of certain monies to certain of the individual  
8 defendants and the actions and or lack of actions by each of the individual  
9 defendants in response to offers or expressions of interest by Patton Vision  
10 and others to purchase all of the outstanding stock of RDI.

11 **Director Defendants' Statement:**

12 On June 12, 2015, the Board of Directors of Reading  
13 International, Inc. ("RDI") voted to terminate Plaintiff James J. Cotter, Jr. as  
14 President and CEO of RDI. Plaintiff claims that this decision was a breach of  
15 fiduciary duty. Plaintiff also claims various other breaches of fiduciary  
16 duty, including with respect to the search for a new President and CEO of  
17 RDI, the hiring of Margaret Cotter as an Executive Vice President for Real  
18 Estate -- NYC, the exercise of an option held by the Estate of James J. Cotter,  
19 Sr. to purchase 100,000 shares of RDI Class B voting stock, and the response  
20 to a third party's indication of interest in purchasing all outstanding shares  
21 of RDI. The Director Defendants contend that they acted in the best  
22 interests of RDI stockholders at all times and fulfilled their fiduciary duties  
23 to the Company.

24 One of the Director Defendants, William Gould is separately  
25 represented. On the central claim that initiated this case—Plaintiff's  
26 termination—Mr. Gould voted *against* terminating Plaintiff. Although  
27 Mr. Gould is separately represented, there is substantial overlap in his  
28 witness list and his responses to other portions of this pre-trial

1 memorandum with that of the other director defendants and individual  
2 defendants have therefore chosen to present a combined defense position in  
3 the pre-trial memorandum.

4 **RDI's Statement:**

5 RDI joins in the Director Defendants' Statement above.

6 **B. List of Claims**

7 Plaintiffs' list of claims for relief is as follows:

8 **A. Breaches of the Duty of Care (SAC 1-179) (First Cause)**

- 9
- 10 **1. Process in connection with termination, including aborting**  
11 **ombudsman and lack of process/process failures (SAC 3, 35,**  
12 **36, 43, 50 – 57, 61 – 94) (EC, MC, GA, EK, DM, WG)**  
13 **(equitable relief)<sup>2</sup>**
- 14 **2. Breach(es) of the duty of care and abdication of fiduciary**  
15 **responsibilities by some or all acts and omissions in SAC**  
16 **(SAC - all), including paragraph A. 1. above and the**  
17 **following:**
- 18 • Use of executive committee (SAC 8, 99) (EC, MC, Kane,  
19 Adams/WG, JC, MW)
  - 20 • Process/process failures from aborted CEO search selecting  
21 EC (SAC 6, 14, 137 – 147, 152) (Search Committee: MC, DM,  
22 WG) (Board: All)
  - 23 • Erroneous and/or materially misleading statements in board  
24 materials such as agendas and minutes, and in public  
25 disclosures including SEC filings and press releases (SAC 9,  
26 13, 72, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (all)

27

---

28 <sup>2</sup> Arabic numbered bold typeface paragraphs indicate matters which  
Plaintiff contends give rise to and/or constitute breaches of fiduciary duty  
independently, as well as together with other matter.

- 1 • Process/process failures in connection with nomination and
- 2 retention of directors, including adding Coddington and/or
- 3 Wrotniak (SAC 11, 12, 121-134) (EC, MC, DM, GA, EK, WG)
- 4 • Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149 –
- 5 151, 166) and paying the \$200,000 pre-employment bonus
- 6 (committees - members) (Board - all)
- 7 • \$50,000 to Adams (SAC 153, 166) (Committees – members)
- 8 (Board – all but GA)
- 9 • Process/process failures in response to Patton Vision offer(s)
- 10 (SAC 16, 154-162) (all)
- 11 **3. Damages/injury (SAC 163 – 168)**
- 12 a. injury to RDI's reputation and goodwill (164)
- 13 b. impairment of shareholder rights due to SEC filings (165)
- 14 **B. Breaches of the Duty of Loyalty (SAC 1 – 172, 180-186) (Second**
- 15 **Cause)**
- 16 1. Threat to terminate (SAC 2, 35, 36, 64-71, 78 – 82, 84, 87,
- 17 88, 91) (GA, EK, DM, EC, MC)
- 18 2. Termination (SAC 3, 35, 36, 43, 50 – 57, 64 – 94) (GA, EK,
- 19 DM, EC, MC) (equitable relief also sought)
- 20 3. Authorizing exercise of the 100,000 share option (SAC 10,
- 21 102 – 108) (GA, EK) (equitable relief also sought)
- 22 4. Aborted CEO search selecting EC (SAC 6, 14, 137 – 147,
- 23 152) (Search Committee: MC, DM, WG) (Board: all)
- 24 5. Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149
- 25 – 151, 166) and paying \$200,000 pre-employment bonus
- 26 (Committee members) (Board: all)
- 27 6. Process/process failures in response to Patton Vision
- 28 offer(s) (SAC 16, 154-162) (all)
7. Breach of the duty of loyalty (all) and misuse of their



position as controlling shareholders (EC, MC) by some or all such acts and omissions in the SAC, including those in paragraphs B. 1. – 7. above and the following:

- Threat to terminate insurance if JJC, Jr. does not resign as a director (SAC 4, 38) (EC, WG)
  - use of executive committee (SAC 8, 99) (EC, MC, Kane, Adams, WG)
  - manipulating board materials (SAC 9, 72, 100) (EC)
  - involuntary retirement of Storey (SAC 12, 127-130) (EC, MC, DM, GA, EK)
  - Board stacking/adding Coddington and Wrotniak (SAC 11, 121-134) (nominating committee) (Board - all others)
  - \$50,000 to Adams (SAC 153, 166) (EC) (all)
  - SEC filings (SAC 13, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (all)
8. **Damages/injury (SAC 163 – 168)**
- a. diminution in value of RDI (163)
  - b. injury to reputation and goodwill (164)
  - c. impairment of shareholder rights due to SEC filings (165)
  - d. other monetary damages (166)
    - i. \$200,000 and job to MC
    - ii. \$50,000 to Adams
    - iii. duplicate cost of paying consultants to perform MC's position's responsibilities
    - iv. class A nonvoting stock accepted *in lieu* of cash consideration for exercise of 100,000 share option

**C. Breaches of the Duty of Candor (SAC 1 – 172, 187 – 192) (Third Cause)**

1. SEC filings and press releases (SAC 13, 101a.-i., 109 – 119, 135a.-k., 136a.-i., 147) (EC - all) (WG - Form 8-Ks and press releases about termination and CEO) (each as to disclosures regarding themselves (e.g., proxies))
2. Damages/injury (SAC 163 – 168)
  - a. diminution in value of RDI (163)
  - b. impairment of shareholder rights due to SEC filings (165)
  - c. injury to reputation and goodwill (168)

**D. Aiding and Abetting Breaches of Fiduciary Duty (SAC 193 – 200) (Fourth Cause)**

1. Threat to terminate (SAC 2, 35, 36, 64-71, 78 – 82, 84, 87, 88, 91) (EC, MC)
2. Termination (SAC 3, 35, 36, 43, 50 – 57, 64 – 94) (Threat to terminate (SAC 2, 35, 36, 78 – 82, 87, 88, 91) (EC, MC)
3. Authorizing exercise of the 100,000 share option (SAC 10, 102 – 108) (EC)
4. Involuntary retirement of Storey (SAC 12, 127-130) (EC, MC)
5. Board stacking/adding Coddington and Wrotniak (SAC 11, 121-134) (EC, MC)
6. Aborted CEO search selecting EC (SAC 6, 14, 137 – 147, 152) (EC)
7. Hiring MC as EVP RED NY (SAC 6, 15, 57 – 61, 92, 95, 149 – 151, 166) and paying \$200,000 pre-employment bonus (EC, MC)
8. Patton Vision offer(s) (SAC 16, 154-162) (EC, MC)

9. Damages/injury (SAC 163 – 168)
  - a. diminution in value of RDI (163)
  - b. injury to reputation and goodwill (164)
  - c. impairment of shareholder rights due to SEC filings (165)
  - d. other monetary damages (166)
    - i. \$200,000 and job to MC
    - ii. \$50,000 to Adams
    - iii. duplicate cost of paying consultants to perform MC's position's responsibilities
    - iv. class A nonvoting stock accepted *in lieu* of cash consideration for exercise of 100,000 share option

**C. List of Affirmative Defenses**

Plaintiff has not abandoned any purported claims identified in the Second Amended Complaint. Director Defendants therefore cannot abandon any affirmative defenses asserted in its Answer to the Second Amended Complaint. Depending on which particular claims for relief Plaintiff actually pursues at trial, Director Defendants may raise the following affirmative defenses:

- Failure to State a Cause of Action;
- Statute of Limitations and Repose;
- Laches;
- Unclean Hands;
- Spoliation;
- Illegal Conduct and Fraud;
- Waiver, Estoppel, and Acquiescence;
- Ratification and Consent;

- No Unlawful Activity;
- No Reliance;
- Failure to Plead Fraud with Particularity;
- Uncertain and Ambiguous Claims;
- Privilege and Justification;
- Good Faith and Lack of Fault;
- No Entitlement to Injunctive Relief;
- Damages too Speculative;
- No Entitlement to Punitive Damages;
- Failure to Mitigate;
- Comparative Fault;
- Business Judgment Rule;
- Equitable Estoppel;
- Election of Remedies;
- N.R.S. 78.138;
- Failure to Make Appropriate Demand;
- Conflict of Interest and Unsuitability to Serve as a Derivative Representative.

**RDI**

- Failure To State A Claim
- Failure To Make Demand
- Corporate Governance
- Irreparable Harm To Company
- Unclean Hands
- Spoliation
- Waiver, Estoppel, And Acquiescence
- Ratification And Consent
- No Unlawful Activity

- Privilege And Justification
- Good Faith And Lack Of Fault
- No Entitlement To Injunctive Relief
- Damages Too Speculative
- Mitigation Of Damages
- Comparative Fault
- Equitable Estoppel
- Nevada Revised Statute 78.138
- Conflict Of Interest And Unsuitability To Serve As Representative

**D. Claims or Defenses to be Abandoned**

None. However, Plaintiff will not seek equitable relief with respect to historical or past actions relating to the executive committee, to corporate governance of RDI such as misleading or inaccurate meeting agendas and/or minutes, to the addition or removal of persons to and/or from the RDI board of directors and to SEC filings and press releases. Plaintiff will seek equitable relief with respect to the vote to terminate James J. Cotter Jr. as President and CEO and reserves the right to do so with respect to authorization of the exercise of the so-called 100,000 share option.

**E. List of Exhibits**

The Court has given the parties to and including December 13, 2017 to provide exhibit list(s).

**F. Agreements to Limit or Exclude Evidence**

None presently.

1           **G.    Witness List**

2               **1.    Nonexpert Witnesses**

3               For Plaintiff:

- 4           1. James Cotter, Jr. (*plaintiff expects to present this witness*)  
5             c/o Mark Krum  
6             Yurko, Salvesen & Remz. P.C.  
7             One Washington Mall, 11<sup>th</sup> Floor  
8             Boston, MA 02108  
9             617.723.6900
- 10          2. Person Most Knowledgeable, Reading International, Inc. (*plaintiff*  
11             *may call this witness if the need arises*)  
12             c/o Mark E. Ferrario, Esq.  
13             Leslie S. Godfrey, Esq.  
14             Greenberg Traurig LLP  
15             3773 Howard Hughes Parkway, Suite 400 North  
16             Las Vegas, Nevada 89169  
17             702-792-3773
- 18          3. Margaret Cotter (*plaintiff expects to present this witness*)  
19             c/o Stan Johnson  
20             COHEN | JOHNSON | PARKER | EDWARDS  
21             375 E. Warm Springs Road, Ste. 104  
22             Las Vegas, NV 89119  
23             702-823-3500
- 24          4. Ellen Cotter (*plaintiff expects to present this witness*)  
25             c/o Stan Johnson  
26             COHEN | JOHNSON | PARKER | EDWARDS  
27             375 E. Warm Springs Road, Ste. 104  
28             Las Vegas, Nevada 89119  
              702-823-3500
5. Douglas McEachern (*plaintiff expects to present this witness*)  
              c/o Stan Johnson  
              Cohen-Johnson, LLC  
              255 East Warm Springs Road, Suite 100  
              Las Vegas, Nevada 89119  
              702-823-3500

- 1 6. Guy Adams (*plaintiff expects to present this witness*)  
2 c/o Stan Johnson  
3 Cohen-Johnson, LLC  
4 255 East Warm Springs Road, Suite 100  
5 Las Vegas, Nevada 89119  
6 702-823-3500
- 7 7. Edward Kane (*plaintiff expects to present this witness*)  
8 c/o Stan Johnson  
9 Cohen-Johnson, LLC  
10 255 East Warm Springs Road, Suite 100  
11 Las Vegas, Nevada 89119  
12 702-823-3500
- 13 8. William Gould (*plaintiff expects to present this witness*)  
14 Donald A. Lattin, Esq.  
15 Carolyn K. Renner, Esq.  
16 MAUPIN, COX & LeGOY  
17 4785 Caughlin Parkway  
18 Reno, Nevada 89519  
19 775-827-2000
- 20 9. Timothy Storey (*plaintiff expects to present this witness*)  
21 Donald A. Lattin, Esq.  
22 Carolyn K. Renner, Esq.  
23 MAUPIN, COX & LeGOY  
24 4785 Caughlin Parkway  
25 Reno, Nevada 89519  
26 775-827-2000
- 27 10. John Hunter (*plaintiff may call this witness if the need arises*)  
28 Milken Institute, Chief Financial Officer  
1250 4th Street  
Santa Monica, CA 90401
11. Antoinette Jefferies (*plaintiff may call this witness if the need arises*)  
10488 Eastborne Avenue, Unit #211  
Los Angeles, California 90024  
310-293-7384

12. Eric Barr (*plaintiff may call this witness if the need arises*)  
9 Park Street, Brighton, VIC 3186  
Southern Melbourne, Australia  
011-61-488-096-616  
[ebarr@optushome.com.au](mailto:ebarr@optushome.com.au)
13. Al Villasenor (*plaintiff may call this witness if the need arises*)  
116 – 19th Street  
Manhattan Beach, California 90266  
Home- 310-546-5193  
Mobile- 310-897-0407
14. Lois Marie Kwasigroch (*plaintiff may call this witness if the need arises*)  
20100 Wells Drive  
Woodland Hills, California 91364  
(805) 447-6265
15. Harry P. Susman (*plaintiff may call this witness if the need arises*)  
Susman Godfrey, LLP  
1000 Louisiana, Suite 5100  
Houston, Texas 77002  
713-653-7875 (w)  
[hsusman@susmangodfrey.com](mailto:hsusman@susmangodfrey.com)
16. Fehmi Karahan (*plaintiff may call this witness if the need arises*)  
The Karahan Companies  
7200 Bishop Road, Suite 250  
Plano, Texas 75024  
214-473-9700 (w)  
[fehmi@karahaninc.com](mailto:fehmi@karahaninc.com)
17. Judy Coddling (*plaintiff expects to present this witness*)  
2266 Canyon Back Road  
Los Angeles, California 90049
18. Michael J. Wrotniak (*plaintiff expects to present this witness*)  
Aminco Resources USA  
World Headquarters  
81 Main Street Suite 110



1 White Plains, NY 10601  
2 914 949 4400  
3 M.Wrotniak@Aminco.biz

4 19. Gil Borok (*plaintiff may call this witness if the need arises*)  
5 3835 Hayvenhurst Avenue  
6 Encino, California 91436  
7 Mobile- 818-0528-3689  
8 Email- gborok@me.com

9 20. Robert Wagner (*plaintiff may call this witness if the need arises*)  
10 Korn Ferry  
11 1900 Avenue of the Stars Suite 2600  
12 Los Angeles, CA 90067  
13 310-226-2672 (w)  
14 Robert.wagner@kornferry.com

15 21. John M. Genovese (*plaintiff may call this witness if the need arises*)  
16 7584 Coastal View Drive  
17 Los Angeles, CA 90045  
18 Mobile: 310-245-1760  
19 Email- jmgenovese@yahoo.com

20 22. William D. Ellis (*plaintiff expects to present this witness and/or*  
21 *present the witness's testimony by means of a deposition*)  
22 c/o Mark E. Ferrario, Esq.  
23 Leslie S. Godfrey, Esq.  
24 Greenberg Traurig LLP  
25 3773 Howard Hughes Parkway, Suite 400 North  
26 Las Vegas, Nevada 89169  
27 702-792-3773

28 23. Craig Tompkins (*plaintiff may call this witness if the need arises*)  
c/o Mark E. Ferrario, Esq.  
Leslie S. Godfrey, Esq.  
Greenberg Traurig LLP  
3773 Howard Hughes Parkway, Suite 400 North  
Las Vegas, Nevada 89169  
702-792-3773

- 1 24. Gary McLaughlin (*plaintiff may call this witness if the need arises*)  
2 Akin Gump  
3 2029 Century Park East, Suite 2400  
4 Los Angeles, CA 90067  
5 310-728-3358
- 6 25. C.N. Franklin Reddick, III (*plaintiff may call this witness if the*  
7 *need arises*)  
8 Akin Gump  
9 2029 Century Park East, Suite 2400  
10 Los Angeles, CA 90067  
11 310-728-3358
- 12 26. Robert Mayes (*plaintiff expects to present this witness and/or*  
13 *present the witness's testimony by means of a deposition*)  
14 Korn Ferry  
15 c/o Samantha Goodman  
16 1900 Avenue of the Stars, Suite 2600  
17 Los Angeles, CA 90067  
18 310.556.8557
- 19 27. Andrew Shapiro (*plaintiff expects to present this witness and/or*  
20 *present the witness's testimony by means of a deposition*)  
21 c/o Jahan Raissi  
22 Shartsis Freise LLP  
23 One Maritime Plaza, 18<sup>th</sup> Floor  
24 San Francisco, CA 94111  
25 415.421.6500
- 26 28. Jonathan Glaser (*plaintiff expects to present this witness and/or*  
27 *present the witness's testimony by means of a deposition*)  
28 c/o Alexander Robertson, IV  
Robertson & Associates, LLP  
32121 Lindero Canyon Road, Suite 200  
Westlake Village, CA 91361  
818.851.3850

1 29. Whitney Tilson (*plaintiff expects to present this witness's*  
2 *testimony*  
3 *by means of a deposition*)  
4 c/o Alexander Robertson, IV  
5 Robertson & Associates, LLP  
6 32121 Lindero Canyon Road, Suite 200  
7 Westlake Village, CA 91361  
8 818.851.3850

9 30. Andrez Matycynski (*plaintiff may call this witness if the need*  
10 *arises*)  
11 c/o Greenberg Traurig, LLP  
12 3773 Howard Hughes Pkwy., Ste. 400N  
13 Las Vegas, NV 89169

14 31. Dev Ghose (*plaintiff may call this witness if the need arises*)  
15 c/o Greenberg Traurig, LLP  
16 3773 Howard Hughes Pkwy., Ste. 400N  
17 Las Vegas, NV 89169

18 For the Director Defendants:

19 1. Ellen Cotter (*the director defendants expect to present this witness*)  
20 c/o COHEN | JOHNSON | PARKER | EDWARDS  
21 375 E. Warm Springs Road, Ste. 104  
22 Las Vegas, NV 89119  
23 702-823-3500

24 And

25 Quinn Emanuel Urquhart & Sullivan, LLP  
26 865 S. Figueroa St., 10<sup>th</sup> Floor  
27 Los Angeles, 90017  
28 213-443-3000

1 Margaret Cotter (*the director defendants expect to present this*  
2 *witness*)  
3 c/o COHEN | JOHNSON | PARKER | EDWARDS  
4 375 E. Warm Springs Road, Ste. 104  
5 Las Vegas, NV 89119  
6 702-823-3500

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

And  
Quinn Emanuel Urquhart & Sullivan, LLP  
865 S. Figueroa St., 10<sup>th</sup> Floor  
Los Angeles, 90017  
213-443-3000

3. James Cotter, Jr. (*the director defendants expect to present this witness*)  
c/o Mark Krum  
Yurko, Salvesen & Remz. P.C.  
One Washington Mall, 11<sup>th</sup> Floor  
Boston, MA 02108  
617-723-6900
4. Guy Adams (*the director defendants expect to present this witness*)  
c/o COHEN | JOHNSON | PARKER | EDWARDS  
375 E. Warm Springs Road, Ste. 104  
Las Vegas, NV 89119  
702-823-3500  
And  
Quinn Emanuel Urquhart & Sullivan, LLP  
865 S. Figueroa St., 10<sup>th</sup> Floor  
Los Angeles, 90017  
213-443-3000
5. Edward Kane (*the director defendants expect to present this witness*)  
c/o COHEN | JOHNSON | PARKER | EDWARDS  
375 E. Warm Springs Road, Ste. 104  
Las Vegas, NV 89119  
702-823-3500  
And  
Quinn Emanuel Urquhart & Sullivan, LLP  
865 S. Figueroa St., 10<sup>th</sup> Floor  
Los Angeles, 90017  
213-443-3000

- 1 6. Douglas McEachern (*the director defendants expect to present this*  
2 *witness*)  
3 c/o COHEN | JOHNSON | PARKER | EDWARDS  
4 375 E. Warm Springs Road, Ste. 104  
5 Las Vegas, NV 89119  
6 702-823-3500  
7 And  
8 Quinn Emanuel Urquhart & Sullivan, LLP  
9 865 S. Figueroa St., 10<sup>th</sup> Floor  
10 Los Angeles, 90017  
11 213-443-3000
- 12 7. Michael Wrotniak (*the director defendants expect to present this*  
13 *witness*)  
14 c/o COHEN | JOHNSON | PARKER | EDWARDS  
15 375 E. Warm Springs Road, Ste. 104  
16 Las Vegas, NV 89119  
17 702-823-3500  
18 And  
19 Quinn Emanuel Urquhart & Sullivan, LLP  
20 865 S. Figueroa St., 10<sup>th</sup> Floor  
21 Los Angeles, 90017  
22 213-443-3000
- 23 8. Judy Coddling (*the director defendants expect to present this*  
24 *witness*)  
25 c/o COHEN | JOHNSON | PARKER | EDWARDS  
26 375 E. Warm Springs Road, Ste. 104  
27 Las Vegas, NV 89119  
28 702-823-3500  
And  
Quinn Emanuel Urquhart & Sullivan, LLP  
865 S. Figueroa St., 10<sup>th</sup> Floor  
Los Angeles, 90017  
213-443-3000
9. Bill Gould (*the director defendants expect to present this witness*)  
c/o Maupin Cox & LeGoy  
4785 Caughlin Parkway  
Reno, NV 89519  
775-827-2000

1 And

2 c/o Bird, Marella, Boxer, Wolpert,  
3 Nessim, Dooks, Lincenberg & Rhow  
4 1875 Century Park East, 23<sup>rd</sup> Floor  
5 Los Angeles, CA 90067  
6 310-201-2100

- 7 10. Timothy Storey (*the director defendants expect to present this*  
8 *witness*)

9 c/o Maupin Cox & LeGoy  
10 4785 Caughlin Parkway  
11 Reno, NV 89519  
12 775-827-2000

13 And

14 c/o Bird, Marella, Boxer, Wolpert,  
15 Nessim, Dooks, Lincenberg & Rhow  
16 1875 Century Park East, 23<sup>rd</sup> Floor  
17 Los Angeles, CA 90067  
18 310-201-2100

- 19 11. Craig Tompkins (*the director defendants expect to present this*  
20 *witness*)

21 c/o Greenberg Traurig, LLP  
22 3773 Howard Hughes Pkwy., Ste. 400N  
23 Las Vegas, NV 89169  
24 702-792-3773

- 25 12. Bob Smerling (*the director defendants expect to present this witness*)

26 c/o Greenberg Traurig, LLP  
27 3773 Howard Hughes Pkwy., Ste. 400N  
28 Las Vegas, NV 89169  
702-792-3773

13. Terri Moore (*the director defendants expect to present this witness*)

c/o Greenberg Traurig, LLP  
3773 Howard Hughes Pkwy., Ste. 400N  
Las Vegas, NV 89169  
702-792-3773

- 1 14. Andrzej Matyczynski (*the director defendants expect to present this*  
2 *witness*)  
3 c/o Greenberg Traurig, LLP  
4 3773 Howard Hughes Pkwy., Ste. 400N  
5 Las Vegas, NV 89169  
6 702-792-3773
- 7 15. Linda Pham (*the director defendants expect to present this witness*)  
8 c/o Greenberg Traurig, LLP  
9 3773 Howard Hughes Pkwy., Ste. 400N  
10 Las Vegas, NV 89169  
11 702-792-3773
- 12 16. Debbie Watson (*the director defendants expect to present this*  
13 *witness*)  
14 c/o Greenberg Traurig, LLP  
15 3773 Howard Hughes Pkwy., Ste. 400N  
16 Las Vegas, NV 89169  
17 702-792-3773
- 18 17. Laura Batista (*the director defendants expect to present this witness*)  
19 c/o Greenberg Traurig, LLP  
20 3773 Howard Hughes Pkwy., Ste. 400N  
21 Las Vegas, NV 89169  
22 702-792-3773
- 23 18. David Roth (*the director defendants expect to present this witness*)  
24 Cecelia Packing Corp.  
25 24780 E South Ave.  
26 Orange Cove, CA 93646  
27 559-626-5000
- 28 19. Michael Buckley (*the director defendants may call this witness if the*  
*need arises*)  
Edifice Real Estate Partners  
545 8th Ave.  
New York, NY 10018  
347-826-4569

1 20. Derek Alderton (*the director defendants expect to present this*  
2 *witness*)

3 Highpoint Associates  
4 100 N Sepulveda Blvd.  
5 El Segundo, CA 90245  
6 310-616-0100

7 21. Mary Cotter (*the director defendants expect to present this witness*)

8 2818 Dumfries Road  
9 Los Angeles, CA 90064  
10 310-559-0581

11 22. Jill Van (*the director defendants expect to present this witness*)

12 Grant Thornton  
13 515 S. Flower St., 7th Floor  
14 Los Angeles, CA 90071  
15 213-627-1717

16 23. Whitney Tilson (*the director defendants may call this witness if the*  
17 *need arises*)

18 c/o Alexander Robertson, IV  
19 Robertson & Associates, LLP  
20 32121 Lindero Canyon Road, Suite 200  
21 Westlake Village, CA 91361  
22 818-851-3850

23 24. Jon Glaser (*the director defendants may call this witness if the need*  
24 *arises*)

25 c/o Alexander Robertson, IV  
26 Robertson & Associates, LLP  
27 32121 Lindero Canyon Road, Suite 200  
28 Westlake Village, CA 91361  
818-851-3850

For Reading International, Ind.:

RDI does not intend to call witnesses, but reserves all rights to  
question witnesses identified by Plaintiff and/or the other defendants in this  
matter.



## 2. Expert Witnesses and Summaries of Opinions

### For Plaintiff:

1. Former Chief Justice Myron Steele will offer opinion testimony relating to matters of corporate governance, including regarding proper exercise of directors' fiduciary duties. Among other things, he will offer opinion testimony regarding appropriate corporate governance practices and activities where a board of directors is faced with circumstances in which directors lack or may lack independence and/or disinterestedness, including the appropriate practices and activities to address such circumstances, and to evaluate the success of such practices and activities, including with respect to the following matters (i) the process used to terminate James J. Cotter, Jr. as President and Chief Executive Officer of Reading International, Inc. ("RDI"), (ii) the use of the Executive Committee of RDI's Board of Directors, (iii) the appointment of EC and MC to their respective current positions and the revised compensation and bonuses that they and Adams were given and (iv) the rejection of the Offer.<sup>3</sup> Former Chief Justice Steele also will offer opinion

---

<sup>3</sup> As stated in the Steele Report, it is Justice Steele's understanding that Nevada courts look to Delaware case law when there is no Nevada statutory or case law on point for an issue of corporate law. See, e.g. *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) ("Because the Nevada Supreme Court frequently looks to the Delaware Supreme Court and the Delaware Courts of Chancery as persuasive authorities on questions of corporation law, this Court often looks to those sources to predict how the Nevada Supreme Court would decide the question."); *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342, 1346 (D. Nev. 1997) ("Where, as here, there is no Nevada statutory or case law on point or an issue of corporate law, this Court finds persuasive authority in Delaware case law."); *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 727 n.10 (Nev. 2003) ("Because the Legislature relied upon the Model Act and the Model Act relies heavily on New York

1 testimony to rebut opinions offered by defendants' experts  
2 Michael Klausner and Alfred Osborne.

- 3 2. Richard Spitz will offer opinion testimony relating to executive  
4 and CEO searches and RDI's supposed CEO search. It is  
5 anticipated that he will offer opinion testimony that the  
6 execution of the (supposed) executive search process undertaken  
7 at RDI in 2015 to find a CEO was not conducted properly and  
8 that the search failed, including because the selection of Ellen  
9 Cotter as CEO was not the product of completing the search  
10 process undertaken and was not a result of the search activities  
11 conducted. Mr. Spitz also will offer opinion testimony to rebut  
12 opinions offered by defendants' expert Alfred Osborne.
- 13 3. Albert Nagy will offer opinion testimony in rebuttal to  
14 defendants' expert Alfred Osbourne. Among other things, it is  
15 anticipated that he will offer opinion testimony that Margaret  
16 Cotter's compensation from RDI is not within a reasonable range  
17 for a person with her experience and qualifications.
- 18 4. Tiago Duarte-Silva will offer opinion testimony about money  
19 damages Plaintiff seeks by this action. It is anticipated that his  
20 opinion testimony will include opinions that (i) Reading's  
21 earnings have declined and underperformed since Ellen Cotter  
22 became Reading's CEO, (ii) Reading's value has declined and  
23

24 and Delaware case law, we look to the Model Act and the law of those states  
25 in interpreting the Nevada statutes.").

26 Justice Steele is aware that the defendants in this action have filed a motion  
27 in limine because the Steele Report stated that the opinions therein were  
28 based on what a court that applied Delaware law would find. That  
phraseology was intended simply to refer to Justice Steele's years of  
experience in Delaware's well-versed body of law. The Delaware law on  
which Justice Steele relies neither supplants nor modifies the plain meaning  
of Nevada law, but only is used to inform Nevada law.

1 underperformed since Ellen Cotter became Reading's CEO, and  
2 (iii) failing to respond favorably to an acquisition offer impeded  
3 an increase in Reading's market value. Mr. Duarte-Silva also will  
4 offer opinion testimony to rebut opinions offered by defendants'  
5 expert Richard Roll.

- 6 5. Dr. John Finnerty will offer opinion testimony to rebut opinions  
7 offered by defendants' expert Richard Roll. It is anticipated that  
8 his opinion testimony will include opinions that Dr. Roll's  
9 conclusions that (1) "the news regarding James Cotter, Jr.'s  
10 termination did not have an adverse effect on the price of RDI  
11 stock;" (2) "the risk adjusted performance of RDI Stock since the  
12 termination of James Cotter, Jr. through June 30, 2016 does not  
13 support Plaintiff's contention that RDI Stock has  
14 underperformed and/or suffered irreparable harm;" and (3) "the  
15 risk adjusted performance of RDI Stock since the termination of  
16 James Cotter, Jr. through June 30, 2016, is not distinguishable  
17 from the performance of RDI Stock while he was CEO" are  
18 incorrect.

19 For the Director Defendants:

- 20 1. Michael Klausner – Mr. Klausner will offer opinion testimony  
21 regarding the Board of Directors' proper exercise of their duties  
22 and obligations in connection with their decision to terminate  
23 James Cotter, Jr. as President and CEO and their decision not to  
24 pursue the third-party indication of interest, including as a  
25 rebuttal to Plaintiffs' expert Justice Myron Steele.
- 26 2. Jon Foster – Mr. Foster will offer opinion testimony regarding  
27 the Board of Directors' decision-making and analysis in  
28 connection with their consideration of the third-party indication

1 of interest, as a rebuttal to the expected testimony of Plaintiffs'  
2 expert Tiago Duarte-Silva.

- 3 3. Richard Roll – Dr. Roll will offer opinion testimony about the  
4 claimed money damages being sought by Plaintiff in this action  
5 based on fluctuations or changes in RDI's stock price, including  
6 as a rebuttal to Plaintiffs' purported damages experts.  
7  
8 4. Bruce Strombom – Mr. Strombom will offer opinion testimony to  
9 rebut the purported damages analysis set forth by Plaintiffs'  
10 exert Tiago Duarte-Silva.  
11  
12 5. Alfred Osborne – Dr. Osborne will offer opinion testimony on  
13 matters relating to corporate governance and assess Williams  
14 Gould's role, responsibilities and conduct in certain corporate  
15 governance processes at RDI. He will also offer opinion  
16 testimony to rebut opinions offered by Plaintiffs' experts Justice  
17 Myron Steele and Mr. Richard Spitz regarding purported  
18 breaches of fiduciary duty by members of the Board of Directors.  
19 For Reading international, Inc.:  
20 RDI joins in the expert designations of the Director Defendants.

21 **H. Issues of Law**

22 **Plaintiff's Position:**

23 Plaintiff's position is that any such issues will be raised with the  
24 Court in the context of jury instructions.

25 **Director Defendants' Position:**

26 As described in detail in the Director Defendants' pending  
27 Motions for Partial Summary Adjudication, the Director Defendants believe  
28 that for each purported breach of fiduciary described in the Second  
Amended Complaint, each of them (1) were subject to the protections and

1 presumptions afforded by Nevada's business judgment rule, (2) properly  
2 exercised their fiduciary obligations, (3) did not engage in any "intentional  
3 misconduct, fraud or a knowing violation of law" required by N.R.S. 78.138  
4 to impose individual liability on corporate directors, and, although not  
5 relevant under Nevada law, (4) were independent for each relevant decision  
6 made by the Board in which they participated. Moreover, as previously  
7 argued in the context of the Director Defendants' Motion for Partial  
8 Summary Judgment No. 1 and Opposition to Plaintiff's Motion for Partial  
9 Summary Judgment, Plaintiff lacks standing to bring this derivative action  
10 or to derivatively assert certain claims that are wholly-personal to him, such  
11 as his termination claim. Similarly, the equitable relief that Plaintiff seeks—  
12 *i.e.*, reinstatement as President and CEO of RDI—is not available as a matter  
13 of law.

14 **RDI's Position:**

15 RDI's business decisions challenged by Plaintiff were the result  
16 of valid business judgment. Additionally, RDI joins in the position of the  
17 Director Defendants.

18 **I. Previous Orders on Motions in Limine**

19 a. Defendants' Motion In Limine to Exclude Expert  
20 Testimony of Myron Steele, Tiago Duarte-Silva, Richard  
21 Spitz, Albert Nagy, and John Finnerty

22 i. Granted in Part. With respect to Chief Justice  
23 Steele, he may testify only for the limited purpose  
24 of identifying what appropriate corporate  
25 governance activities would have been, including  
26 activities where directors are interested, including  
27 how to evaluate if directors are interested.

28 Withdrawn as to Dr. Finnerty. Denied as to all

other experts. See December 21, 2016 Order Regarding Defendants' Motions for Partial Summary Judgment Nos. 1-6 and Motion In Limine to Exclude Expert Testimony ("December 21, 2016 Order"), attached as Ex. \_\_\_\_.

**J. Previous Orders on Motions for Partial Summary Judgement**

- a. Individual Defendants' Motion for Summary Judgment (No. 1.) Re: Plaintiff's Termination and Reinstatement Claims
  - i. Denied. See December 21, 2016 Order.
- b. Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence
  - i. Continued. See December 21, 2016 Order.
- c. Individual Defendants' Motion for Partial Summary Judgment (No. 3) On Plaintiff's Claims Related to the Purported Unsolicited Offer
  - i. Continued. See December 21, 2016 Order.
- d. Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff's Claims Related to the Executive Committee
  - i. Granted in Part. Granted as to the formation and revitalization (activation) of the Executive Committee; Denied as to the utilization of the committee. See December 21, 2016 Order.
- e. Individual Defendant's Motion for Partial Summary Judgment (No. 5) On Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO

- i. Continued. See December 21, 2016 Order.
- f. Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re: Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation of Margaret Cotter and Guy Adams
- i. Continued. See December 21, 2016 Order.
- g. Plaintiff James J. Cotter, Jr.'s Motion for Partial Summary Judgment.
- i. Denied. See October 3, 2016 Order Denying James J. Cotter Jr.'s Motion for Partial Summary Judgment and Granting RDI's Countermotion for Summary Judgment.
- h. Defendant William Gould's Motion for Summary Judgment
- i. Continued.

**K. Estimated Length of Trial**

The parties estimate 15 to 19 days; 80-100 trial hours.

**L. Other Issues**

**Plaintiff's Statement:**

Plaintiff is unable to locate an answer from defendant Gould to the Second Amended Complaint, which the individual defendants should have answered long ago.

**Director Defendants' Statement:**

Plaintiff's list of claims above neither complies with the rules for pre-trial disclosures nor provides *any* clarity about what claims Plaintiff

1 actually intends to prove at trial or what damages (money or equitable) he  
2 seeks. Eighth District Rule of Practice 2.67(b)(2) requires Plaintiff to provide  
3 "[a] list of all claims for relief designated by reference to each claim or  
4 paragraph of a pleading and a description of the claimant's theory of  
5 recovery with each category of damage requested." The Director  
6 Defendants intend to address at trial any purported breaches of fiduciary  
7 duty—and will show that Plaintiff's claims are baseless—but must be told  
8 which specific actions are at issue in order to properly prepare their defense.

9 Plaintiff states that he will pursue claims for breaches of  
10 fiduciary duty potentially based on each and every allegation in the Second  
11 Amended Complaint by, for example, stating his intent to pursue  
12 "[b]reach(es) of the duty of care and abdication of fiduciary responsibilities  
13 by some or all acts and omissions in SAC." This provides no more  
14 information than if Plaintiff had never made his pre-trial disclosures—he  
15 may or may not pursue a claim based on any act or omission mentioned or  
16 alluded to anywhere in the Second Amended Complaint. Plaintiff's witness  
17 list similarly fails to shed any light on the claims Plaintiff intends to  
18 pursue—his list strays so far afield that Plaintiff has stated his intent to call  
19 Defendant Guy Adams' ex-wife (Lois Marie Kwasigroch) at trial.

20 Plaintiff also fails to disclose the actual monetary damages or  
21 equitable relief he intends to seek at trial. For example, Plaintiff states that  
22 his damages resulting from Defendants' alleged breaches of the duty of care  
23 are "injury to RDI's reputation and goodwill" and "impairment of  
24 shareholder rights due to SEC filings." If these are supposed money  
25 damages, Plaintiff does not state his claim for damages, or even explain  
26 what shareholder rights are purportedly impacted. With the exception of  
27 the equitable relief he seeks in connection with his termination from RDI  
28 (*i.e.*, being reinstated as President and CEO), Plaintiff does not link any



1 particular claim to any particular category or amount of damages. For  
2 example, Defendants have no idea what relief Plaintiff is seeking in  
3 connection with the "involuntary retirement of Storey" or "process/process  
4 failures in connection with nomination and retention of directors, including  
5 Coddington and/or Wrotniak." Plaintiff's list of claims/damages is  
6 indecipherable and nonsensical; Plaintiff has attempted to reserve the right  
7 at trial to pursue any claim he wants and seek whatever damages he wants.  
8 Defendants cannot prepare for trial based on these inadequate disclosures,  
9 which amount to nothing but gamesmanship and are highly prejudicial.

10 **RDI's Position:**

11 RDI contends the equitable relief sought would result in  
12 significant disruption of RDI management and the pursuit of its long term  
13 business strategy. Additionally, RDI joins in the statement of the Director  
14 Defendants regarding Plaintiff's purported damages.

15 MORRIS LAW GROUP

16  
17 By: /s/ AKKE LEVIN

18 Steve Morris, Bar No. 1543  
19 Akke Levin, Bar No. 9102  
20 411 E. Bonneville Ave., Ste. 360  
Las Vegas, Nevada 89101

21 Mark G. Krum, Bar No. 10913  
22 YURKO, SALVESEN & REMZ, P.C.  
23 1 Washington Mall, 11th Floor  
Boston, MA 02108

24 Attorneys for Plaintiff  
25 James J. Cotter, Jr.

26 H. Stan Johnson (00265)  
27 Cohen | Johnson | Parker | Edwards  
28 375 East Warm Springs Road, Suite 104  
Las Vegas, NV 89119  
702.823.3500

Christopher Tayback (pro hac vice)  
Marshall Searcy (pro hac vice)  
Quinn Emanuel Urquhart & Sullivan LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, CA 90017  
213.443.3000

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

Mark Ferrario (No. 1625)  
Kara Hendricks (No. 7743)  
Tami Cowden (No. 8994)  
Greenberg Traurig, LLP  
3773 Howard Hughes Parkway  
Suite 400 North  
Las Vegas, NV 89169  
702.792.3773

Attorneys for Reading International, Inc.

Donald A. Lattin (NV SBN. 693)  
Carolyn K. Renner (NV SBN. 9164)  
Maupin, Cox & Legoy  
4785 Caughlin Parkway  
Reno, Nevada 89519  
775.827.2000

Ekwan E. Rhow (*admitted pro hac vice*)  
Shoshana E. Barnett (*admitted pro hac vice*)  
Bird, Marella, Boxer, Wolpert, Nessim,  
Drooks, Lincenberg & Rhow, P.C.  
1875 Century Park East, 23rd Floor  
Los Angeles, California 90067-2561  
310.201.2100

TRAN

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

JAMES COTTER, JR.	.	CASE NO. A-15-719860-B
Plaintiff	.	A-16-735305-B
	.	P-14-082942-E
vs.	.	
	.	DEPT. NO. XI
MARGARET COTTER, et al.	.	
	.	<b>Transcript of</b>
Defendants	.	<b>Proceedings</b>
.....	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

**HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE**

MONDAY, DECEMBER 11, 2017

COURT RECORDER:

JILL HAWKINS  
District Court

TRANSCRIPTION BY:

FLORENCE HOYT  
Las Vegas, Nevada 89146

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

JA5823

APPEARANCES:

FOR THE PLAINTIFF:

MARK G. KRUM, ESQ.  
STEVE L. MORRIS, ESQ.  
AKKE LEVIN, ESQ.

FOR THE DEFENDANTS:

H. STANLEY JOHNSON, ESQ.  
MARSHALL M. SEARCY, ESQ.  
CHRISTOPHER TAYBACK, ESQ.  
JAMES L. EDWARDS, ESQ.  
MARK E. FERRARIO, ESQ.  
KARA B. HENDRICKS, ESQ.  
EKWAN RHOW, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

2 (Court was called to order)

3 MR. FERRARIO: Ms. Hendricks has something to take  
4 up with you.

5 MS. HENDRICKS: I just have a question.

6 THE COURT: On what?

7 MS. HENDRICKS: On how many drives we each need.

8 THE COURT: Wait. That's not me. Wait. Don't go  
9 there yet.

10 MS. HENDRICKS: Okay.

11 THE COURT: Who are you looking for?

12 MR. MORRIS: I'm so unaccustomed to being on the  
13 plaintiff's side.

14 (Pause in the proceedings)

15 THE COURT: All right. So moving on. Good morning.  
16 We were talking about the pro bono awards at the 8:00 o'clock  
17 session this morning, and Mr. Ferrario didn't get one this  
18 year, so I was giving him a hard time because nobody from his  
19 firm did a lot of work. But apparently they did. It just  
20 didn't get reported because it was done with a different  
21 agency.

22 Right, Ms. Hendricks?

23 MS. HENDRICKS: Yes. We're getting that fixed right  
24 now.

25 THE COURT: Okay. So before we start on your

1 motions I need to hit some practical problems. As those  
2 lawyers who practice here in the Eighth all the time know, as  
3 the chief judge I do not have a courtroom. That occurred  
4 because when the Complex Litigation Center was investigated  
5 for purposes of conducting the CityCenter trial we determined  
6 that it had a structural issue and some electrical issues. As  
7 a result, we did not renew the lease --

8 When was that, Mr. Ferrario?

9 MR. FERRARIO: It was 2013.

10 THE COURT: In 2013 we did not renew the lease, and  
11 since that time we have been down one courtroom. The person  
12 who gets screwed is the chief judge. So since 2013 we have  
13 had the chief judge be a floater. Unfortunately for you guys,  
14 I'm the first judge who kept my docket, because Business Court  
15 cases have a lot of history and it's not one of those things  
16 you can get rid of and assume somebody else is going to be  
17 able to be familiar with it fairly quickly.

18 So the down side for all of you is that I don't have  
19 a courtroom. Which is why sometimes we borrow Judge  
20 Togliatti's courtroom when you guys see me, sometimes in this  
21 courtroom. And you've been in the two Family Court courtrooms  
22 a couple of times here. I also have judges who lend me their  
23 courtrooms on a regular basis on the third floor, and  
24 sometimes I have courtrooms in other places in the building I  
25 borrow.

1           Recently I learned that I am going to be able on  
2 behalf of the court to acquire the seventeenth floor that used  
3 to be occupied by the Supreme Court and to build a new Complex  
4 Litigation Center, because since 2013 every time we have a  
5 complex trial we build out a courtroom, it costs a quarter of  
6 a million dollars, and then when we're done with it we take it  
7 back down to put it back in regular shape. And so finally the  
8 County has realized that's probably not an effective use of  
9 the funds, and so we're going to build out the seventeenth  
10 floor as a complex litigation, jury, and criminal caseload  
11 accommodated. Unfortunately, that's a construction project,  
12 and it is in process. And when I say in process it means  
13 they're still in the bid evaluation process and it has to now  
14 go to something called long-term planning at County  
15 management, which means that some day there'll be a courtroom  
16 there. In the meantime --

17           MR. MORRIS: So our trial will start when the  
18 construction is complete on 17?

19           THE COURT: No, no. You're going to start. I just  
20 don't know where we're going to be, Mr. Morris. This is the  
21 reason for the speech, because Mr. Ferrario says nobody  
22 believes me that I don't have a courtroom. I don't have a  
23 courtroom. So I will have a courtroom when I end being chief  
24 judge. I'll go back to being a regular judge and I'll have a  
25 courtroom, and then the new chief won't have a courtroom

1 unless we finish building out the seventeenth floor by then.

2           So right now the reason I'm telling you that is it  
3 impacts your trial. The trial I am currently in is a bench  
4 trial, so it's not a jury trial and we have moved from  
5 courtroom to courtroom during our 10 days we've been in  
6 proceedings so far. So we've not been in the same courtroom  
7 every day. But that's sort of the life of being in this  
8 department at the moment. That's the history.

9           Now let's go to the electronic exhibit part of our  
10 problem. Brandi is the head of the Clerk's Office, Mike is  
11 the head of IT, so they are the two people who are here to  
12 make sure that they are able to interact with you -- and then  
13 I'll let them leave while I hear your motions -- about the  
14 electronic exhibit protocol. Because when we use the  
15 electronic exhibit protocol there's two ways that we have to  
16 deal with it, from an IT standpoint and from the Clerk's  
17 Office standpoint. So instead of us hauling all the paper  
18 volumes from courtroom to courtroom, depending on where we're  
19 going to be, the clerk won't have to do that. They will have  
20 the drives, as Ms. Hendricks mentioned earlier, for that  
21 purpose so that Dulce will then -- after IT has cleared the  
22 drives Dulce will then work with the drives, and then we  
23 usually keep one that is called golden that we don't mess  
24 with, and we have one that's a working drive. But I'll let  
25 Mike explain that and Brandi explain it, because not all of



1 you have been through the electronic exhibit protocol in the  
2 past.

3 Mike, you're up.

4 MR. DOAN: So this is a jury trial, so a high level.  
5 We expect three drives, a working copy, a golden copy, and  
6 then a blank for the jury that everything that gets accepted  
7 or submitted in a group will be over on that drive.

8 Depending on the number of drives is just based on  
9 the space. So if your teams, whoever's putting these drives  
10 together -- we have problems if you get a million exhibits on  
11 one drive or even 600,000 on one drive. Not so much even the  
12 space, it's just navigating through those files. And so as  
13 long as your team can navigate and view the files, that's okay  
14 for us. We don't have like a set number. We just ask that  
15 the drives be twice as big as the amount of the exhibits,  
16 because in theory everything could get accepted, and therefore  
17 everything would be stamped and there'd be duplicate on the  
18 drive.

19 THE COURT: And when it's stamped there's a program  
20 that goes through and it puts a stamp on each page of the  
21 electronic exhibit that says it's admitted so that we have  
22 your original proposed copy and then your admitted copy. The  
23 one drawback for lawyers is if you decide you want to admit a  
24 partial version of an exhibit, we cannot do that with  
25 electronic exhibits. We need you to submit a replacement

1 electronic exhibit that includes only the pages that you are  
2 offering. That will then have an exhibit marker placed upon  
3 it. But I can't with the electronic exhibits admit pages 6  
4 through 10 of the 25-page document.

5 So, Mike, what did I miss?

6 MR. DOAN: That's it.

7 THE COURT: Okay, Brandi. You're up.

8 MS. WENDELL: Have you already given them the  
9 ranges? Do we have --

10 THE COURT: No, we have not done ranges yet.

11 MS. WENDELL: Okay. The protocol is pretty basic.  
12 Your paralegals or your IT people that are going to be working  
13 on those might have questions. Usually -- a lot of times on  
14 all the other trials Litigation Services was used. They're  
15 very familiar with this program. I'm not advocating for them  
16 or anything, but if anybody's contracted with them, they're  
17 pretty familiar with how to do it. It's really important that  
18 you pay attention to the naming convention. Make sure there  
19 are no letters in it. It has to be strictly numbers and then  
20 .pdf. The last time there was a question about whether .tifs  
21 worked, and Mike was able to verify that .tifs are -- we're  
22 able to use those. But color photos can be done as long as  
23 there's a little border up at the top for the stamping program  
24 to mark all of the information.

25 Another thing that we have found useful, it's not in

1 the protocol, but at least a couple weeks before the trial  
2 starts we do like a dry run, because your exhibit list, the  
3 templates that Dulce went ahead and emailed to you, you cannot  
4 change that, the formatting. It's critical because Mike's  
5 team will do a validation, and it validates the exhibit  
6 numbers to what is on the drive, each exhibit. And it'll  
7 identify if there's something that's missed or skipped that's  
8 on the list but it's not actually on the drive. And a lot of  
9 times there's been some formatting problems when people try to  
10 get creative. So, you know, just a little advice that we  
11 found from trial and error that that is an important piece.

12 What else?

13 MR. DOAN: That's the biggest thing, is if you can  
14 get with us -- and we'll make ourselves available as soon as  
15 you're available to do like an initial run before you start  
16 all printing and doing all these other things just so  
17 everything can be tested for format so there's not a lot of  
18 time wasted.

19 MS. WENDELL: The clerk must have -- the exhibit  
20 list must be printed out.

21 THE COURT: Not in 2 font, Ms. Hendricks.

22 MS. HENDRICKS: [Inaudible] that was not our  
23 office's fault, Your Honor.

24 MS. WENDELL: That should be in a binder so that the  
25 clerk as you're actually offering and admitting the evidence

1 during the trial, she'll be working on that. Later that day  
2 she'll be doing the electronic stuff or we'll have a second  
3 clerk that'll be helping her. Antoinette is court clerk  
4 supervisor, and so she's here to make sure that, you know, if  
5 we have any questions that have to be answered.

6 A lot of times -- oh. Last trial somebody asked if  
7 because the exhibit list itself was going to be like 14 of  
8 those big binders, they asked if they could print on the front  
9 and the back. That was in Judge Kishner's big trial. We let  
10 them do it, and -- but the trial settled, so it wasn't an  
11 issue.

12 THE COURT: It's not a good idea.

13 MS. WENDELL: It's not ideal, so --

14 THE COURT: Please don't do a front and back.

15 MS. WENDELL: Anybody have any idea how many  
16 exhibits you're looking at?

17 THE COURT: We're going to start with them and do  
18 our ranges first. But we're not quite there yet.

19 So if anybody has questions or your staffs have  
20 questions, would you like contact information to reach out to  
21 either Antoinette, Brandi, or Mike?

22 MR. TAYBACK: Yes.

23 MS. HENDRICKS: That would be great, Your Honor.

24 THE COURT: So tell them or give them business  
25 cards.

1 MS. WENDELL: Okay.

2 MR. FERRARIO: If you all have cards, then that'd be  
3 easiest.

4 THE COURT: They're County employees. Does that  
5 mean they get cards?

6 MR. DOAN: Yeah.

7 THE COURT: Oh. Look at that.

8 MR. DOAN: You know, and it's best to have one point  
9 of contact so then we don't get confused.

10 MS. WENDELL: I'm putting my cards away now.

11 THE COURT: Who do you guys want to be the person  
12 that calls? Do they want to call Antoinette, they want to  
13 call you, want call Mike?

14 MS. WENDELL: Well, Antoinette is -- she's not  
15 Dulce's direct supervisor, but I can be the point of contact,  
16 and then I can go ahead and let you guys know. My email  
17 address and my phone number are both on here. If you could  
18 pass some of these out, that'd be great. And then I'll  
19 probably hand you off depending on the questions that come up.  
20 Most of them are going to be technical questions, but I'll try  
21 to help if I can.

22 THE COURT: All right. So do you have any more  
23 questions for the Clerk's Office, the IT folks, in the  
24 electronic exhibit protocol? You will notice because of what  
25 happened in CityCenter in paragraph 6 it now says the exhibit

1 list will be font size 12, Times New Roman. So we're very  
2 specific on what size, because the clerk's actually have to  
3 work with the paper copy.. And so although you can blow up the  
4 Xcel spreadsheet and see it when it's 2 font, they can't. So  
5 we have to have it in a larger font.

6 Any more questions?

7 Okay. Mr. Krum, how many exhibits do you think  
8 you're going to have so I can set the exhibit ranges?

9 MR. KRUM: The answer is it's in the hundreds, not  
10 in the thousands. So if --

11 THE COURT: So if I give you 1 to 9999, you will be  
12 okay?

13 MR. KRUM: Yes.

14 THE COURT: All right. Who wants to have 10000 as  
15 their start? Mr. Searcy, how many have you got?

16 MR. SEARCY: I think our approximation is basically  
17 the same. It's in the hundreds, not the thousands. So if we  
18 had 10000 to --

19 THE COURT: 1999 [sic]?

20 MR. SEARCY: Yeah, that would be perfect.

21 THE COURT: I have to give you lots of extras,  
22 because if you're going to do partial exhibits, we need that  
23 space to be able to add those. So if you've got subparts of  
24 one exhibit, I need an exhibit number for each one of those.  
25 So I'm giving you more than you need.

1           Mr. Ferrario, how many do you need?

2           MR. FERRARIO: Your Honor, Your Honor, I would  
3 suspect our -- any exhibits we would introduce independent of  
4 what Mr. Krum and the other defendants would be nominal. So  
5 you can give us a very short range.

6           THE COURT: 20000 to 2499 [sic].

7           THE COURT: Who else wants exhibit lists that's not  
8 one of those three? Anybody else need --

9           MR. TAYBACK: Counsel for Mr. Gould is sitting  
10 behind me.

11          THE COURT: So Mr. Gould's counsel, you want about  
12 the same range Mr. Ferrario has, 25000 to 30000?

13          MR. RHOW: That's fine, Your Honor. Just for  
14 protocol --

15          THE COURT: Hold on. They've got to get your name,  
16 because otherwise I'm going to get really -- I'm going to  
17 screw up.

18          MR. FERRARIO: Can you let Ekwan speak today? He's  
19 been here all -- he hasn't even got to argue one time, Your  
20 Honor.

21          THE COURT: All right, Mr. --

22          MR. RHOW: I'm actually in this case. Ekwan Rhow,  
23 Your Honor. Thank you.

24          THE COURT: Okay.

25          MR. RHOW: We can have a separate range for sure,

1 but is there any problem with incorporating Mr. Gould's  
2 exhibits into the exhibits for Mr. Searcy that he presents?

3 THE COURT: There is absolutely no problem with your  
4 exhibits being within their exhibit range, but I need to give  
5 you a separate range for your own in case you all don't reach  
6 an agreement.

7 MR. RHOW: I see.

8 THE COURT: So my exhibit ranges based on what I've  
9 heard today is 1 to 9999 for the plaintiffs, 10000 to 1999  
10 [sic] for the Quinn Emanuel folks and their associated, which  
11 includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic]  
12 for Mr. Ferrario and his team. And, Mr. Krum, we gave you  
13 25000 to 2999 [sic] for Mr. Gould.

14 Do we anticipate there is anyone else who's going to  
15 need more numbers? Anybody else who's going to show up  
16 randomly in the case?

17 All right. Any other stuff I need to do on your  
18 part?

19 MS. WENDELL: No. Based on that, that's very good  
20 news. The goal will be for all counsel to prepare your  
21 exhibits and then everybody put them one drive. The only  
22 reason why we do different drives is because if there's like  
23 10,000 exhibits on one, like Mike said, so if there's any way  
24 possible -- and you all have to use the same exhibit list  
25 template. Now, if that's a problem to do that, then if your



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

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

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

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

16 MS. WENDELL: Yes.

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

20 All right. So anybody else have more stuff?

21 Yeah. Your history will never die.

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

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

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

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

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

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

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

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

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

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

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

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

24 THE COURT: Some of them will be here.

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

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

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

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

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

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

14 MR. KRUM: Understood.

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

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

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

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

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

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

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

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

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

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

24 MR. KRUM: Okay.

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

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

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

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

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

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

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

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

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

20 THE COURT: Whatever you want to do.

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

23 MR. FERRARIO: Are we on the clock?

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

1 (Pause in the proceedings)

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

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

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

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

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

19 MS. LEVIN: Okay.

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

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

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

5 MS. LEVIN: Right.

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

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

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

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

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

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

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

5 THE COURT: Okay.

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

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

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

23 Right, Mr. Morris?

24 MR. MORRIS: Yes.

25 THE COURT: See, so we all know.



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

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

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

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

15 MR. FERRARIO: No.

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

18 (Pause in the proceedings)

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

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

23 THE COURT: Oh. It was you?

24 MR. RHOW: Not necessary.

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

1 call you.

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

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

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

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

10 MR. TAYBACK: Correct.

11 THE COURT: Okay.

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

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

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

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

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

22 THE COURT: Yes.

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

1 motion.

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

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

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

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

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

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

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

6 THE COURT: You mean for personal liability?

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

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

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

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

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

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

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

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

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

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

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

13 MR. TAYBACK: Yes.

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

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

18 THE COURT: Okay.

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

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

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

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

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

8 THE COURT: No. It's okay.

9 Mr. Krum, Mr. Morris?

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

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

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

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



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

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

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

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

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

1 MR. KRUM: Yes.

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

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

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

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

1 behalf of.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

1 MR. KRUM: Understood.

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

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

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

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

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

18 MR. TAYBACK: Correct.

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

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

23 MR. TAYBACK: Yes, Your Honor.

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

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

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

12 THE COURT: Briefly.

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

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

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

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

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

22           THE COURT: No, it is not.

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

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

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

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

20 THE COURT: Thank you.

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

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

5           Okay. That takes you to Number 3.

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

9           THE COURT: Yeah.

10          MR. TAYBACK: -- there are --

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

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

15          THE COURT: Eh, you know.

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

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

1 MR. TAYBACK: And I did know that.

2 THE COURT: Okay.

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

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

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

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

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

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



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

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

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

8 MR. KRUM: I'm sorry.

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

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

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

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

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

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

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

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

15 THE COURT: Anything else?

16 MR. KRUM: No.

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

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

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

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

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

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

11 THE COURT: Ready for me to say denied?

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

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

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

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

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

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

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

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

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

17 THE COURT: Nope.

18 MR. SEARCY: Thank you, Your Honor.

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

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

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

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

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

6 THE COURT: Okay. Anything else?

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

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

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

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

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

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

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

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

13 THE COURT: Okay. Anything else?

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

15 THE COURT: Denied.

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

19 MR. TAYBACK: Your Honor, you --

20 MR. KRUM: You ruled on it previously.

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

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

1 THE COURT: It's your motion.

2 MR. RHOW: Thank you, Your Honor.

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

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

6 THE COURT: Here's my first question.

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

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

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

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

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

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

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

22 THE COURT: Oh. Okay. All right.

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

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

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

3 MR. RHOW: Correct.

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

6 MR. RHOW: Thank you, Your Honor.

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



1 THE COURT: Thank you.

2 Ms. Levin, is this your motion?

3 MS. LEVIN: Yes, Your Honor.

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

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

11 MS. LEVIN: Correct, Your Honor.

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

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

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

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

25 MR. RHOW: I'm sorry?

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

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

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

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

10 THE COURT: What?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17           MR. KRUM: Okay.

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

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

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

1 work.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: I know.

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

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

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

11 THE COURT: Coach.

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

14 THE COURT: You want to be better.

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

16 THE COURT: I understand.

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



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

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

9 THE COURT: Thank you.

10 MS. LEVIN: Thank you.

11 THE COURT: Mr. Searcy --

12 MR. SEARCY: I'll address that.

13 THE COURT: -- I am inclined to deny the motion.

14 But if the evidence is admitted at trial, to admit it with a  
15 limiting instruction that says that it only goes to  
16 suitability.

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

19 THE COURT: Okay.

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

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

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

3 MR. SEARCY: Thank you, Your Honor.

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

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

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

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

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

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

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

8           THE COURT: Nope. Motion's denied.

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

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

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

17           THE COURT: I am.

18           MS. LEVIN: Okay. Well --

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: I understand.

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

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

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

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

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

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

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

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

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

17 THE COURT: Okay.

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

23 THE COURT: Yeah. We had a hearing.

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

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

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

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

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

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

17          MS. LEVIN:  Okay.  Thank you.

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

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

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

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



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

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

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

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

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

18 All right. Anything else that I missed?

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

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

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

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

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

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

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

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

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

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

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

8 MR. RHOW: Understood, Your Honor.

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

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

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

17 MR. TAYBACK: Thank you, Your Honor.

18 MR. KRUM: Thank you.

19 MR. EDWARDS: Your Honor --

20 THE COURT: Yes, Jim.

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

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

1 MR. EDWARDS: Okay.

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

6 Anything else?

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

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

12 MR. FERRARIO: Thank you, Your Honor.

13 THE PROCEEDINGS CONCLUDED AT 12:00 NOON

14 \* \* \* \* \*

15

16

17

18

19

20

21

22

23

24

25

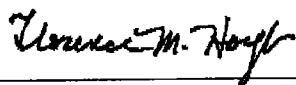
**CERTIFICATION**

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

**AFFIRMATION**

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT**  
Las Vegas, Nevada 89146

  
\_\_\_\_\_  
FLORENCE M. HOYT, TRANSCRIBER

12/12/17

\_\_\_\_\_  
DATE