IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Appellant, v. DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, MICHAEL WROTNIAK, and nominal defendant READING INTERNATIONAL, INC., A NEVADA CORPORATION Respondents.	CASE NO.: 75053 Electronically Filed Jan 23 2019 10:16 a.m. Elizabeth A. Brown Clerk of Supreme Court District Court Case No. A-15-719860-B

Appeal
Eighth Judicial District Court, Dept. XI
The honorable Elizabeth G. Gonzalez

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant James J. Cotter, Jr. is an individual. He was represented in the district court by Mark G. Krum and Noemi Kawamoto of Yurko, Salvesen & Remz, P.C. and Steve Morris, and Akke Levin of Morris Law Group.

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I. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(1), which allows an appeal to be taken from a "final judgment entered in an action . . . commenced in the court in which the judgment is rendered." Cotter Jr. commenced this case in the Eighth Judicial District Court. I JA1-29.[1] On January 4, 2018, the district court certified as final under Nev. R. Civ. P. 54(b) that portion of its December 28, 2017 order that dismissed five of the eight defendants from the case. XXVI JA6293-6299. Cotter Jr. filed his notice of appeal on February 1, 2018. XXVI JA6326-6328.

II. ROUTING STATEMENT

The Nevada Supreme Court should retain jurisdiction under NRAP 17(11), because this appeal raises an issue of statewide importance: Can the presumptions of NRS 78.138(3) be rebutted only by showing that the directors in question lacked independence or disinterestedness, such that the statutory presumptions did not apply in the first instance? The Court in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, 399 P.3d 334 (2017) did not address or resolve this issue. The issue is of statewide importance because the Legislature recently amended NRS

[1] "JA" refers to Joint Appendix. The Roman numeral preceding "JA" refers to the volume(s) of the appendix in which the cited page(s) can be found.

78.138(7) to include, among other changes, a new subsection (a) that says a director or officer cannot be liable to the corporation "unless. . . [t]he trier of fact determines that the presumption [that the director or officer acted in good faith, on an informed basis and with a view to the interests of the corporation] established by subsection 3 has been rebutted . . . ." NRS 78.138(7)(a). If, as the district court found, independence and disinterestedness are dispositive, a derivative plaintiff such as Cotter Jr. would never be able to show that disinterested and independent directors breached their fiduciary duties or engaged in intentional misconduct, fraud, or a knowing violation of the law.

III. ISSUES PRESENTED

1. Four director defendants filed partial motions for summary judgment on specific *issues,* not claims. A fifth director belatedly raised new argument in support of summary judgment in a request for a hearing to which Cotter Jr. was not given a chance to respond. Did the District court deprive Cotter Jr. of due process when it *sua sponte* granted summary judgment and dismissed all of Cotter Jr.'s *claims* against these five director defendants?

2. The district court dismissed all Cotter Jr.'s claims against five directors on the basis that there were no genuine issues of material fact

regarding their disinterestedness or independence. Is a finding that directors are independent and disinterested dispositive of a claim for breach of fiduciary duty before the trier of fact has considered the claim that the directors were not acting "with a view to the interests of the corporation?" Putting the question in terms of this case, may the business judgment rule be rebutted by showing that the directors breached their fiduciary duties by implementing the Cotter sisters' wishes to oust their brother and take over the company?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

This is a shareholder derivative action against eight directors for breaches of their fiduciary duties owed to nominal defendant Reading International, Inc. ("RDI") and its shareholders, which include, but are not limited to the Cotter siblings. I JA168-224. Appellant Cotter Jr. is a substantial shareholder and a former director, President, and CEO of RDI. I JA175 (¶17). His sisters, respondents Ellen Cotter and Margaret Cotter (collectively, the "Cotter sisters"), are members of the RDI board of directors (the "Board") and at all times relevant hereto the controlling shareholder(s) of RDI. I JA175-176 (¶¶18–19). The remaining individual

respondents are members of the Board, as well as members of certain Board committees. I JA176-178 (¶¶20–25); XXI JA5021-5050 (¶¶20-25).

B. Course of the proceedings and disposition below.

Cotter Jr. filed his complaint on June 12, 2015. I JA1-29. In 2016, after a period of discovery, all directors other than William Gould filed six motions for partial summary judgment on specific issues (not claims). V-XIV JA1050-3275. Director Gould filed a separate motion for summary judgment on all claims. I-V JA225-1049. The motions were initially denied but were renewed and supplemented in November and December of 2017, respectively. XX JA4935-4941, XX-XXI JA4946-5000. Following a hearing on December 11, 2017 on the six partial summary judgment motions (but not Gould's), the district court granted summary judgment in favor of five director defendants—Edward Kane, Douglas McEachern, Judy Codding, Michael Wrotniak, and William Gould—on all of Cotter Jr.'s derivative claims on the ground that there were no genuine issues of material fact related to their disinterestedness and/or independence. XXIV JA5823-5897, XXVI JA6212-6222. The district court entered its order on the summary judgment motions on December 28, 2017, and on January 4, 2018, certified the dismissal of the five directors as final under Nev. R. Civ. P. 54(b). XXVI JA6170-6176, 6212-6222, 6293-6299.

V. STATEMENT OF RELEVANT FACTS.

RDI is a publicly traded Nevada corporation engaged in the development, ownership, and operation of multiplex cinemas (movie theaters) and other retail and commercial real estate in the United States, Australia, and New Zealand. I JA178-179 (¶ 26). Until August 7, 2014, James Cotter Sr. was the CEO and Chairman of the Board and controlled 70% of RDI's Class B-voting stock. I JA179.

A. Cotter Jr. is appointed CEO by unanimous vote.

Appellant Cotter Jr.'s tenure with RDI begins in 2002, when he became a director of RDI. I JA175 (¶17). In 2005, he became involved in RDI's management, *id.*; XVI JA4146, and was appointed Vice Chairman of the RDI board of directors in 2007. In 2013, Cotter Jr. was appointed President of RDI. I JA175 (¶17). When his father, Cotter Sr., resigned for health reasons in August 2014, the Board unanimously appointed Cotter Jr. as the CEO of RDI. *Id.*; XXI JA5025 (¶ 17). Cotter Sr. died on September 13, 2014. I JA180.

B. Three RDI directors facilitate the Cotter sisters' wish to remove Cotter Jr.

1. The Cotter sisters seek to become Co-CEOs.

Following the death of Cotter Sr., the Cotter sisters refused to accept Cotter Jr.'s authority as CEO and refused to report to him. I JA180

(¶ 34); XXI JA5028 (¶ 41). Just one month after their father passed, the Cotter sisters proposed to reconstruct RDI's dormant executive committee in a manner that would essentially allow them to become "co-CEOs" of RDI. XVI JA4150-4152, XXII JA5259-5264. Specifically, the sisters proposed that the revived executive committee would play an active and supervisory role in determining RDI's business strategy, give the Cotter sisters management power within their respective "operational areas," with the committee voting on decisions made by key executives. *Id*. The proposal also called for the sisters to report to the executive committee instead of Cotter Jr., the CEO of RDI. *Id*.

2. The Cotter sisters begin litigation against Cotter Jr. in the California probate court.

At the same time, the Cotter sisters sought to increase their control (and diminish Cotter Jr.'s) over the Trust established by Cotter Sr. by initiating trust and estate litigation against Cotter Jr. in the California probate court to obtain control of RDI Class B voting stock sufficient to elect all of RDI's directors. I JA175 (¶¶ 17-19); XV JA3541-3543 (¶8), JA3508-3509.

3. Cotter Jr. is threatened with termination and then terminated as CEO.

In the spring of 2015—less than a year after Cotter Jr. was appointed CEO—the Cotter sisters together with three RDI directors urged Cotter Jr. to settle the California trust and estate litigation on terms acceptable to the sisters or be terminated as CEO. I JA181-190; XVIII JA4318-4319 (¶¶11-14), JA4368; XIV JA3405; XV JA3564. These three directors were: (1) Edward Kane, a quasi-family member and longtime friend of Cotter Sr., who appointed Kane to the Board in 1985 where he remained until 1998, and returned in 2004, I JA176-181 (¶¶ 20, 38); VIII JA1894, XXIII JA5545; (2) Guy Adams, who was financially dependent on money from RDI and Cotter entities controlled by the Cotter sisters. (Adams became a director in 2014). I JA176 (¶11); XXI JA 5026 (¶¶ 21); VIII JA1876; and (3) Doug McEachern, who became a director in 2012. I JA177 (¶ 22); VIII JA1874. When Cotter Jr. refused to accept this ultimatum, the Cotter sisters and these three directors voted to have him removed as CEO. I JA169-170 (¶3); I JA188-193 (¶¶ 72-94); XIV JA3315 (¶20); XXI JA5032-5033 (¶¶ 79, 84, 94).

Appellant's removal had little, if anything, to do with the business interests of RDI or his job performance. For example, although

director Kane had personally told Cotter Jr. that he was best qualified to be CEO, and hoped he remained CEO for the next 30 years or more, XVII JA4148, Kane nevertheless voted to terminate Cotter Jr. XXI JA5032-5033. Director Adams was interested in Cotter Jr.'s removal because he wanted to be, and was considered for, interim CEO. XVIII JA4258-4259.

4. The Cotter sisters get their executive positions.

Once Cotter Jr. was terminated as CEO, the Board appointed Ellen Cotter as interim CEO, and ultimately—following an aborted search for an independent CEO—CEO; this despite her lack of experience in real estate development that the CEO search committee had earlier found crucial. I JA193, 207-208; XXI JA5039, JA5118-5119, JA5122; XXIII JA5688. Margaret Cotter was granted her wish to become RDI's Executive Vice President of Real Estate Management and Development-NYC, despite her lack of experience or qualifications for this position. I JA209; XXI JA5040 (¶¶149-151); XXI JA5118-5119.

C. The directors make other post-termination decisions that solidify the Cotter sisters' power.

Following Cotter Jr.'s termination, the directors continued to make decisions that accommodated the Cotter sisters' wishes. For example, Kane and Adams—as two of three members of the RDI Board's

compensation committee—voted to allow the Cotter sisters to exercise an option to acquire 100,000 shares of RDI class B voting stock from the estate of Cotter Sr., without ascertaining if the estate of which the Cotter sisters were co-executors actually owned that option. I JA172, 197-198 (¶¶10, 104, 107); XXI JA5023, 5034-5035 (¶¶10, 104, 107); XXI JA5222-5223 (¶35). This option exercise did not benefit RDI, because the Cotter sisters funded exercise of the option with illiquid, non-voting Class A shares—not cash. *Id*. Directors McEachern, Kane, and Adams—acting ostensibly as a one-time nominating committee for board members and following a directive from the Cotter sisters—declined to nominate director Timothy Storey for reelection to RDI's Board. I JA196, 203; XVIII JA4324, JA5023 (¶12). Next, again following the wishes of the sisters, these directors nominated two new directors: (1) Judy Codding; and (2) Michael Wrotniak. I JA202-203; XXI JA5026-5027 (¶¶24-25). Codding is a friend of Cotter Sr.'s wife, who lives with respondent Ellen Cotter; Wrotniak is the husband of respondent Margaret Cotter's best friend in college. XVII JA4379-4380, JA4406-4407. Neither Codding nor Wrotniak had relevant professional work experience or experience serving as a director of a publicly traded company. I JA172, 177-178 (¶¶ 11-12, 24-25); XXI JA5023, 5026-5027 (¶¶ 11-12, 24-25); XXIII JA5543.

D. Cotter Jr.'s complaint.

Cotter Jr. filed this derivative lawsuit following his termination in June 2015, and twice amended his complaint. I JA1-29, JA46-95, JA168-224. In the Verified Second Amended Complaint ("SAC") he stated four claims: (1) breach of the *fiduciary duty of care*; (2) breach of the *fiduciary duty of loyalty*; (3) breach of the *fiduciary duty of candor and disclosure*; and (4) *aiding and abetting breach of fiduciary duty*. I JA214-219 (Causes of Action I-IV). These four fiduciary duty claims are based on a number of demonstrable decisions, acts, and omissions by one or more directors, including the following:

1. The threat and subsequent vote by directors Adams, Kane, McEachern to terminate Cotter Jr. as RDI's president and CEO because he failed to acquiesce to the conditions that he (a) resolve unrelated trust and estate litigation as they asked and (b) relinquish control of RDI to the Cotter sisters, I JA169-170, JA181, JA188-193 (¶¶ 2-3, 36, 72-94);

2. Directors Kane, Adams, and the Cotter sisters' use of the executive committee to limit the participation of directors Cotter Jr. and Timothy Storey, I JA194-195 (¶99);

3. The decision by directors Kane and Adams, as compensation committee members, to authorize the Cotter sisters to exercise the 100,000 Class B share option to cement their control of RDI, I JA197-198;

4. Accept the Cotter sisters' direction and subsequent decision by the one-time "special nominating committee" (McEachern, Adams, and Kane) not to re-nominate Storey as a director, I JA203;

5. Accept the Cotter sisters' proposal and subsequent decision by the one-time "special nominating committee" (McEachern, Adams, and Kane), to nominate family friends Judy Codding and Michael Wrotniak as directors, I JA201-203;

6. The decision by the CEO search committee (Margaret Cotter, McEachern, and Gould) to abort a formal search for a qualified independent CEO in favor of appointing Ellen Cotter who did not have the required experience and other qualifications to serve as CEO, I JA193, JA207-208;

7. The directors' decision to hire respondent Margaret Cotter as a senior executive responsible for RDI's New York real estate portfolio and pay her a $200,000 pre-employment bonus, despite acknowledging that she lacked credentials for or experience in real estate development, I JA209; and

8. The directors' preparation, and failure to correct, erroneous or materially misleading statements in board materials and public disclosures, including disclosures filed with the SEC and press releases. I JA195-197; XXIV JA5795-5799.

E. Defendants' summary judgment motions.

1. The six motions for partial summary judgment.

On September 23, 2016, all individual director defendants other than Gould (hereinafter, the "individual defendants") filed six separate motions for partial summary judgment, numbered 1 through 6 ("Partial MSJ Nos. 1–6"). V-VIII JA1050-3275. Each of the Partial MSJs was directed at specific issues of Cotter Jr.'s claims: Partial MSJ No. 1 addressed the subject of Cotter Jr's termination as RDI's CEO ("Termination"). V-VIII JA1050-1862. Partial MSJ No. 2 addressed "the Issue of Director Independence" ("Director Independence"). XIII-X JA1863-2272. Partial MSJ No. 3 pertained to an offer to purchase RDI (the "Offer"). X JA2273-2366. Partial MSJ No. 4 pertained to the creation and misuse of the executive committee of the Board ("Executive Committee"). Partial MSJ No. 5 concerned "Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO"("CEO Search"). X JA2367-2477. Finally, Partial MSJ No. 6 pertained to the 100,000 voting-shares option exercise and related issues, including

RDI's employment of Margaret Cotter to deal with real estate development for which she was not qualified ("Option and MC Employment"). X-XI JA2478-2744.

None of the Partial MSJs sought summary judgment on any of Cotter Jr.'s four fiduciary duty claims. V-XI JA1050-2744. Rather, as the district court recognized and defendants' counsel acknowledged, the "group of motions . . . [we]re attacking *individual aspects* of the alleged breaches of fiduciary duties []." XX JA4804-4806 (at 55:23–58:25) (emphasis added). Moreover, not all aspects of Cotter Jr.'s four fiduciary duty claims were addressed in the Partial MSJs. For example, the Partial MSJs did not address the decision not to re-nominate director Storey or the recommendation and decision to appoint friends Codding and Wrotniak to the RDI board. V-XI JA1050-2744.

2. Gould's summary judgment motion.

Director Gould filed a separate motion for judgment ("MSJ"). I-II JA225-263. Gould's main arguments were that (1) he was independent; and (2) the conduct alleged against him was not a breach of his fiduciary duties involving intentional misconduct, fraud, or a knowing violation of the law. I JA232-233. Unlike his co-defendants' Partial MSJs, Gould's sought summary judgment as to all of Plaintiff's *claims*. II JA261.

3. RDI's joinders.

Despite the fact that RDI was a nominal defendant and Cotter Jr.'s fiduciary duty claims against the individual directors were derivative, made on RDI's *behalf*, I JA168, JA219, JA221 (¶5)—*not against* RDI—RDI took sides and its attorneys filed joinders to the individual defendants' Partial MSJs, including Nos. 1 (Termination) and 2 (Director Independence). XV JA3725-3750; XVI JA3751-3757. Specifically, RDI's Joinder to Partial MSJ No. 2 asked the district court to grant summary judgment *in RDI's favor*, arguing that Cotter Jr. had failed to produce evidence to show directors McEachern, Adams, Kane, Wrotniak, and Codding lacked independence. XV-XVI JA3736-3757.

F. The initial October 27, 2016 motions hearing.

On October 27, 2016, the district court heard argument on the Partial MSJs, including from nominal defendant RDI's counsel, who—over the objection of Cotter Jr.'s counsel—was permitted to argue in support of Partial MSJ No. 2 on Director Independence. XX JA4750-4904.

The district court denied Partial MSJ No. 1 (Termination), finding that "there are genuine issues of material fact and issues related to interested directors participating in the process." XX JA4866 (at 117:9–12). The district court denied Partial MSJ No. 2 on Rule 56(f) grounds. XX

JA4975-4976, JA4999. The district court expressed its "belief that the independence issue needs to be evaluated on a "transaction- or action-by-action basis," while recognizing that there "may be facts that overlap between different actions that apply to others . . . ." XX JA4975 (at 84:21-25). The district court granted Partial MSJ No. 4 (Executive Committee) as to the "formation and revitalization of the committee," but denied it as to "the utilization of the committee . . . ." XX JA4842 (at 93:10–13). The district court denied the remaining Partial MSJs (Nos. 3, 5, and 6) on Rule 56(f) grounds. XX JA4933.

Although Gould's MSJ was also scheduled for hearing on October 27, 2016, the district court did not hear argument on his MSJ before the hearing concluded. XX JA4888-4889, JA4900-4903 (at 139:18-140:2; 151:20-154:21).

G. Defendants' supplemental briefing in 2017.

1. The individual defendants' Supplement.

On November 9, 2017, after completing additional discovery in 2017, the individual defendants filed a supplement to Partial MSJ Nos. 1, 2, 3, 5, and 6 (hereafter "Supplement"). XX-XXI JA4946-5000. Like the prior Partial MSJs, the Supplement did not seek summary judgment on each of Cotter Jr.'s four fiduciary duty claims, but sought "partial" summary

judgment with respect to certain issues related to Cotter Jr.'s four claims, such as the "Issue of Director Independence." XX JA4950, JA4956-4965.

Specifically, the individual defendants' Supplement did not argue that Plaintiff's purported failure to offer additional evidence to support a lack of director independence was dispositive on Cotter Jr.'s claims. XX JA4950, JA4960-4962. Their request for summary judgment based on the claimed absence of intentional misconduct, fraud, or knowing violation pertained only to the directors' personal liability; it was *not* dispositive as to their derivative liability, as the district court later recognized. XX JA4967-4968; XXIV JA5847 (at 25:5-16). Further, the individual defendants' Supplement concluded by asking for summary judgment as to Cotter's four claims for relief only "to the extent" the claims asserted damages "related to" six enumerated issues. XX JA4968. The "Issue of director independence" was not one of them. *See id*.

Cotter Jr. timely filed four supplemental oppositions to the individual defendants' Partial MSJs and Supplements, and Gould's initial MSJ (to the extent the arguments also pertained to Gould). XXI-XXII JA5067-5612. Cotter Jr.'s supplemental opposition to Partial MSJ Nos. 1 and 2 recited a list of acts and omissions by the directors that he alleged constituted multiple breaches of fiduciary duty. XXI JA 5071-5072. All

four supplemental oppositions were supported by record evidence, including excerpts of deposition testimony and exhibits, to resist summary judgment as the various issues. XXI JA5081-5091, JA5108-5228; XXII JA5238-5487, XXIII 5488-5612.

2. Gould's belated Hearing Request and Supplemental Reply.

Gould did not supplement his MSJ by the November 9, 2017 deadline for filing dispositive motions. On December 1, 2017, Gould filed a "Request for Hearing [on his] Previously-Filed [MSJ]," which included 9 pages of additional argument. XX JA5051-5065. The hearing on Gould's MSJ was set for January 8, 2018. XX JA5053. Three days later, on December 4, 2017, Gould filed a "Supplemental Reply in Support of Motion for Summary Judgment." XXIII JA5613-5629. In this Supplemental Reply, Gould argued, *inter alia*, that he is disinterested and independent and that there is no evidence showing he breached his fiduciary duties. XXIII JA5614, JA5617-5627.

H. The district court dismisses five defendants following the December 11, 2017 hearing on the Partial MSJs.

All six Partial MSJs were reset for hearing on December 11, 2017. XXIV JA5823-5897. During the hearing, the district court was particularly focused on whether there was any evidence of interestedness

with respect to directors McEachern, Kane, Gould, Codding, and Wrotniak. XXIV JA 5852-5853, JA5855, JA5858, JA5879.

Following argument from counsel for Cotter Jr. and counsel for the individual defendants (but not counsel for Gould), the district court granted Partial MSJ No. 1 (Termination) and Partial MSJ No. 2 (Director Independence) as to defendants McEachern, Kane, Gould, Codding, and Wrotniak on the grounds that Cotter Jr. had failed to raise a genuine issue of material fact regarding their disinterestedness. XXIV JA5863, JA5866-5867, JA5895. The district court denied Partial MSJ Nos. 1 and 2 as to the Cotter sisters and Adams, finding there were genuine issues of material fact as to their disinterestedness and independence. XXIV JA5863, JA5866.

Further, the district court dismissed all Cotter Jr.'s claims against defendants Kane, McEachern, Codding, Wrotniak, *and* Gould, XXIV JA5895, even though: (1) none of the Partial MSJs sought outright dismissal of Cotter Jr.'s four fiduciary duty claims; (2) the district court had denied, in part, Partial MSJ No. 4 and denied in full Partial MSJ Nos. 5 and 6, which motions involved decisions and conduct by dismissed directors Gould, McEachern, and Kane; (3) Gould's MSJ was not set for hearing until

January 8; and (4) Cotter Jr.'s opposition to Gould's December 1 filings not due until December 18. XXIV JA5870-5874; XX JA5053.[2]

I. The five dismissed directors ask to take up ratification of the Termination and Share Option decisions at the Board meeting.

As a result of the dismissal of all claims against five directors, Cotter Jr.'s derivative claims were narrowed to two principal decisions in which the three remaining directors had a determinative say: (1) the June 12, 2015 decision by directors Adams, Kane, McEachern and the Cotter sisters to terminate Cotter Jr. as CEO of RDI ("Termination Decision"); and (2) the September 2015 decision by directors Adams and Kane to allow the Cotter sisters to exercise an option to purchase 100,000 shares of Class B voting stock in RDI held by the estate of Cotter, Sr. and use Class A non-voting stock to pay for the exercise of the option, which would confirm that the Cotter sisters had voting control at the 2015 annual shareholders meeting (the "Share Option Decision").

Shortly after the district court dismissed the five directors for lack of interestedness at the December 11 hearing, the five dismissed directors requested that RDI's Board take up "ratification" of the 2015

[2] The district court granted Partial MSJ No. 3 (the Offer) on separate grounds. XXIV JA5870.

Termination Decision and the Share Option Decision at the December 29, 2017 Board meeting. XXVI JA6190, JA6192, JA6210-6211.

During the hearing on Cotter Jr.'s motion for reconsideration on December 28, 2017, his counsel informed the district court of this request for ratification the following day of Cotter Jr.'s ouster in 2015 and argued that it supported reconsideration of the dismissal order, because it was (1) new evidence that called into question the independence of these five directors; and (2) apparently made for the purpose of changing the remaining three defendants' burden of proof at trial that was scheduled to begin just ten days later, on January 8, 2018. XXVI JA6190, JA6192-6193, JA6211.

Counsel for nominal defendant RDI admitted that the anticipated ratification was intended to affect the scope of trial, cryptically advising the district court that the pretrial conference may be "unusual" in that "there "may be something occurring on Friday [at the Board meeting] that may provide some *relief* under [] NRS 78.140 in particular . . . ." XXVI JA6201 (at 15:1-5). Indeed, on January 4, 2018—just days before trial was to start—the individual defendants moved for judgment as a matter of law on

all Cotter Jr.'s claims based on the ratification vote during the December 29 Board meeting. XXVI JA 6260-6292.[3]

J. The district court enters its order dismissing the five defendants and grants Rule 54(b) certification.

On December 28, 2017, after hearing and denying Cotter Jr.'s motion for reconsideration of its December 11 ruling dismissing five directors, the district court entered its order on the individual defendants' Partial MSJs, Gould's MSJ, and several motions *in limine* ("the Order"). XXVI JA6170-6176, JA6186-6209, JA6212-6222. The Order states, in relevant part, that there are "no genuine issues of material fact related to the disinterestedness and/or independence" of defendants Kane, McEachern, Codding, Wrotniak, and Gould, and that "judgment in favor of [these five defendants] is GRANTED on all claims asserted by Plaintiff." XXVI JA6173-6174, JA6219-6220.

Cotter Jr. moved to certify as final that portion of the district court's order that dismissed the five director defendants, which the district court granted by order dated January 4, 2018. XXVI JA6223-6237, JA6254-

[3] The ratification decision and the events and rulings that followed and ultimately resulted in the dismissal of the remaining three defendants is the subject of a separate, but related appeal filed by Cotter Jr., Case No. 76981.

6256, JA6293-6200. Cotter timely appealed on February 1, 2018. XXVI JA6326-6328.

VI. SUMMARY OF ARGUMENT

The district court erred when it *sua sponte* dismissed all four of Cotter Jr.'s fiduciary duty claims against five director defendants solely based on its determination that there were no genuine issues of material fact regarding their disinterestedness. The individual defendants sought partial summary judgment as to *specific issues* raised in Cotter Jr.'s SAC only—*not* on all four causes of action. Gould's motion for summary judgment was not yet fully briefed and not scheduled for hearing on December 11. In dismissing all claims against five director defendants—including Gould—following the December 11, 2017 hearing, the district court deprived Cotter Jr. of his due process rights to be heard and given a fair opportunity to defend against dismissal of all his *claims* against these defendants.

The district court also fundamentally erred in prematurely granting summary judgment in favor of these defendants, because the court based its ruling solely on the five directors' disinterestedness with respect to the particular matters raised by their Partial MSJs. As this Court has held, the business judgment rule can be rebutted not only by showing

that the directors are interested in the challenged transactions, but also by showing that: (a) the directors were controlled or influenced in their duties with respect to the challenged transactions by interested directors; (b) acted in bad faith; or (c) the directors otherwise breached their fiduciary duties, such as by failing to take the requisite due care in making the challenged business decisions. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, __, 399 P.3d 334, 341 (2017); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006). Evidence of breaches of fiduciary duty—in particular the duty of loyalty—rebuts the business judgment rule's presumptions. Moreover, the district court failed to recognize that the acts and omissions of individual directors must be viewed collectively, not in isolation, to fairly assess whether they breached their fiduciary duties.

By making disinterestedness both the beginning and the end of its inquiry, the district court's ruling makes the business judgment rule un-rebuttable. The effect of the district court's ruling is that if "independent" or "disinterested" directors invoke the business judgment rule in a summary judgement proceeding, that will immunize them against any liability for any breach of their fiduciary duty. Such result deprives a derivative plaintiff of the right to present evidence and have the trier of fact

determine whether fiduciary duties have been breached and the extent to which the directors are liable for such breaches. This is not, and cannot be, the law. *See* NRS 78.138(7)(a), enacted in 2017 by S.B. 203, 2017 Leg., 79th Sess. § 4 (2017) (confirming that directors' and officers' liability may be established if the "trier of fact determines that the presumption established by subsection 3 has been rebutted"). The Court should reverse the dismissal order and allow Plaintiff to proceed to trial on his claims against all eight director defendants.

VII. ARGUMENT

A. Standard of review.

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party," *id.*, here, appellant Cotter Jr.

B. The district court deprived Cotter Jr. of due process by prematurely granting summary judgment as to five defendants on all his claims.

Although district courts may *sua sponte* grant summary judgment on claims that are not part of a motion for summary judgment,

they must first give non-moving parties 10 court days' notice and a reasonable opportunity to defend themselves. Nev. R. Civ. P. 56(c), Nev. R. Civ. P. 6(a); *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014) ("*Renown*"); *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83–84, 847 P.2d 731, 735 (1993). This right to notice and an opportunity to be heard "has nothing to do with the merits of the case." *Soebbing*, 109 Nev. at 83, 847 P.2d at 735 (quoting *U.S. Dev't Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 734 (4th Cir.1989)). It is a matter of "fairness and due process . . . ." *Renown*, 335 P.3d at 202.

Renown is directly on point. There, the defendant hospital moved for summary judgment on three specific (legal) issues: policy coverage, the third-party beneficiary status of the plaintiff, and Renown's compliance with certain statutes. *Renown*, 335 P.3d at 201. The district court initially denied the motion but thereafter invited the parties to file cross-motions for summary judgment on the issues. *Id.* The defendant's second motion for summary judgment raised the same three issues; the plaintiff, however, only filed a partial summary judgment motion on the statutory violation issue. *Id.* After a hearing, the district court granted the plaintiff's motion. *Id.* But the court decided not only the three legal issues raised by Renown; it found "in favor of [plaintiff] on his breach of contract

and intentional interference with contract claims, *even though the full merits of these claims were not specifically argued in the cross-motions for summary judgment or at the hearing*." *Id*. (emphasis added). This Court granted Renown's writ petition with respect to that portion of the order because the "claims for breach of contract and intentional interference with contract . . . were nowhere mentioned in the six summary judgment briefs." *Id*. at 202.

1. The Partial MSJs did not argue for dismissal of all aspects of Cotter Jr.'s claims.

Here, as in *Renown*, "the full merits of [Cotter Jr.'s] claims were not specifically argued" in the Partial MSJs or at the hearing.[4] The individual defendants moved for "partial" summary judgment on specific matters only—*i.e.*, Cotter Jr.'s Termination (Partial MSJ No. 1); Director Independence (No. 2); the Offer (No. 3); the Executive Committee (No. 4); the aborted CEO Search (No.5); and the Option and MC Employment (No. 6). *See, e.g.*, V JA1051 (moving for partial summary judgment "as to the

[4] Although the individual defendants summarily argued in their Supplement that they were all "statutorily immune to individual liability" under NRS 78.138(7), because the "purported breaches did not involve intentional misconduct, fraud, or a knowing violation of law," XX JA4967-4968, the district court rejected that argument, XXIV JA5847 (at 25:5-16), and did not base its decision on it.

First, Second, Third, and Fourth Causes of Action in Plaintiffs [sic] Second Amended Complaint, *to the extent that they assert claims based on Plaintiffs [sic] June 12, 2015 termination* . . . ."') (emphasis added).

Not a single Partial MSJ sought summary judgment across the board as to ***all*** Cotter Jr.'s four claims for breach of fiduciary duty against them. These four claims are also based on conduct and matters *not* addressed in the MSJs that supported Cotter Jr.'s claim of an entrenchment scheme to benefit the Cotter sisters—*e.g.*, the creation of and failure to correct misleading and inaccurate board materials and public disclosures in which the Company took the position Cotter Jr. should resign as director; the involuntary "retirement" of director Storey; and the stacking of the Board with persons loyal to the Cotter sisters. XXIV JA5795-5799.

Moreover, Cotter Jr.'s claims are based in part on matters as to which the District court *denied* partial summary judgment, including Partial MSJ Nos. 1, 2, 5 and 6—each of which involves conduct by dismissed defendants. For example, Partial MSJ No. 5 (aborted CEO search and the appointment of Ellen Cotter as CEO) involves conduct by members of the search committee, which included Gould and McEachern. X JA2488. Partial MSJ Nos. 1 (Termination), which was denied as to the Cotter sisters

and Adams, involved conduct by dismissed directors Kane and McEachern. V JA1069.

Given that the Partial MSJs focused on discrete matters—not claims— Cotter Jr. should have received ten court days' notice and an opportunity to be heard before the district court could "grant summary judgment sua sponte" on all Cotter Jr.'s claims. *Renown*, 335 P.3d at 202. The district court denied Cotter Jr. that right in granting summary judgment and dismissing all claims against the individual defendants based solely on their disinterestedness with respect to the particular matters that were the subjects of the motions for partial summary judgment. For this reason alone, the order granting the Partial MSJs and dismissing the entire case against directors Kane, McEachern, Codding and Wrotniak must be reversed. *Cf. Renown*, 335 P.3d at 202 (directing clerk to order a writ of mandamus vacating portion of district court order granting summary judgment on two of the plaintiff's claims).

2. The district court decided Gould's MSJ before briefing was complete.

Cotter Jr. was entitled to the same notice on Gould's MSJ. As this Court held in *Cheek v. FNF Constr., Inc.*, 112 Nev. 1249, 924 P.2d 1347 (1996), "[t]he fact that the renewed motion for summary judgment did not

raise any new issues is not dispositive." *Id*. at 1254, 924 P.2d at 1351. Where, as here, a plaintiff objects to holding the hearing on the summary judgment motion early and claims prejudice by his "inability to fully prepare [his] opposition," the plaintiff is entitled to "ten days' notice *regardless* of the merits. . . ." *Id*. (emphasis added).

Although Gould filed an initial MSJ in 2016 on all claims, he failed to timely supplement this MSJ by the November 9, 2017 deadline for dispositive motions. XX JA4943. Gould tried to "fix" this omission on December 1, 2017 by filing a "Request for Hearing on [His] Previously-Filed Motion for Summary Judgment ("Request")" that included nine pages of supplemental argument. XX JA5051-5065. Unlike in *Cheek*, the district court did not notice the hearing on shortened time but set the hearing for January 8, 2018. XX JA5053. Cotter Jr.'s Opposition to Gould's Request was thus not due until December 18, 2017. EDCR 2.20(e). Moreover, Cotter Jr.'s counsel, like the plaintiff in *Cheek*, specifically objected to hearing Gould's MSJ early and stated his intent to respond to the additional papers filed by Gould. XXIV JA5878-5899 (at 56:11-57:10). Nevertheless, the district court on December 11 dismissed Gould from the case for the same reasons it dismissed the four other individual defendants. XXIV JA5882. This, too, was reversible error.

C. The district court committed legal error by dismissing all Cotter Jr.'s claims against five directors solely based on their "disinterestedness."

1. The business judgment rule is a rebuttable presumption.

The business judgment rule is not absolute; it is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the Company." *Shoen v. the SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006 ("*Shoen*") (internal quotation marks and citation omitted; *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, __, 399 P.3d 334, 341 (2017) ("*Wynn*") (holding same); NRS 78.138(3). But not all directors can invoke this presumption: only "disinterested directors can claim its protections." *Shoen*, 122 Nev. at 635–636, 137 P.3d at 1181 (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) ("*Aronson*"); *Aronson*, 473 A.2d at 812 ("its protections can only be claimed by disinterested directors whose conduct otherwise meets the tests of business judgment"). "Directorial interest exists whenever divided loyalties are present." *Rales v. Blasband,* 634 A.2d 927, 933 (Del. 1993). If directors are not disinterested, they are "incapable of invoking the business judgment rule's protections…. " *Shoen*, 122 Nev. at 637, 137 P.3d at 1181.

2. The business judgment rule can be rebutted by showing bad faith, lack of independence, interestedness, and breaches of fiduciary duty.

Even if directors can invoke the business judgment rule's presumptions, the rule is just that: a statutory presumption, NRS 78.138(3), which is rebuttable. In *Shoen*, this Court discussed two alternative tests to determine whether demand on the board to take corrective action is excused, which tests also apply to determine whether the derivative plaintiff can rebut the business judgment rule's presumptions.

The *Aronson* test.

First, if the board deciding a demand to bring a derivative action is the same as the board that made the challenged decision, the "*Aronson*" test applies. *Shoen*, 122 Nev. at 636, 137 P.3d at 1181. Under this test, a plaintiff can rebut the presumptions of the business judgment rule by showing that the business judgment rule "is not likely to *in fact* protect the decision" because: (1) the directors are either (a) financially or otherwise interested in the challenged decision or (b) controlled by an interested director in their duties with respect to the decision—or (2) the challenged decision or transaction was not " 'otherwise the product of a valid exercise of business judgment.' " *Id.* at 637, 137 P.3d at 1181–82 (quoting *Aronson,* 473 A.2d at 814–15) (emphasis added).

Under the first prong of the *Aronson* test, courts look at: (a) whether the directors have "divided loyalties in relation to" or are "entitled to receive specific financial benefit from, the subject transaction"; and (b) whether the directors are influenced in the performance "of their duties generally, and more specifically in respect to the challenged transaction." *Shoen*, 122 Nev. at 638, 137 P.3d at 1182 (internal quotation marks and citations omitted). Thus, "directors' independence can be implicated" when "the directors' execution of their duties is unduly influenced [], manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the [person] doing the controlling []." *Shoen* 122 Nev. at 639, 137 P.3d at 1183 (citations and internal quotation marks omitted).

"The second prong of the *Aronson* test" comes into play if "the business judgment rule remains applicable because a majority of directors are disinterested or independent of one who is interested under the first prong." *Shoen*, 122 Nev. at 638,137 P.3d at 1182. In that case, a plaintiff may still rebut the business judgment rule by showing that the directors otherwise failed in performing and breached their fiduciary duties. *Id*. at 637, 137 P.3d at 1182; *Wynn,* 399 P.3d at 341 ("director will not be liable . . . unless it can be shown that the director breached his fiduciary duties. . . .")

(citing NRS 78.138(7)).[5] A plaintiff may do so, for example, by showing that one or more directors failed to act: (i) on an informed basis; (ii) in good faith; (iii) with due care; or (iv) in the honest belief that the action was taken in the best interests of the company. *Wynn*, 399 P.3d at 343-44; *see also Cinerama v. Technicolor, Inc.*, 663 A.2d 1156, 1164 (Del. 1995) (to rebut this presumption, the plaintiff bears "the burden of providing evidence that the board of directors, in reaching its challenged decision, breached any one of its… fiduciary duties [of] good faith, loyalty or due care").

The *Rales* test.

If the majority of the directors who made the challenged decision changed, or if the challenged acts or omissions are not business decisions by the board—(for example, the threat to terminate Cotter Jr. if he did not resolve trust and estate litigation with his sisters on terms satisfactory to them)—the "*Rales*" test applies, which looks at disinterestedness and independence of the directors of the board considering the demand. *Shoen*, 122 Nev. at 641, 137 P.3d at 1184

[5] To hold directors individually liable for damages—which is a question different from whether a particular director breached his or her fiduciary duties—a plaintiff also must show that the fiduciary duty breaches by the individual director defendants entailed intentional misconduct, a knowing violation of law, or fraud. NRS 78.138(7).

(articulating the test developed in *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993)).

3. The district court considered only the disinterestedness of the directors before dismissing all Cotter Jr.'s claims against the five defendants.

The district court erroneously concluded that the disinterestedness of the five directors is dispositive—not just as to whether the five directors were entitled to invoke the business judgment rule's presumptions, but on all of Cotter Jr.'s four different breach of fiduciary duty claims. XXVI JA6170-6176; XXIV JA5863, JA5866, JA5895.

Specifically, during the December 11, 2017 hearing on the Partial MSJs, the district court focused solely on the "interestedness" component of the first prong of the *Aronsen* test, asking with respect to each of the five dismissed directors what evidence Cotter Jr. had on their interestedness. For example, with respect to McEachern, the district court asked:

> THE COURT: . . . What evidence of disinterestedness [sic] do you have for Mr. McEachern? And if you could tell me where in the briefing it is, I will look at it again. But, as I've said, other than Mr. Adams I did not see evidence of disinterestedness [sic] as opposed to allegations of breach of fiduciary duty.
>
> [Counsel]: Mr. McEachern attempted to extort Mr. Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter, you need to go resolve your disputes with your sisters and were going to reconvene at 6 o'clock and if you

> don't[,] you'll be terminated. Now, there is no dispute about that. We have in evidence the testimony—
>
> THE COURT: I understand that that's one of your claims of breach of fiduciary duty…

XXIV JA5858 (at 36:10–23), JA5855 (at 33:2-10) (asking same for Gould, Kane, McEachern, Codding, and Wrotniak); JA5879 (at 57:11-18) (asking same for director Gould).

The district court did not consider Cotter Jr.'s claims and evidence of undue influence, lack of process, bad faith, or the directors' breaches of their fiduciary duties to rebut the business judgment rule's presumption. Rather, the district treated such evidence as irrelevant. For example, the district court's sole rationale for granting Partial MSJ Nos. 1, 5, and 6 as to some directors but denying it as to others, was that it found "[s]ome directors. . . to be disinterested" and therefore "protected." XXIV JA5874 (at 52:4–10). Although counsel for Cotter Jr. recited a series of fiduciary duty breaches by director defendant Gould, JA5879-5881 (at 57:22–58:14 and 59:2–25), the district court cited disinterestedness as the reason for granting summary judgment as to him and others on all four of Cotter Jr.'s claims—even though the court denied several Partial MSJs. JA5882 (at 60:1–8). To be sure, while the dismissal order also states that the court found no genuine issues of material fact regarding the five directors'

"independence," XXVI JA6219, the district court provided no analysis for this finding in its Order, *id.*, and made no inquiry on this aspect during the hearing. XXIV JA5866-5864.

4. Cotter Jr. provided evidence of Gould and Kane's lack of independence.

Undue influence exists any time a director is influenced in his or her decision-making process by factors other than "independent business judgment." *In re Dish Network Derivative Litig.*, 401 P.3d 1081, 1089-90 (Nev. 2017). "Independence is a **fact-specific** determination made in the context of a particular case." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (emphasis added). "The Court must make that determination by answering the inquiries: independent from whom and independent for what purpose?" *Id.* at 1049–50. As noted above, the district court made no such factual determination.

Here, Cotter Jr. provided the district court with evidence showing that Kane's conduct and decisions at RDI were directly influenced by what the Cotter sisters wanted and by his *understanding* of how *Cotter Sr.* wanted his estate matters handled—*i.e.*, Kane made decisions that required Cotter Jr. to give up control at RDI and in the trust and estate

litigation, and for Cotter Jr. and his sisters to work together "as an executive committee." XVIII JA4344, JA4353; XIV JA3416. For example, when Cotter Jr.'s termination was first scheduled for vote at the May 21, 2015 board meeting, Kane refused to even meet with directors Gould and Storey beforehand to make sure that they followed a minimum of "a process" before terminating the CEO. XV JA3609, JA3611, JA3723. Kane told Gould that the "die was cast." XV JA3611. Yet Kane would have allowed Cotter Jr. to stay as CEO—in fact Kane told Cotter Jr. "there is no one more qualified to be the CEO of [RDI] than you" and that he wanted Cotter Jr. to be the CEO "for the next 30 years or more"—if Cotter Jr. accepted the Cotter sisters' condition that he settle the trust and estate litigation *and* work with his sisters "as an executive committee." XVII JA4148, JA4229; XVIII JA4344.

Although Cotter Jr. deemed Gould "technically independent," IV JA874; XIV JA3313, Kane did not believe Gould was independent and explicitly told him so in an email: ". . . [i]n my opinion you are certainly not independent." XV JA3611. Kane reminded Gould how years earlier Gould successfully talked Cotter Sr. out of removing him from the Board by throwing a more senior director under the bus. *Id.* RDI also employed Gould's law firm, TroyGould PC, from time to time. XXIII JA5545. And

although Gould testified it was "very important" in his mind to find a CEO with real estate development experience to manage RDI's valuable New York properties, Gould agreed to abandoning the CEO search to appoint Ellen Cotter, who admittedly lacked the real estate experience he earlier found crucial. XXI JA5118-5119, JA5122; XXIII JA5688. In fact, all directors on the CEO search committee—including McEachern—and the executive search firm Korn Ferry were focused on hiring a CEO with significant real estate development experience, only to abandon that crucial requirement when Ellen Cotter put her name in the hat to be CEO. *E.g.*, XXI JA 5153, JA5164; XXIII JA5688.

Cotter cited *and* supported many other examples in his motion papers to show a lack of independence by the five directors, such as Michael Wrotniak's connection to Margaret Cotter, XVIII JA4379-4380, Judy Codding's relationship with Ellen Cotter and her mother, *id*. JA4406-4407, McEachern's support of the Cotter sisters' condition that Cotter Jr. settle unrelated trust and estate litigation with his sisters—a condition that had nothing to do with the business of RDI. XXI JA5074. At a very minimum, the evidence raised a genuine issue of material fact about the directors' independent business judgment that should have precluded summary judgment based on disinterestedness alone.

5. The five directors' eleventh-hour request to bring the 2015 Termination and Share Option Decisions up for ratification in December 2017 was new evidence of their lack of independence.

On the eve of trial—and just weeks after the December 11 motions hearing—the five dismissed directors made a written request that the Board take up ratification of the two main decisions left to be tried against Adams and the Cotter sisters. XXVI JA 6191, JA6200, JA6211; XX JA 4942.[6] On its face, this belated request to ratify decisions made more than two years earlier was a litigation tactic aimed at helping the Cotter sisters (and Adams) get a dismissal and avoid trial on January 8. Indeed, the Cotter sisters and Adams moved for judgment as a matter of law just days after the five directors ratified the Termination and Share Option Decisions. XXVI JA6260-6292. RDI—on whose *behalf* Cotter Jr.'s claims were made and damages were sought—would receive no benefit from a dismissal. I JA 221. At the very minimum, the timing of the ratification request raised

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[6] The ratification and the rulings that followed from it are the subject of a separate appeal. *See* Case No. 76981. But the ratification issues raised in appeal 76981 are also of consequence to this appeal. As Cotter Jr. will argue in Case 76981, the timing of the ratification, the process of the ratification, and the failure by the special independent committee to retain independent counsel when recommending to the five dismissed directors that ratification be put on the agenda on the advice of RDI's conflicted counsel only underscores the directors' lack of independence. These facts constitute proof that ratification was a sham and a fraud that does not warrant protection under the business judgment rule.

genuine issues of material fact as to whether the five directors were unduly influenced and made the request "to comport with the wishes or interests of the [Cotter sisters] doing the controlling." *Shoen*, 137 P.3d at 1183. The district court erred by not considering this request as new evidence of lack of independence. JA6258.

6. Cotter Jr. presented evidence of bad faith and a lack of process in the directors' decision-making process.

Courts may inquire "into the procedural indicia of whether the directors resorted in good faith to an informed decision[-]making process." *Wynn,* 399 P.3d at 343 (internal quotation marks and citation omitted).

Bad faith as a basis to rebut the business judgment rule's presumptions is especially important in cases like this, where controlling shareholders (the Cotter sisters and Cotter Sr.) stacked the board "with friends and other acquaintances" (Codding and Wrotniak, and Kane, respectively) who—while not legally beholden to the controlling shareholders—may be "more willing to accede to [their] wishes and support [them] unconditionally than *truly* independent directors." *In Re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 761 n. 487 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (emphasis added). In such cases, "the concept of good faith" may fill the "gap and insure that the persons entrusted by

shareholders to govern [the] corporation do so with an honesty of purpose and with an understanding of whose interests they are there to protect." *In Re Walt Disney Co. Derivative Litig.*, 907 A.2d at 761 n. 487.

Here, there is also record evidence of a lack of process and bad faith with respect to the various decisions on which Cotter's fiduciary duty claims are based. Cotter Jr.'s "status of President and CEO" was put on the May 19, 2015 agenda for the May 21 Board meeting, when the true purpose was to terminate him without any discussion of his employment "status." XIV JA3324-JA3328, JA3399. Kane refused to meet with Gould and Storey before the board meeting and deemed Cotter Jr's termination a *fait accompli*. XV JA3611 (the "die is cast."). Ellen Cotter had already talked to each director (except Storey) about terminating Cotter Jr. before the Board meeting. XIV JA3329, JA3399; XVI JA3871-3872. Gould presciently and correctly warned Kane in a May 19 email that failing to meet separately (from the Cotter sisters) would expose the directors to "possible claims for breach of [fiduciary] duty if the Board takes action without following a process . . . ." XV JA3611.

There is also evidence that the decision by Kane and Adams to allow the Cotter sisters to exercise the 100,000 Class B share option was devoid of an honest corporate purpose. The decision was not "in the best

interest of" RDI, because the Cotter sisters were allowed to pay for the *liquid* Class B shares with *illiquid*, non-voting Class A shares instead of cash. XXI JA 5222-5223 (¶35), JA5235. The only "benefit" of exercising the option did not accrue to RDI; the exercise "benefitted" the Cotter sisters by assuring their control of RDI at the expense of their brother. *Id*. This evidence raised a genuine issue of material fact to rebut the business judgment rule's presumptions.

7. The district court failed to collectively consider the acts and omissions of the five directors

Taken together, a series of decisions can show that the manner in which directors execute their duties was influenced "in such a way as to comport with the wishes or interests of the [person] doing the controlling." *Shoen*, 122 Nev. at 639, 137 P.3d at 1183 (internal quotation marks and citation omitted). For example, in *In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402 (Del. Ch. Jan. 15, 2016), the Delaware Chancery Court rejected the director defendants' contention that bylaw amendments should be viewed individually rather than collectively. *Id*. at *66–67 n.173; *see also Carmody v. Toll Brothers, Inc.,* 723 A.2d 1180, 1189 (Del. Ch. 1998) (holding that particularized allegations that directors acted for entrenchment purposes are sufficient to excuse demand).

In other words, while multiple acts of conduct looked at "individually" may not be sufficient to excuse demand on the corporation, when viewed "as a whole," the acts may be. *See Chrysogelos v. London*, 1992 WL 58516, at *8 (Del. Ch. March 25, 1992) ("None of these circumstances, if considered individually and in isolation from the rest, would be sufficient to create a reasonable doubt as to the propriety of the director's motives. However, when viewed as a whole, they do create such a reasonable doubt . . ."); *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343 at *29–30 (Del. Ch. Dec. 18, 2002) (concluding that allegations which individually would be insufficient to show a lack of disinterestedness or independence when taken together, were sufficient to do so).

A collective view of the directors' conduct is particularly important here, because there are claims for breach of fiduciary duty arising from: (1) matters that were *not* the subject of Partial MSJ Nos. 1–6 (*e.g.*, the breach of duty of loyalty arising from the efforts of director defendants Kane, McEachern, and Adams to push Cotter Jr. into resolving unrelated, personal trust and estate disputes in the probate court he had with his sisters); as well as (2) matters that *were* the subject of Partial MSJ Nos. 1–6 but which were *denied* in whole or part (MSJ Nos. 1, 4, 5 and 6).

Here, Cotter Jr. listed and supported with evidence a series of acts and decisions collectively showing a pattern of entrenchment—especially by Kane, Adams, and McEachern—sufficient to raise a genuine issue of material fact as to whether the dismissed directors breached their fiduciary duties. XXI JA5071-5072, JA5081-5091; XXI-XXIII JA6287-5612; XXIV JA5795-5796. The first of those acts was the threat to terminate Cotter Jr. as CEO and president if he failed to resolve the California trust and estate litigation with the Cotter sisters. XVIII JA4318-4319 (¶¶11-14), JA4368; XIV JA3405; XV JA3564; XXI JA5071. Another was Kane and Adams' blessing of the Cotter sisters' exercise of the 100,000 Class B share option (without verifying whether the estate owned the option), which only benefitted the sisters, because: (1) exercise of the option assured them of voting control; and (2) RDI received no cash for the exercise; it received illiquid, non-voting Class A stock, which did not have cash value. XXI JA5023, JA5034-5035, JA5071, JA5222-5223. Another was the appointment to the Board, at the express recommendation of the sisters, of two friends who had zero experience as directors of a publicly-traded corporation. XXI JA5026-5027; XXII JA5287JA. Next came the duty-breaching decisions to appoint and overcompensate the Cotter sisters in positions that neither had the experience to fill. XXII JA5287-5288, JA5299, JA5377 (¶36).

If not to curry favor with the Cotter sisters—who collectively became the new majority shareholders following Cotter Sr.'s death—and solidify these directors' own tenure on the Board, what legitimate business purposes did these decisions have? They certainly did not enhance shareholder value.

The district court's failure to view this evidence collectively and preserve Cotter Jr.'s right to have the finder of fact to evaluate it constitutes clear error under the authority cited above. At the very minimum, Cotter Jr.'s evidence shows a genuine issue of material fact as to whether the Cotter sisters influenced the conduct of each of the other directors in the execution of their duties and, in particular, whether the course of conduct complained of constituted an effort to perpetuate their entrenchment by a self-dealing scheme in derogation of the directors' fiduciary duties to RDI's shareholders.

In sum, the district court made no inquiry or determination under the second prong of the *Aronson* test. The district court's analysis and conclusion therefore are inconsistent with the plain terms of NRS 78.138(3) and (7), and directly contrary to the holding and rationale of *Shoen*, 137 P.3d at 1181. Dismissal of Cotter Jr.'s claims under these facts and circumstances amounts to a legal determination that in Nevada

directors are effectively immunized from liability, no matter which fiduciary duties are breached so long as they are "disinterested" in the matters in question. The district court's erroneous order should not become precedent for other cases. Based on this legal error and because Cotter Jr.'s evidence raised at the very least a genuine issue of material fact that precluded summary judgment, the Court should reverse the December 28, 2017 order and allow Cotter Jr. to proceed to trial on all his claims against all directors.

VIII. CONCLUSION

Appellant Cotter, Jr. respectfully requests that the Order granting summary judgment in favor of directors Kane, Gould, Wrotniak, Codding, and McEachern, and dismissing all Cotter Jr.'s claims against them be reversed, and that Cotter Jr. be allowed to proceed to trial on his four claims against all eight individual defendants.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this OPENING BRIEF, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 9811 words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January 2019, I served a copy of **APPELLANT'S OPENING BRIEF** upon all counsel of record:

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

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