IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., DERIVATIVELY ON BEHALF OF READING INTERNATIONAL, INC., Appellant, v. EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, AND MICHAEL WROTNIAK, READING INTERNATIONAL, INC., A NEVADA CORPORATION, Respondents.	Supreme Court Case No.: 75053 Dist. Court Case No.: A-15-719860-B Related to Cases: 72261, 72356, 74759, 76981, 77648, 77333

ANSWERING BRIEF OF RESPONDENT READING INTERNATIONAL, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Respondent Reading International, Inc., through its undersigned counsel, states that it is a publicly traded corporation, with no parent company.

The following law firms have represented Reading International, Inc. in this litigation:

Greenberg Traurig, LLP

Dated this 25th day of March 2019.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

NEVADA CASE LAW

OTHER CASE LAW

STATUTES AND RULES

OTHER AUTHORITY

Respondent Reading International, Inc. ("RDI" or the "Company") through its counsel of record, Greenberg Traurig, LLP, respectfully submits its Answering Brief.

INTRODUCTION

Just two years ago, this Court stated in unequivocal terms, that the business judgment rule "prevents a court from replacing a well-meaning decision by a corporate board with its own decision."[1] This Court further stated that "Nevada's statutory business judgment rule precludes courts from reviewing the substantive reasonableness of a board's business decision" and that "a court that applies the business judgment rule will not 'second-guess' a particular decision made by a corporation's directors or officers if the requirements of the business judgment rule are satisfied." [2] Moreover, in the same year, Nevada's legislature clarified the statutory codification of the business judgment rule, declaring that, absent exception made in a corporation articles, the business judgment rule applies to corporate decisions in all circumstances, and further, mandating that plain language of Nevada's business judgment rule "must not be supplanted or modified by laws or judicial decisions from any other jurisdiction"[3] .

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[1] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of State*, 399 P.3d 334, 342 (Nev. 2017)(internal quotation and citation omitted).

[2] *Id.*

[3] NRS 78.012(3)

Despite this clear and unmistakable policy that Nevada's courts cannot and will not serve as a referee for disagreements over how to run a company, Appellant James J. Cotter, Jr. asks this Court to do just that.

Unfortunately, this case stands as a model of the morass that results when a plaintiff whose complaint should have been dismissed at the pleading stage is instead permitted to proceed with his claims to resolution on the merits. Even though he sought relief that was quite obviously personal, *i.e.,* his own reinstatement, Cotter, Jr. pursued this litigation masquerading as a derivative plaintiff. Yet, despite two amendments to his Complaint, Appellant James Cotter, Jr. never alleged, with sufficient particularity, facts indicating that demand would have been futile in this matter. As a result, Appellant herein *never* made the requisite showing of standing to proceed as a derivative plaintiff.

Such a failure arguably deprived the District Court (and thus, this Court) of jurisdiction over the claims, and both this appeal, and Cotter, Jr.'s appeal of the subsequent resolution of the claims against the three remaining director defendants. Case No. 76981, should be dismissed, with instructions to dismiss the matter below, as well. But even if this Court does not agree that standing is necessary to confer subject matter jurisdiction, Cotter, Jr.'s failure to show demand futility, and therefore, his failure to establish his own standing, requires that the judgment be affirmed.

Additionally, in order to prevent, in the future, similar hijacking of the derivative action process, RDI urges this Court to elaborate on its past direction to the district courts for the appropriate analysis of allegations of demand futility. Requiring, whenever a district court determines that demand futility has been sufficiently pleaded, that the district court make detailed and reasoned findings as to the pleading sufficiency as to each claim and as to each board member, this could prevent future companies from being forced to spend millions of dollars defending its board members from meritless claims. A shareholder should not be "lightly permitted" to circumvent the will of a corporation's board of directors in pursuit of the shareholder's desires. [4] Direction from this Court as to the degree of particularity required in the allegations, the propriety of conclusory and/or blanket assertions, and a mandate that the allegations for each and every board member be separately considered, could prevent another corporation from being forced to expend assets to defend its officers and directors on the basis of claims that could not possibly yield any benefit to the corporation.

[4] *McMahon ex rel. Uranium Energy Corp. v. Adnani*, Case No. 74196, at *3 (Nev. Feb. 22, 2019) (NSOP) ("[A], a shareholder will not lightly be permitted to circumvent the corporation's board of directors without first making a demand on the board, or if necessary, on the other shareholders, to obtain the action that the shareholder desires)

ROUTING STATEMENT

Pursuant to NRAP 17(b)(9), this matter, which originated in business court, falls within the presumptive assignment of the Supreme Court. Accordingly, pursuant to NRAP 17(b)(10), it is appropriate for the Nevada Supreme Court to retain this matter.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. COTTER, JR. LACKS STANDING TO PURSUE THIS APPEAL, AS HE FAILED TO ALLEGE FACTS SUFFICIENT TO SHOW THAT DEMAND WAS FUTILE, AND THE EVIDENCE SHOWED THAT DEMAND WAS NOT, IN FACT, FUTILE.

II. BECAUSE COTTER, JR HAS NO STANDING, DISMISSAL, OR IN THE ALTERNATIVE, AFFIRMANCE, IS REQUIRED.

STATEMENT OF THE RELEVANT FACTS[5]

Appellant Cotter, Jr. was terminated from his position as President and CEO by the RDI Board of Directors. He immediately filed an action, purported to act both individually and on behalf of the Company as a derivative plaintiff, but seeking his own reinstatement. **I JA 1.** The claims of breach of fiduciary duty against the individual Respondents were all premised on the theory that they put the interests of Ellen Cotter and or

[5] To avoid duplication, RDI presents only those facts specifically relevant to the issues discussed herein. RDI incorporates the Statement of Facts contained in the Answering Brief filed by the Individual Director Respondents, as though set forth herein in its entirety.

Margaret Cotter ahead of the interests of RDI. Relying on that theory, Cotter, Jr. attacked his own termination as an employee. He would later amend his complaints to challenge a host of subsequent board decisions, all of which related to operational matters, asserting that each challenged decision had been approved by the Individual Defendants only because the decision in question action could be construed to have benefited Ellen or Margaret Cotter.

Cotter, Jr. filed a total of three complaints alleging derivative claims, the original complaint ("Complaint"), the Amended Complaint ("FAC") and the Second Amended Complaint ("SAC"). **I JA 1-29, 46-95, 168-224.** Since he never made a pre-suit demand, he was required, pursuant to NRCP 23.1, to include in those complaints, particularized allegations showing why demand would have been futile.

Demand Futility Allegations in the Original Complaint.

Cotter, Jr. first filed his Complaint in this action on June 12, 2015. **I JA 1.** The Complaint combined both individual claims and claims brought derivatively on behalf of RDI. The Defendants for the derivative claims included RDI Directors Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern,

William Gould, and Timothy Storey,[6] with RDI as a Nominal Defendant. The demand futility allegations contained in the Complaint consisted of the following:

> 107. Insofar as any or all of the claims made herein are derivative in nature, demand upon the RDI board is excused because, among other things, ***each of the individuals named as defendants here comprising seven out of eight board members (and counting Plaintiff, eight of eight), and comprising five outside directors, are unable to exercise independent and disinterested business judgment in responding to a demand,*** and because ***actions giving rise to this action, namely, the threat to terminate JJC and subsequent actions to do so when he refused to be pressured into settling trust and estate litigation with EC and MC on terms satisfactory to them, were not bona fide business decisions undertaken honestly and in good faith in the best interests of RDI, must less the product of a valid exercise of business judgment.***
>
> 108. In that respect, all RDI board members named as defendants herein ***would be materially affected, either to their benefit or detriment, by a decision by the RDI board with respect to any demand, and would be so affected in a manner not shared by the Company or its stockholders, including for the reasons alleged herein.***
>
> 109. Additionally, each of the five outside directors is and would be ***unable to exercise independent and disinterest business judgment responding to a demand because, among other things, doing so would entail assessing their own liability, including possibly to the Company.*** The same is true with respect to a majority of the outside directors, meaning ***Adams, Kane and McEachern, each of whom lacked independence generally, and more particularly, with respect to the decision to pick sides in a family dispute and terminate Plaintiff as President and CEO of RDI, lack of disinterestedness, including for the reasons alleged herein, including but not limited to Adams'[sic] financial dependence on companies controlled or claimed to be controlled by EX and MC, Kane's quasi-familial relationship with EC***

[6] On May 6, 2016, Cotter, Jr. voluntarily dismissed Defendant Timothy Storey from the action.

and MC, and McEachern's decision to protect and pursue his own personal and financial interest, which is, Plaintiff is informed and believes, is based upon McEachern's erroneous expectation that EC and MC ultimately will prevail and control seventy percent (70%) of the voting stock of the Company, thereby controlling McEachern's fate as a director.

110. Additionally, and notwithstanding the foregoing allegations, ***each of Kane, Adams and McEachern lack disinterestedness and independence because each has affirmatively chosen, without any obligation to do so and in derogation of their fiduciary obligations as directors of RDI, to pick sides in a family dispute involving trust and estate litigation between Plaintiff, on one hand, and EC and MC, on the other hand, and to misuse their positions as directors in doing so. Like EC and MC, in so acting, they did not act honestly and in good faith in the best interests of RDI.***

I JA 24-25, ¶¶ 107-110 (emphasis added). As indicated in ¶ 107, there were, at the time the Complaint was filed, eight board members. As relevant herein, the demand futility allegations against the relevant directors included the following assertions:

As to Gould and Storey:

- the challenged business decisions were not made in good faith for the best interest of the company;
- they would be assessing their own liability.

As to Kane:

- the challenged business decisions were not made in good faith for the best interest of the company;
- he would be assessing his own liability;

- he quasi-familial relationship with EC and MC.[7]

As to McEachern:

- the challenged business decisions were not made in good faith for the best interest of the company;
- he would be assessing his own liability;
- he acted to protect of status as director.

As can be seen, the allegations were conclusory assertions, which did not involve any particularized facts as to Gould, Storey or McEachern, and as to Kane, only an assertion of a long-term relationship with the Cotter family.

The individual directors moved to dismiss the derivative claims for a failure to make demand; RDI joined that motion. **I RDI's Supplemental Appendix 1; I RDI SA 62; I RDI SA 58** ("I RDI SA"). At a hearing on September 10, 2015, the District Court determined that Cotter, Jr. had "adequately alleged demand futility and interestedness," but partially granted the motion to dismiss due to a failure to adequately plead damages. ***See* I RDI SA 88:24-89:3.**

[7] Cotter, Jr. also alleged that Kane was made a director because he was a friend of James J. Cotter, Sr. (father of Cotter, Jr., Ellen Cotter and Margaret Cotter), and that Kane had a "decades long quasi-familial relationship with each of MC and EC who call him 'Uncle Ed.'" **I JA 3, ¶ 6; I JA 5, ¶ I JA 9, ¶ 28.** Of course, Cotter, Jr., youngest child of Cotter, Sr., *also* called Kane "Uncle Ed. "**XVII JA 4050, Cotter, Jr. Depo. 83:6-12.**

Cotter, Jr. thereafter filed his First Amended Complaint, to which Defendants Judy Codding and Michael Wrotniak, who had been appointed to the RDI Board of Directors in October 2015, were added as defendants. Because Mr. Storey had resigned, with these two additions, RDI's Board was now composed of nine directors. In the FAC, the demand futility allegations asserted were:

> 166. Insofar as any or all of the claims made herein are derivative in nature, demand upon the RDI board is excused because, among other things, ***each of the individuals named as defendants herein comprising seven of eight board members (and, counting Plaintiff, eight of eight) and comprising five of five outside directors, are unable to exercise independent and disinterested business judgment in responding to a demand, and because the actions giving rise to this action, namely, the threat to terminate JJC and the subsequent actions to do so when he refused to be pressured into settling trust and estate litigation with EC and MC on terms satisfactory to them, were not bona fide business decisions undertaken honestly and in good faith in the best interests of RD I, much less the product of a valid exercise of business judgment.***
>
> 167. In that respect, all the RDI board members named as defendants herein ***would be materially affected, either to their benefit or detriment, by a decision of the RDI board with respect to any demand, and would be so affected in a manner not shared by the Company or its stockholders, including for the reasons alleged herein.***
>
> 168. Additionally, ***each of the five outside directors is and would be unable to exercise independent and disinterested business judgment responding to a demand because, among other things, doing so would entail assessing their own liability,*** including possibly to the Company. ***The same is true particularly with respect to a majority of the outside directors, meaning Adams, Kane and McEachern, each of whom lack independence generally and, more particularly with respect to the decision to pick sides in a family dispute and terminate Plaintiff as President and CEO of RDI, lack disinterestedness, including for the reasons alleged herein, including but not limited to Adams' financial***

> ***dependence on companies controlled or claimed to be controlled by EC and MC, Kane's quasi-familial relationship with EC and MC and McEachern's decision to protect and pursue his own personal and financial interest which, Plaintiff is informed and believes, is based upon McEachern's erroneous expectation that EC and MC ultimately will prevail and control seventy percent (70%) of the voting stock of the Company, thereby controlling McEachern's fate as a director.***
>
> 169. Additionally, notwithstanding the foregoing allegations, ***each of Adams, Kane and McEachern lack disinterestedness and independence because each has affirmatively chosen, without any obligation to do so and in derogation of their fiduciary obligations as directors of RDI, to pick sides in a family dispute involving trust and estate litigation between Plaintiff, on one hand, and EC and MC, on the other hand, and to misuse their positions as directors in doing so. Like MC and EC, in so acting, they did not act honestly and in good faith in the best interests of RDI.***

I J 86-87, ¶¶ 166-169 (emphasis added). As can be seen, despite the addition of two additional defendants who were not on the board at the time of the primary board decisions challenged (i.e., Cotter, Jr.'s termination), and despite the change from an eight-member board to a nine-member board, Cotter, Jr. repeated his original demand futility allegations *verbatim*. Thus, his allegations again consisted of only conclusory, generalized assertions against Codding, Gould, McEachern, Storey, and Wrotniak, and those allegations, plus the assertion of a quasi-familial relationship against Kane.

The Individual Director Defendants again sought dismissal based on demand futility, pointing out, *inter alia*, that no allegations relating to Ms. Codding or Mr. Wrotniak had even been asserted. I **RDI SA 123-124.** Despite the lack of such

allegations as to these two directors, the District Court denied the motions in an order filed March 1, 2016. I **RDI'S SUPP APP 201.** The Court's Order noted that the denial was without prejudice.

Later in 2016, Cotter, Jr. sought leave to amend his First Amended Complaint. II RDI **SA 202.** Reading and the Individual Defendants opposed that motion, arguing at length that the proposed Second Amended Complaint failed to allege demand futility adequately. II **RDI SA 274-278, 279-373, 374-438.** Despite the detailed descriptions of the demand futility deficiencies, the District Court granted Cotter, Jr. leave to amend his complaint. II **RDI SA 464.** The demand futility allegations contained in the "SAC", filed September 2, 2016, were:

> 169. Insofar as any or all of the claims made herein are derivative in nature, demand upon the RDI board is excused because, among other things, as to each matter complained of herein, a majority if not all members of RDI' s Board of Directors except Plaintiff (and in certain instances former director Storey) took and/or approved the complained of conduct. They therefore are unable to exercise independent and disinterested business judgment in responding to a demand, including ***because the actions giving rise to this action alleged herein were not undertaken honestly and in good faith in the best interests of RDI, much less the product of a valid exercise of business judgment.***
>
> 170. Each and all of the RDI board members named as defendants herein would be ***materially affected, either to their benefit or detriment, by a decision of the RDI board with respect to any demand, and would be so affected in a manner not shared by the Company or its stockholders, including for the reasons alleged herein.***
>
> 171. Additionally, as to each and all matters complained of herein, a majority if not all of the director defendants is and would be unable to exercise independent and disinterested business judgment responding

> to a demand because, among other things, ***doing so would entail assessing their own liability, including possibly to the Company. The same is true particularly with respect to the non-Cotter directors, who lack independence and lack disinterestedness, including for the reasons alleged herein, including but not limited to Adams' financial dependence on companies controlled by EC and MC, Kane's quasi-familial relationship with EC and MC, McEachern's and Gould's fiduciary breaches and Codding and Wrotniak's personal relationships with Cotter family members.***
>
> 172. Additionally, notwithstanding the foregoing allegations, each of Adams, Kane and McEachern lack disinterestedness and independence because each has affirmatively chosen, without any ***obligation to do so and in derogation of their fiduciary obligations as directors of RDI, to pick sides in a family dispute involving trust and estate litigation between Plaintiff, on one hand, and EC and MC, on the other hand, and to misuse their positions as directors in doing so. Like MC and EC, in so acting, they did not act honestly and in good faith in the best interests of RDI. Additionally, in voting to give EC and MC positions for which they are unqualified, and corresponding compensation packages, and in failing to take steps to make an informed, good faith decision regarding the Offer to purchase all RDI stock at a premium, and instead effectively deferring to EC and/or MC, each of the director defendants, including Codding and Wrotniak, acted in derogation of the fiduciary duties they owe to RDI and its other shareholders.***

I JA 214-215, ¶¶ 169-172 (emphasis added). As can be seen, the allegations regarding demand futility were not significantly modified from those in the Complaint and the FAC. There were the same conclusory assertions of bad faith and breach of fiduciary duty against all the directors, claims that they would be assessing their own liability and would act to protect their directorships, along with and bare

assertions of the existence of long term relationships as to Kane, Codding, and Wrotniak – the latter two involving only third-party friendships.[8]

Given that the Court had granted the leave to amend despite the deficiencies of proposed amendments, no motion to dismiss the SAC based on demand futility was sought.

Summary Judgment Motions re Director Independence

The allegations of purported breaches of fiduciary duty against the Respondent Directors were as lacking as the allegations of demand futility, as their actions were challenged on the same basis – i.e., that the various challenged decisions were not made on the basis of the best interests of the corporation, but instead, were made to please Ellen and/or Margaret Cotter. ***See, e.g.***, **I JA 176-178, ¶ 20 (alleging that Kane was siding with Ellen and Margaret Cotter in a family dispute); ¶ 22 (alleging that McEachern was using his position to "protect and further the interests of" the Cotter sisters); ¶ 23 (alleging that Gould had abdicated his director responsibility's by acquiescing to actions Plaintiff claims benefited by Ellen and Margaret Cotter); ¶ 24 (alleging that Codding acted to**

[8] Cotter, Jr. alleged that Judy Codding had a "long-standing personal relationship with Mary Cotter [the mother of the Cotter siblings] with whom Ellen Cotter lives." and that Michael Wrotniak's wife has a "longstanding close personal relationship with" Margaret Cotter. I JA 177-178, ¶¶ 24-25.

"advance and further the interests of" the Cotter sisters), and ¶ 25 (alleging the same as to Wrotniak).

In December 2016, the District Court denied, without prejudice, motions for partial summary judgment that had been directed at various issues raised in the complaints, including director interest/independence, and some of the challenged decisions. The District Court held that there were material issues of fact as to the issue of director independence, and, ordering additional discovery pursuant to NRCP 56(f). **XX JA 4931**. Following such additional discovery, in late 2017, the Individual Defendants renewed certain of their previously filed summary judgment motions, including a motion addressing the allegations that the Director Defendants lacked independence. **XX JA 4946- XXI JA 5000 (Under seal).**

At the hearing held December 11, 2017, the District Court granted those motions as to five of the directors: Codding, Gould, Kane, McEachern, and Wrotniak (hereafter, collectively, the "Dismissed Directors"). **XXIV JA 5823-5897** In so ruling, the District Court made clear that the evidence presented by plaintiff was insufficient to show disinterestedness or lack of independence as to these directors. ***Id.* at transcript pages 32:21-41:12; 57:11-60:8.** The District Court recognized that in the absence of the issue of director independence, the actions of these directors fell, as a matter of law, within the protection of the business judgment rule. In properly granting summary judgment in favor of the Dismissed Directors on all

claims, this District Court recognized that Cotter, Jr. had failed to 1) present sufficient evidence from which a fact finder could determine that any of these five directors were unable to exercise their business judgment without undue influence, and 2) that Cotter, Jr. had failed to present sufficient evidence to overcome the presumption created by the business judgment rule.

The Court's written order was issued December 28, 2017. **XXVI JA 6170-6176.** At plaintiff's request, the order was certified as a final judgment pursuant to NRCP 54(b). **XXVI JA 6254-6256.**

Cotter, Jr.'s Opening Brief.

Tellingly, Cotter, Jr. spends little effort in his Opening Brief attempting to show that he had presented sufficient evidence to create a material issue of fact regarding the independence of the Director Respondents. Recognizing that as a lost cause, he instead complains of a due process concerns, claiming he was not given sufficient notice the pending summary judgment motions could determine the fate of his claims against any of the Defendants.[9] But, as discussed above, his challenges to the participation of the Respondent Directors in the various challenged decisions

[9] Of course, even if there were any validity to this notion, the fact that he was given the opportunity to raise this issue in his Motion to Reconsider eliminates any due process concerns. *Valley Health Sys., LLC v. Estate of Doe*, 427 P.3d 1021, 1033 (Nev. Sep. 27, 2018) (A "subsequent opportunity to fully brief the issue. . . is sufficient to cure any initial due process violation. . . .).

was based on the theory that they acted to serve the interests of Ellen and Margaret Cotter, either out of friendship with the sisters of third parties, or out of a desire to continue to serve as directors.

STANDARD OF REVIEW

This Court reviews both the sufficiency of a derivative complaint, and the propriety of a grant of summary judgment de novo. *In re Amerco Derivative Litig*., 127 Nev. 196, 210-11, 252 P.3d 681, 692 (2011); *Wood v. Safeway*, 121 Nev. 724, 729 (Nev. 2005). Subject matter jurisdiction is also reviewed de novo. *Ogawa v. Ogawa,* 125 Nev. Adv. Op. No. 51, 221 P.3d 691 (2009) The denial of a motion to amend a judgment is reviewed for an abuse of discretion. See 11 C. Wright, A. Miller M. Kane, *Federal Practice and Procedure,* § 2818, at 188 (2d. ed. 1995) (distinguishing between appealability and reviewability and noting that an order deciding a Rule 59(e) motion, while not independently appealable, is reviewable for abuse of discretion); *cf. Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007) (an order denying reconsideration may be reviewed on appeal from the underlying judgment).

/ / /

SUMMARY OF THE ARGUMENT

Cotter, Jr., failed to establish that demand was futile at trial, and indeed, never adequately alleged demand futility. His claims that the Dismissed Directors' approval of the various board decisions constituted breaches of fiduciary duty were all premised on the theory that the Dismissed Directors' approval was not the product of their own independent business judgment, but instead, was motivated by loyalty to Ellen and or Margaret Cotter. But Cotter, Jr. was unable to prove that any of the Dismissed Directors had reason to place the interests of the Cotter sisters ahead of the interests of RDI. Nor was he ever able to plead, under the heightened standard required by NRCP 23.1 and NRS 41.520, facts sufficient to establish the requisite lack of independence. Whether considered under the *Aronson* test, or the *Rales* standard, his allegations were insufficient to create a doubt as to the independence of the Dismissed Directors, or to the applicability of Nevada's business judgment rule.

Cotter, Jr.'s inability to establish his own standing results in this Court, as well as the District Court, being deprived of subject matter jurisdiction, and accordingly, the litigation should be dismissed. In the alternative, there being no material issue of fact regarding the issue of independence, and therefore, none regarding demand futility, the judgment should be affirmed on this alternative ground.

LEGAL ARGUMENT[10]

Cotter, Jr. failed to present evidence sufficient to show that the Dismissed Directors were unable to exercise independent judgment as to decisions relating to RDI. Such a failure is not surprising, given that he never met the pleading requirements necessary to establish standing as a derivative Plaintiff.

Cotter, Jr.'s claims against the Dismissed Directors were all premised on the theory that, in making the challenged corporate decisions, the Dismissed Directors were not exercising their own independent judgment but instead, were merely doing the bidding of Ellen and Margaret Cotter, and thus, were acting in bad faith. Cotter, Jr. was unable to present facts sufficient to prove his claims. Nor did he present any facts that would support a finding that the presumptions created by NRS 78.138(3) could be rebutted. He did not present evidence to show that the directors were uninformed as to any decisions, or that they had improperly relied on unreliable evidence. See *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334, 344 (Nev. 2017).

[10] To avoid duplication, RDI does not repeat the arguments made by the Individual Director Respondents. RDI incorporates the Arguments set forth in the in the Answering Brief filed by the Individual Director Respondents, as though set forth herein in its entirety.

Because he was unable to present facts, or indeed, even *allege* facts sufficient to support this theory, Cotter, Jr. cannot prevail on his appeal, because he cannot show his standing to act as a derivative plaintiff.

This appeal, along with the underlying matter and the appeal of the final judgment in that underlying, must be dismissed due to a lack of subject matter jurisdiction. Alternatively, if the Court determines that standing under NRCP 23.1 is not jurisdictional, then the District Court's grant of summary judgment in favor of the Dismissed Directors must be affirmed.

I. APPELLANT LACKS STANDING TO PURSUE THIS APPEAL, AS THE EVIDENCE SHOWED THAT DEMAND WAS NOT FUTILE, AND MOREOVER, HE NEVER ALLEGED FACTS SUFFICIENT TO SHOW THAT DEMAND WAS FUTILE.

Cotter, Jr. never showed that at least four of the eight members of the Board of Directors in place at the time of the filing of the Complaint could not consider a demand, because he failed to show that Storey, Gould, Kane and McEachern lacked interest or independence. He never showed that at least five of the nine members of the Board of Directors in place at the time of the filing of the FAC or the SAC could not properly consider demand, because he did not allege particularized facts showing that Gould, Kane, McEachern, Codding and Wrotniak lacked interest or independence. The District Court's conclusions as to the sufficiency of Cotter, Jr.'s evidence merely confirmed his lack of standing, and further, served in lieu of the

required evidentiary hearing to determine whether demand was, in fact, futile, required under *In Re Amerco*. 127 Nev. at 222, 252 P.3d at 700.

A company's board of directors generally has the sole power and authority to determine whether a lawsuit should be filed. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1179 (2006). A derivative action is the exception to that general rule, but such a suit may proceed only when the named plaintiff sets "forth with particularity the efforts of the plaintiff to secure from the board of directors or trustees and, if necessary, from the shareholders such action as the plaintiff desires, and the reasons for the plaintiff's failure to obtain such action or the reasons for not making such effort." NRS 41.520(2); see also, NRCP 23.1. The requirement for demand "protects clearly discretionary directorial conduct and corporate assets by discouraging unnecessary, unfounded, or improper shareholder actions. *Shoen*, 122 Nev. at 633, 137 P.3d at 1179, s*ee also*, *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) ("[T]he demand requirement and the strict requirements of factual particularity under Rule 23.1 exist to preserve the primacy of board decision making regarding legal claims belonging to the corporation.") (internal citations omitted).

A. The District Court Properly Granted Summary Judgment on the Issue of Independence.

For the reasons stated in the Answering Brief filed by the Individual

Director Respondents, the decision of the District Court, finding that Cotter, Jr. had failed to show the existence of any materials issues of fact regarding the independence or disinterest of the Dismissed Directors was correct. Indeed, Cotter, Jr. implicitly recognized that the District Court's decision is correct, as he made little effort to present for this Court's review the evidence on which he relied.

He presented no evidence that the decisions were made without proper information. Instead, he insists that because the decisions could be construed to benefit one of the other of his sisters, they must necessarily have been in bad faith. But his insistence that a trial should have been conducted so that a jury could determine whether the challenged decisions could have been made to benefit the Company is nothing more than a demand that the court review the substance of the decisions itself. This is precisely what the business judgment rule forbids.

B. Cotter, Jr. Never Sufficiently Pleaded Demand Futility.

Allegations of demand futility must address the members of the board of directors as it was composed as of the time of the filing of the complaint. *La. Mun. Police Employees' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1058 (9th Cir. 2016) ("The relevant board is the board as it was constituted when the shareholders filed their amended complaint."). The allegations must create a reasonable doubt as to ability to consider a demand by at least half of the members of that board. *Id.*

Where it is alleged that the defendant directors participated in corporate decisions challenged by the plaintiff, a demand futility claim must set forth particularized facts sufficient to create a reasonable doubt as to whether the directors were disinterested as to the decisions in question, or as to whether the business judgment rule otherwise protects the directors' decision. *Shoen* at Id. at 641, 137 P.3d at 1184 (adopting the rule articulated in *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). Where a director defendant did not participate in the challenged decision, then "the demand futility analysis considers only whether a majority of the directors had a disqualifying interest in the [demand] matter or were otherwise unable to act independently" at the time the complaint was filed." *Shoen* 122 Nev. at 639, 137 P. 3d 1183 (adopting rule set forth in *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993).

Here, both tests apply. Directors Gould, Kane, McEachern, and Storey had each participated in all the decisions challenged in the Complaint. Accordingly, the *Aronson* test applies to the determination of the adequacy of pleading demand futility in the Complaint. As to Director Kane, the same is still true as to the FAC and SAC, as well. Accordingly, as to Kane, the *Aronson* test applies as to each of the complaints.

In the FAC and SAC, Directors Gould and McEachern participated in all challenged decisions, except for Cotter, Jr.'s challenge to the RDI's Compensation

Committee's approval of the Estate of Cotter, Sr. using Class A stock to exercise an option to purchase Class B stock, and Directors Codding and Wrotniak participated in all challenged decisions occurring after their appointment to the Board. Accordingly, as to these four directors, the appropriate test would depend on the specific issue.

Significantly however, Cotter, Jr. never separated his demand futility allegations as to specific claims. Instead, he based his claim of demand futility on broad conclusory assertions that the challenged actions had been made with bad faith and constituted breaches of fiduciary duty, and that the Dismissed Directors were not independent of the influence of Ellen and Margaret Cotter. Moreover, regardless of which test is used, the allegations are insufficient.

1. ***Cotter, Jr.'s allegations were insufficient under the Aronson test.***

As stated above, the *Aronson* test requires that the allegations in the complaint be sufficient to create reasonable doubt as to the disinterest and independence of the directors, or that the challenged decision was the product of a valid exercise of business judgment. *Aronson*, 473 A.2d at 814. Cotter, Jr.'s allegations failed to do either of these. A lack of disinterest requires a showing that the board members face significant personal liability because of the challenged transactions.

a. The allegations were insufficient to create doubt as to independence.

Over the course of the three complaints, Cotter, Jr. challenged virtually every decision made by RDI's Board since, and including, his termination. But Cotter, Jr. did not allege that RDI had been injured by any transactions in which the Dismissed Directors stood to benefit directly and personally. Instead, he based his allegations of a lack of disinterest and independence of the influence of his sisters. He contended that the Dismissed Directors wanted to retain their positions, and therefore were either influenced by the voting control exercised by the sisters; or, referring to Kane, Codding and Wrotniak, the Dismissed Directors were moved to vote as his sisters wished, because of longstanding relationships.

With respect to the first issue, Cotter, Jr.'s allegations were quite like those rejected as insufficient in *Aronson*. In *Aronson*, the plaintiff alleged that one director, who owned nearly half the company stock, dominated and controlled the remaining directors. To show such domination, he alleged that the board had approved an employment agreement with the dominating director that was unfair to the company. The Delaware Supreme Court found such allegations insufficient, stating,

> in the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control

> such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.

Aronson, 473 A.2d at 815. But Cotter, Jr. did not even attempt to allege any such additional facts as to Storey, Gould, and McEachern.

And as to Kane, Codding and Wrotniak, the allegations of personal relationships are insufficient. This Court has held the heightened pleading requirements for demand futility cannot be satisfied through the allegation of the mere existence of personal or familial relationships among a corporation's directors. Instead, "to show partiality based on familial relations, the particularized pleadings must demonstrate why the relationship creates a reasonable doubt as to the director's disinterestedness." *Shoen*, at 639 n. 56, 137 P.3d at 1183 n. 56. The plaintiff must allege facts that show that the relationship would materially affect the directors' judgment. *Id*. at 639, 137 P.3d at 1183 (internal quotation marks omitted).

Here, Plaintiff alleged that Director Kane had long been good friends with Cotter, Sr., and that Ellen and Margaret called Director Kane "Uncle Ed." However, not even a blood uncle/sibling relationship would suffice. *In re Amerco Derivative Lit., 252 P.3d at 706 (Pickering, J. concurring in part and dissenting in part)* (citing with approval 1 *Principles of Corp. Governance* § 1.26 (1994) (an uncle/nephew relationship does not establish the parties as members of one another's immediate families, as child/parent or sibling relationships do).") Moreover, there

are no allegations of facts showing that this longstanding "quasi-familial relationship" would interfere with Kane's ability to exercise his own judgment.

Cotter, Jr.'s allegations as to Directors Codding and Wrotniak are even more attenuated. Codding's inability to exercise independent judgment was allegedly based on her friendship with Mary Cotter, the mother of the three Cotter siblings; Mary Cotter is not a director, nor is she a party to this case. As for Wrotniak, he is not even the person purported to have the longstanding relationship. Instead, it is his wife that was alleged to be friends with Margaret Cotter.

In order to create a reasonable doubt about independence, a plaintiff must plead facts that would support the inference that "because of the nature of a relationship . . . the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director." *Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). No such facts were presented as to any of these directors here. Instead, Cotter, Jr. merely relied on the existence of the relationship. This not enough. *Uranium Energy Corp. v. Adnani*, No. 74196, at *2-5 (Nev. Feb. 22, 2019) (NSOP) (mere allegation of existence of relationship does not satisfy heightened pleading requirement).

b. <u>The allegations were insufficient to create doubt as to disinterest based on potential liability.</u>

Nor were the allegations sufficient to suggest that the directors faced a significant risk of potential liability. It is not enough to merely allege that liability

will occur because of approval of the challenged board actions. Instead, "interestedness because of potential liability can be shown only in those rare case[s] . . . where defendants' actions were so egregious that a substantial likelihood of director liability exists." *Shoen*, at 1183-84.

To show such a risk here, Plaintiffs would have had to allege facts showing that the Dismissed Directors had engaged in "intentional misconduct, fraud or a knowing violation of law." NRS 72.138(7)(b). Here, no fraud or unlawful conduct was alleged. Additionally, the only purported "misconduct" is that the actions were purportedly taken to benefit Ellen and Margaret Cotter. But, as shown above, those allegations were insufficient to satisfy the heightened standard.

c. The allegations were insufficient to suggest the business judgment rule would not protect the challenged decisions.

Nor did Cotter, Jr. plead facts to satisfy the second prong of the *Aronson* test, i.e., that the business judgment rule would not protect the decisions. In order to satisfy the second prong, the he was required to "plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision." *La. Mun. Police Employees v. Wynn*, 829 F.3d at 1062, quoting *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 286 (Del. Ch. 2003).

Here, the challenged transactions concern various employment decisions, including termination of Cotter, Jr., appointment of Ellen Cotter as CEO, and the transformation of Margaret Cotter from what had essentially been an independent contractor status to employee; various compensation decisions, none of which involved objectively excessive amounts; activation of a previously inactive executive committee; and approval of a means of payment for exercise of a stock option. Other than conclusory assertions, Cotter, Jr. did not allege facts showing that the Directors were uninformed in making their decisions.[11] Instead, he merely made the conclusory assertions that the challenged actions were "not taken honestly and in good faith in the best interests of RDI, much less the product of a valid exercise of business judgment." I JA 213, ¶ 169.

In order to show a reason to doubt good faith, the plaintiff must show "that the board's decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests" and was "essentially inexplicable on any ground other than bad faith." *Lenois v. Lawal*, C.A. No. 11963-VCMR, at *29-31 (Del. Ch. Nov. 7, 2017). "While aspirational goals of ideal corporate governance practices may be highly desirable, to the extent they go

[11] While Cotter, Jr contended that an "appropriate" process had not been followed with respect to his termination, his allegations actually showed that the decision had considered over the course of multiple board meetings. See, e.g., SAC, ¶¶ 50-53, 72-98

beyond the minimal legal requirements of the corporation law, they do not define standards of liability." *Id.* Here, Plaintiff pretended that his concern was over following "ideal corporate governance practices," but he never alleged facts sufficient to show that the actions he opposed gave rise to liability.

2. ***Cotter, Jr.'s Allegations were Insufficient under the Rales Test.***

As noted above, the *Rales* test is applicable to some of the Dismissed Directors, as to some of the challenged decisions. This test looks at whether the allegations create a doubt that the directors can make an independent assessment of the demand. To show such a lack of independence, Cotter, Jr. was required to "show that the directors are "beholden" to the [Cotter sisters] or so under their influence that their discretion would be sterilized." *Rales*, 634 A.2d at 936 (Del. 1993). Thus, this test concerns the same independence analysis as the *Aronson* test, except that instead of considering whether the allegations show that the challenged decisions were the product of influence, the analysis is whether a demand would be viewed without such influence. For the same reasons that the allegations were insufficient to create a doubt as to independence under *Aronson,* the allegations are insufficient under *Rales.*

Because Cotter, Jr. never adequately alleged demand futility, he had no standing to pursue the litigation on behalf of RDI, and thus, has no standing to pursue this appeal. He never showed that at least four of the eight members of the Board of

Directors in place at the time of the filing of the Complaint could not consider a demand, because he failed to show that Storey, Gould, Kane and McEachern lacked interest or independence. He never showed – in either his pleadings, or in his opposition to the summary judgment motions – that at least five of the nine members of the Board of Directors in place at the time of the filing of the FAC or the SAC could not consider a demand, because he did not allege and did not prove particularized facts showing that Gould, Kane, McEachern, Codding and Wrotniak lacked interest or independence. The District Court's conclusions as to the sufficiency of Cotter, Jr.'s evidence merely confirmed his lack of standing.

II. BECAUSE COTTER, JR HAS NO STANDING, DISMISSAL OF THE APPEAL AND THE UNDERLYING ACTION OR IN THE ALTERNATIVE, AFFIRMANCE, IS REQUIRED.

Where demand was not futile, a derivative plaintiff has no standing. Thus, even when a district court determines that demand futility pleadings are sufficient to withstand dismissal, the district court is required to "later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue." *In re Amerco Derivative Litig.*, 127 Nev. at 222, 252 P.3d at 700, quoting *Shoen,* 122 Nev. at 636, 137 P.3d at 1181.

Here, Cotter, Jr's demand futility allegations were the same as his claims with respect to the underlying liability of the Dismissed Directors, *i.e.,* they were unable

to exercise their independent judgment because of purported influence by the Cotter sisters. Addressing the merits of that contention, the District Court determined that Cotter, Jr. had failed to present sufficient evidence to show such influence. Because the same allegations regarding independence were relied upon both for demand futility and the underlying claims, the District Court's decision establishes not only the Dismissed Directors' lack of liability, but also, Cotter, Jr.'s lack of standing.

A. Standing is an Element of Subject Matter Jurisdiction, and therefore, Dismissal is Required.

In defining a lack of demand futility as an issue of standing, the *Shoen I* court cited to *Nelson v. Anderson*, 84 Cal. Rptr. 2d 753, 761 (1999), *as modified on denial of reh'g* (June 14, 1999). In *Nelson*, the California Court of Appeals reversed ***a jury verdict*** entered against a corporate director, due to the failure of the plaintiff to ***plead*** demand futility. While this Court did not mention jurisdiction in Shoen, this Court's requirement that an evidentiary determination of the standing issue be made even if the pleading requirements was acknowledged in *Nelson v. Anderson*, 84 Cal. Rptr. 2d 753, 761 (1999), *as modified on denial of reh'g* (June 14, 1999).

It is not surprising therefore, that in the years since the issuance of *Shoen I*, Nevada's appellate courts have repeatedly held that standing is a jurisdictional issue. *See Smaellie v. City of Mesquite*, 393 P.3d 660 (Nev. 2017) (holding that dismissal for lack of standing should have been without prejudice, because standing is a jurisdictional mandate); *Schettler v. Ralron Capital Corp.*, 66725, 2016 WL

2853438, at *1 (Nev. May 12, 2016) (entertaining an argument that the district court lacked subject matter jurisdiction due to lack of standing, albeit rejecting such argument on the grounds that the respondent had standing). *See also, Heller v. Legislature of State of Nev.*, 120 Nev. 456, 461, 93 P.3d 746, 749 (2004) (noting that the issue of standing, which neither party had raised prior to oral argument, affected the court's jurisdiction).

Nevada's tying of standing and subject jurisdiction is consistent with both federal courts, and the majority of state jurisdictions. *See, e.g.*, *Oaktree Capital Mgmt., L.P. v. KPMG*, 963 F. Supp. 2d 1064, 1077 (D. Nev. 2013) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit.") (citations omitted); *Applera Corp. v. MP Biomedicals, LLC,* 93 Cal.Rptr.3d 178, 192 (Ct.App.2009) (standing is jurisdictional, thus lack of standing may be raised for the first time on appeal), cited with approval by *Ross v. Bonaventura*, *supra; Bennett v. Bd. of Trustees for Univ. of N. Colorado*, 782 P.2d 1214, 1216 (Colo. App. 1989) ("Although standing was not raised in the trial court, it is a jurisdictional issue which can be raised at any stage of an action, including the appeal."); *Davis v. Bills*, 444 S.W.3d 752, 756 (Tex. App. 2014) ("Subject matter jurisdiction is fundamental to the trial court's authority to decide a case, and implicit in the concept of that jurisdiction is standing.").

If a party has no standing, then the action should be dismissed. NRCP 12(h)(3). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Accordingly, this appeal, as well as the underlying action and the appeal in Case No. 76981, must be dismissed.[12]

C. In the Alternative, the Judgment Should Be Affirmed.

As noted in Part A, recent Nevada decisions have acknowledged that standing is inextricably connected to subject matter jurisdiction. However, this Court has also likened the lack of standing for a derivative plaintiff to a failure to state a claim upon which relief may be granted, pursuant to NRCP 12(b)(5). *See Shoen*, 122 Nev. at 634, 137 P.3d at 1180 (2006) (shareholder's failure to sufficiently plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted). In Nevada, dismissal for failure to state a claim may be raised at any time. NRCP 12(h)(2); *Clark County Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382,

[12] Two other appeals arising out of the lower court proceedings are also pending: Case No: 77648 and 77733. However, dismissal of these appeals is not required, as they concern post-judgment rulings regarding costs and attorneys' fees. This Court has held that, even after a court is divested of jurisdiction to adjudicate the merits of a case, it retains jurisdiction to consider collateral matters like whether to award attorney fees and costs. *See Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677-79, 263 P.3d 224, 227-29 (2011); *Kantor v. Kantor*, 116 Nev. 886, 895, 8 P.3d 825, 830 (2000).

395, 168 P.3d 87, 95 (2007). Accordingly, in the event the Court determines that standing is not a jurisdictional issue, the District Court's judgment in favor of the Dismissed Directors should be affirmed on the alternative grounds that Cotter, Jr. failed to state a claim upon which relief may be granted pursuant to NRCP 12(b)(5). *See Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (recognizing that this court will affirm the district court's judgment if the district court reached the right result, albeit for different reasons)."

CONCLUSION

Disgruntled shareholders unhappy with how the directors choose to run a company cannot use a derivative action as the forum to air their grievances. Cotter, Jr. is free to vote his opinions with such voting stock that he has not sold to fund his campaign of vengeance. He cannot use the courts to overset the decisions made by the Company's Board of Directors, and to impose his own self-aggrandizing view of who should run the Company, and how the Company should be run.

This Appeal must be dismissed, because Cotter, Jr. does not have standing to serve as a derivative plaintiff on behalf of RDI. His demand futility arguments (and indeed, all of his claims against the Dismissed Directors) ultimately turned on the purported lack of independence of the Dismissed Directors. But Cotter, Jr. was unable to prove his claims that these directors were beholden to Ellen and/or

Margaret Cotter. He pointed to no evidence presented below that was sufficient to create a material issue of fact as to the issue of independence.

Not only was Cotter, Jr.'s proof insufficient, but even his allegations fell short, and thus, this matter should have been dismissed long ago. Because a failure to plead or prove demand futility deprives the plaintiff of standing, and because standing is necessary for subject matter jurisdiction, this court should dismiss this appeal, as well as the underlying matter and the appeal from the final judgment on the merits in that matter, Case No. 7698. In the alternative, the Court should affirm the judgment in favor of the Dismissed Directors, due to Cotter, Jr.'s lack of standing.

Respectfully submitted this 25th day of March 2019.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8082 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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.

Dated this 25th day of March 2019.

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of March, 2019, a true and correct copy of the foregoing ***Answering Brief of Respondent Reading International, Inc.*** was served by via this Court's e-filing system, on counsel of record for all parties to the action below in this matter, as follows:

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP