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,	Electronically Filed May 31 2019 05:14 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No.: 75053 Dist. Court Case No.: A-15-719860-B Related to Cases: 72261, 72356, 74759 Consolidated for purposes of disposition with Cases 76981, 77648, 77333

OPENING BRIEF OF READING INTERNATIONAL, INC. FOR CASE NO. 77733

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Case NO 77733 Appellant 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 31st day of May 2019.

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INTRODUCTION

This appeal is the final request for appellate review in a case that spawned more than a half a dozen such requests. The resources of this Court, and those of the court below, have thus been burdened by a lawsuit that, viewed objectively, can only be explained as having been brought for purposes of harassment and revenge by Caser No 77733 Respondent James J. Cotter, Jr. ("Cotter, Jr."), after his scheme to hold onto his position as CEO of RDI fell apart. Cotter, Jr. abused his fiduciary obligations as a derivative plaintiff to pursue his own personal agenda and in so doing impose millions of dollars of legal fees on the very Company and stockholder's whose interests he was obligated to protect. Indeed, during the course of the litigation, Cotter, Jr., dropped all pretense of seeking any monetary damages for the benefit of the Company or its stockholders or vindicating any of the rights, preferences or privileges of the stockholders, and instead sought only his personal reinstatement as RDI's President and CEO. Nevada's courts should not countenance such misuse of shareholder derivative actions.

This litigation was filed on the same day that Cotter, Jr., was terminated as President and CEO of the Company by a vote of the Company's directors.

Originally, Cotter Jr. brought this action as both an individual and a derivative suit, and he attempted to sidestep the demand requirement for derivative actions by naming as defendants all of the member of the Board--- even the two directors who had voted *against* his termination, and when new independent directors were appointed to the Board , by naming them as well. The suit was ultimately decided against Cotter, Jr., through summary judgment, including summary judgment granted because he failed to establish that Directors Codding, Kane, Gould, McEachern, or Wrotniak lacked independence.[1]

Cotter, Jr. challenged an assortment of corporate management decisions, including his termination, and claimed that that these decisions, *none* of which created any limitations on, or indeed, even related to, shareholder voting rights, were "entrenchment" measures. For the next three years, masquerading as a derivative plaintiff,[2] Cotter Jr. continued his campaign of terror against the Company, whose rights he was supposed to be vindicating, constantly demanding

[1] Following this determination of independence, summary judgment was entered in favor of all defendants based on the fact that all of the matters contested by Cotter, Jr., were either originally approved or ratified by these independent directors.

[2] In Case No. 753053, wherein RDI is a Respondent, RDI noted in its Answering Brief that the absence of demand futility resulted in a lack of subject matter jurisdiction. However, while such lack of jurisdiction is further evidence that the litigation here was brought and maintained without reasonable grounds, this Court is not deprived of jurisdiction over collateral issues, such as the award of attorney's fees. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677-79, 263 P.3d 224, 227-29 (2011).

more and more discovery, and putting off the trial. He also ignored the multiple indications that his claims had no merits, including his *own* testimony acknowledging the independence of two of the Director Defendants, the withdrawal of the intervenor suit that had been filed based on his allegations, and the clarification of Nevada law regarding the business judgment rule that removed any conceivable argument that the burden shifting test of "entire fairness" applied in Nevada. Even the grant of summary judgment to five of the Director Defendants gave him no pause; to the contrary, he doubled down on his claims, saying, ***without any reasonable basis,*** that the subsequent ratification of the few remaining challenged actions must be invalid, and demanding a discovery fishing expedition in hopes of proving it. Significantly, throughout this time, Cotter, Jr. was not an outside shareholder pursuing discovery to obtain information he did not have. Instead, Cotter, Jr was a director of the Company for the entirety of the time the litigation was proceeding below.

In short, this Court would be hard put to find any evidence in this record that indicates that Cotter, Jr. was *ever* motivated by a desire to vindicate the rights of the RDI or its stockholders. To the contrary, the record shows that Cotter, Jr. did not even intend to present evidence of any purported harm suffered by RDI, as he acknowledged that he did not intend to call any damages experts to testify at trial.

RDI was forced to incur more than $15,000,000 in attorney's fees, both in defense of itself, and due to its statutory and contractual indemnity obligations, in defense of the Director Defendants against Cotter, Jr.'s claims. A derivative plaintiff who truly has the best interests of the corporation at heart would desire a speedy resolution of the claims, both to limit the disruption to company management posed by the litigation, and to limit the costs to the company, which must not only defend itself, but also has an obligation to bear the cost of defense for the board members defendants. Indeed, due to the extraordinary nature of derivative suits, which seize litigation decisions from the company's chosen management and place them in the hands of a single stockholder, a derivative plaintiff bears a fiduciary duty to prosecute the case fairly, and in a manner intended to benefit the corporation. Cotter, Jr. did not fulfill that duty, but instead, persisted in maintaining claims that were groundless, and even prolonged the litigation, seeking constant delays in the trial for assorted reasons, many of which proved highly suspect.

Derivative cases sound in equity. As matter of equity, the "reasonable grounds" purporting to justify a derivative action should be judged in the context of both the plaintiff's fiduciary duties to act in the best interests of the corporation and the specific proof standards necessary to for a derivative plaintiff to prevail on claims for breach of fiduciary duty against a company's directors. RDI and its

stockholders should not be required to bear the burden of attorney's fees for the claims brought by Cotter without reasonable grounds, and/or for the purpose of harassing RDI or its directors. Accordingly, Cotter, Jr.'s actions warranted an award of fees pursuant to NRS 18.010(2)(b), and the District Court abused its discretion in denying that request.

JURISDICTIONAL STATEMENT

Appellate jurisdiction is proper pursuant to NRAP 3A(b)(8), as this is an appeal of an order denying a Motion for Attorneys' Fees, and of the denial of a Motion to Enter Judgment in Favor of Reading, Inc.; therefore, it is an appeal of special orders entered after final judgment. The Orders were both entered on November 16, 2018, and notices of the entry of the two orders were entered on November 20, 2018. **VIII RDI-A 10778-10798.** [3] The Notice of Appeal was filed on December 14, 2018. **VIII RDI-A 10799.**

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.

[3] Because of the existence of multiple appendices among the consolidated appeals, the appendix here will be referred to as [Vol.#] RDI-A [page #].

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES AS COTTER, JR. BROUGHT CLAIMS WITHOUT REASONABLE GROUNDS**.**

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES AS COTTER, JR. MAINTAINED CLAIMS DESPITE THEIR APPARENT GROUNDLESSNESS

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT JUDGMENT IN FAVOR OF RDI.

STATEMENT OF THE CASE

In the underlying action, Respondent Cotter, Jr. brought three claims of breach of fiduciary duty against all Director Defendants, and one claim of aiding and abetting breach of fiduciary duty against Ellen and Margaret Cotter. I **RDI-A 1.** He sought also injunctive relief that, if granted, would have imposed obligations on RDI itself, rather than just on the Director Defendants. I **RDI-A 30-30.** During the litigation, RDI at all times acted as a party defendant, including filing dispositive motions and answers, participating in discovery, and seeking dispositive relief. **I RDI-A 205.** Summary judgment on all claims was granted in favor of Director Defendants Codding, Gould, Kane, McEachern, and Wrotniak on December 28, 2017, and certified under NRCP 54(b) on January 4, 2018. **VII RDI-A 9595-9601, 9611.** That decision has been appealed in Case No 75053. Summary Judgment on all claims was granted in favor of the remaining Director Defendants Ellen Cotter, Margaret Cotter, and Guy Adams on August 14, 2018,

with notice of entry on August 16, 2018. **VII RDI-A 10542-10552N.** That decision has been appealed in Case No. 76981. No judgment was entered in favor of or against RDI. *Id.* RDI and the Director Defendants sought and were awarded their costs, and that decision has been appealed in Case No. 77648. **VIII RDI-A 10774A.**

RDI also moved for attorneys' fees, and moved for entry of judgment in its favor, with the Director Defendants joining. **VIII RDI-A 10642-10751.** The District Court denied both motions and RDI appealed these decisions, in this matter, Case No. 77733. **VIII RDI-A 10799.** This Court consolidated these four appeals for purposes of disposition in an order dated April 18, 2019.

STATEMENT OF THE RELEVANT FACTS

General Background

RDI is a publicly traded but controlled corporation, principally focused on the development, ownership, and operation of real estate and entertainment assets in the U.S., Australia and New Zealand. **I RDI-A 8, ¶ 15.** It has two classes of stock, Class A non-voting stock and Class B voting stock. **I RDI-A 6,¶ 7.** For many years, a controlling majority of RDI's voting stock was owned by James J. Cotter, Sr. ("Cotter, Sr."), who served as RDI's CEO and Chairman of the Board. **I RDI-A 8, 539.**

In August 2014, Cotter, Sr. resigned his positions for medical

reasons. **I RDI-A 539, II RDI-A 3796.** At that time, in addition to Cotter, Sr., RDI's Board of Directors had eight other members:

- Ellen Cotter, eldest child of Cotter, Sr. and Mary Cotter, who had served as a director since March 2013, had been an RDI employee since 1998, and controlled the day-to-day operations of the Company's domestic cinema operations;
- Margaret Cotter, second child of Cotter, Sr. and Mary Cotter, who had served as a director since 2002, and, as an outside consultant, managed RDI's live theater division, supervised certain live theater real estate, and was responsible for redevelopment work on RDI's Manhattan theater properties;
- James J. Cotter, Jr., youngest child of Cotter, Sr. and Mary Cotter, who had served as a Director since 2002, and had been an employee of the Company for approximately one year;
- Edward Kane, who had served as a director from 1985-1998, and October 2004 forward, and was Chair of the Tax Oversight and the Compensation and Stock Option Committees;
- Guy Adams, who had served as a director since January 2014 and was a registered investment advisor and experienced independent director on public company boards;

- Douglas McEachern, who had served as a director since May 2012 and was an audit partner at Deloitte & Touche from 1985-2009;
- Timothy Storey, who had served as a director since December 2011 and was Chairman of a New Zealand-based investment fund specializing in commercial property; and
- The late William Gould, who served as a director from October 2004 until his death in the fall of 2018, and who had been a renowned expert on corporate governance issues.[4]

I RDI-A 554-555. All of these individuals were well known to Cotter, Jr., who had in each case voted for either their initial appointment to the board or their subsequent nomination for re-election to the Board. **

Upon Cotter, Sr.'s sudden resignation in August 2014, the RDI Board, faced with an emergency vacancy, and given to understand that this was consistent with Cotter, Sr.'s wishes, appointed Cotter, Jr. as CEO, in the hope that Cotter, Jr. would grow into the job. **I RDI-A 555-556.** Cotter, Sr. died several weeks later. ***Id.***

[4] *See, e.g.*, *Wynn Resorts v. Eighth Judicial Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 343 (2017) (quoting Mr. Gould's treatise regarding Nevada's business judgment rule).

Cotter, Sr.'s Estate Plans

Cotter, Sr.'s estate planning had included the James J. Cotter, Sr. Living Trust, (the "Trust"), which owned much of the RDI stock, including RDI Class B Voting stock, controlled by Cotter, Sr. **II RDI-A 3796.** The Trust provided that following Cotter, Sr.'s death, all of RDI's Class B voting stock would be moved into a separate voting trust (the "Voting Trust) for the benefit of Cotter, Sr.'s grandchildren. At the time of his death, Cotter, Sr. also owned a significant amount of RDI's voting stock that had not been transferred into the Trust, but which, under the terms of his Will would eventually be transferred to the Voting Trust. ***Id.*** Ellen Cotter and Margaret Cotter were appointed co-executors of Cotter, Sr.'s Estate (the "Estate").[5] ***Id.***

When Cotter, Sr. had been hospitalized in the summer of Cotter, Jr. had an amendment to the Trust drafted ("Hospital Amendment"), and used undue influence to persuade his father to execute the same. **VIII RDI-A 10658-16859.** Through that amendment Cotter, Jr. attempted, *inter alia*, to materially alter the administration of the Trust and the Voting Trust, and to put himself in a position to control RDI. He did this by adding himself as a trustee of the Trust (prior to the Hospital Amendment, Ellen Cotter and Margaret Cotter were the sole trustees) and

[5] The Probate Case, filed in the Eighth Judicial District Court, Case No. P-14-082942-E, was consolidated or coordinated with this matter until August 8, 2018,

as a trustee of the Voting Trust (prior to the Hospital Amendment, Margaret Cotter was the sole trustee) with alternating control of the voting stock held by the Voting Trust. ***Id.*** Following Cotter, Sr.'s death, Ellen and Margaret Cotter filed suit in California to have the Hospital Amendment to the Trust declared invalid ("Trust Litigation"), which suit was ultimately successful**.** ***Id.*** Accordingly, Ellen Cotter and Margaret Cotter are now recognized as the sole trustees of the James J. Cotter Living trust and Margaret Cotter is now recognized as the sole trustee for the James J. Cotter Voting Trust. This resulted in the reinstatement of Cotter, Sr.'s original estate plan and the elimination of Cotter, Jr. as a purported trustee of the Trust and of the Voting Trust, and of his claimed right to control RDI. ***Id***. Prior to a decision being reached on the validity of the Hospital Amendment, the Trust's stock was voted based on a majority decision of the three trustees of the Trust. **I RDI-A 256:18-257:14.**

Cotter, Jr's Performance as CEO

Meanwhile, Cotter, Jr. continued in the position as President and CEO, and did an abysmal job. **I RDI-A 553-554.** RDI's Board began discussing "the possibility of getting an interim CEO . . . as early as October 2014" or a management coach. to ameliorate Cotter Jr.'s shortcomings. **I RDI-A 554, 557.** Among Cotter Jr.'s failings were his lack of managerial skills and his display of a violent abusive leadership. **I RDI-A 555.** The Board of Directors saw Cotter Jr.'s

style as closed-door and unengaged and felt that he was reluctant and slow to make decisions. ***Id.*** RDI employees viewed Cotter Jr. as having a volatile temper and anger management issues. ***Id.*** Cotter Jr.'s behavior caused several female employees to be fearful of him and concerned for their physical safety to the extent that at least one employee began carrying mace to the office. ***Id.*** Board members considered sending Cotter Jr. to a psychologist or psychiatrist or to anger management classes in early 2015. ***Id.***

Cotter Jr. also displayed a lack of understanding of RDI's business operations. He could not understand the labor and other cost differences between the US and the Australian and New Zealand cinema industries. **I RDI-A 556.** Director Adams and others also questioned Cotter Jr.'s "knowledge about the business," whether he "properly investigated" claimed issues before bringing them before the Board, and whether he was "really learning the business" and "leading us forward." **I RDI-A 560.** As Director McEachern later admitted, "from August of 2014 until [Cotter, Jr.'s] termination, I cannot tell you one thing that we did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing." ***Id.***

Non-Cotter Directors criticized his conduct, both for his duplicity and the wasteful allocation of his time, including apparently deliberate efforts to undermine his sisters, including Ellen, a key executive. **I RDI-A 554.** The tension

that resulted from Cotter Jr.'s actions, as well as the dispute over the Trust, led to the Non-Cotter Directors determining in February 2015 that RDI had a "dysfunctional management team." Moreover, Cotter, Jr. himself recognized his own inadequacies, surreptitiously hiring, at Company expense, a consultant to coach him. **I RDI-A 10565.** Things got so bad that beginning in March 2015, one independent board member was charged with the duty of acting as an ombudsman. **I RDI-A 556.** The Non-Cotter directors made clear that if matters did not improve, one or more terminations were likely. *Id.* Cotter, Jr. himself testified that either the tension had to ease or termination(s) would be necessary. ***Id.***

Cotter, Jr.'s Termination and the Filing of this Action

By May 2015, multiple board members had had enough, and following a process that progressed through three board meetings over approximately three weeks, Cotter Jr. was terminated. I **RDI-A 557-560.**

The very same day he was terminated, Cotter, Jr. filed this action, which originally included both his own direct claims related to his termination, as well as a purported derivative claim. I **RDI-A 1.** That filing was no surprise, as Cotter, Jr.'s personal counsel threatened to do so at the May 21 meeting, and Cotter, Jr. made repeated threats to various board members personally, stating that if they voted to fire him he would "sue [them] and ruin them financially." **I RDI-A 558.**

Purporting to act as a derivative Plaintiff, Cotter, Jr. alleged two causes of

action for breach of fiduciary duty against all other members of the RDI Board, based on 1) his termination as CEO, and 2) on the Compensation Committee's approval of the Estate's exercise of an option to purchase RDI voting stock, with payment for said exercise being made with an equivalent fair market value of RDI non-voting stock. I **RDI-A 1-31**. His claims against the non-Cotter directors were premised on the theory that these directors failed to exercise their own business judgment, and instead, voted as directed by Ellen and Margaret Cotter. **_I RDI-A 3, ¶ 3.** In support of this theory, he presented *no* facts as to Directors Gould, McEachern or Storey; as to Kane, he alleged a longstanding friendship between Kane and Cotter, Sr., resulting in the Cotter Sisters calling Director Kane "Uncle Ed"; and as to Adams, the claim that he was dependent on income from contracts with Cotter entities, which Cotter, Jr. claimed put him under the influence of Ellen and Margaret. **I RDI-A 6-7 ¶¶10-11.** Cotter, Jr. also brought a claim for aiding and abetting breach of fiduciary duty against Ellen Cotter and Margaret Cotter, based on the purported breaches by the Non-Cotter Directors. **I RDI-A 28-29, ¶¶125-132.** As detailed in RDI's Answering Brief in Appeal 75053, Cotter, Jr. failed to adequately allege demand futility.

The First Year of Litigation

After Cotter, Jr.'s Complaint was filed, T2 Partners Management, LLP and other hedge fund stockholders in RDI, (collectively, the "T2 Plaintiffs"), filed a

Complaint in Intervention, which parroted the allegations made by Cotter, Jr. **I RDI-A 69-86.** The intervention was granted, and the T2 Plaintiffs thereafter participated in the litigation until mid- 2016. **I RDI-A 65.**

In August 2015, Cotter, Jr. brought a motion for a preliminary injunction, which sought to void the termination decision and Cotter, Jr.'s immediate reinstatement as President and CEO. **I RDI-A 33.** Cotter Jr. also sought expedited discovery, pursuant to which the Defendants including RDI produced documents in September and October of 2015. **I RDI-A 154** But Cotter Jr., after crying wolf and imposing the costs of expedited discovery, including expensive ESI discovery on the Defendants and RDI, thereafter proposed waiting until February to hold the hearing on his motion. **I RDI-A 160:9-12.** The District Court concluded that Cotter, Jr.'s conduct belied the need for immediate relief and vacated the request for preliminary injunction, although the Court stated that Cotter, Jr. could renew the request. **I RDI-A 177:10-17.** Cotter, Jr. never renewed his request for preliminary injunctive relief.

Cotter, Jr. amended his complaint to challenge virtually all board decisions that had occurred since his termination, including Board actions taken while he was a director and as to which he was already fully informed, and to include the two new board members, Judy Codding and Michael Wrotniak, who had been appointed to fill the vacancies left by Cotter, Sr. and by Timothy Storey, who had

retired. I **RDI-A 87-136.**[6]

While Cotter, Jr., apparently saw no benefit to himself in pursuing further preliminary relief, in June 2016, the District Court denied a Motion for Preliminary Injunction brought by the T2 Plaintiffs that requested to enjoin the voting of the voting stock held in the Estate and by the Trust. **RDI-A 251-278.** In the hearing of the Motion, the District Court acknowledged that, one year before, in the Probate case, it had ruled that the Estate Executors were entitled to vote the stock in the Estate. **RDI-A 264:7-16.** The Court further declined to prevent a majority of the Living Trust Trustees from voting the stock held by the trust. ***Id.***

The Second Year of Litigation

In July of 2016, the T2 Plaintiffs withdrew their complaint. II **RDI-A 279.** In a jointly filed motion, RDI, the Director Defendants, and the T2 Plaintiffs stated:

> The T2 Plaintiffs have reviewed a number of transactions and engaged in discussions with management in addition to participating in the litigation and have determined the Defendants have acted, and will continue to act in good faith to use best practices with regard to board governance, protection of stockholder rights, and maximizing value for all its stockholders. . . .
>
> Based upon T2 Plaintiffs' Counsel's evaluation as well as T2 Plaintiffs' own evaluation, T2 Plaintiffs have determined that the Settlement is in the best interests of Reading and its current stockholders and has agreed to settle the T2 Action upon the terms

[6] The deficiencies as to demand futility in this First Amended Complaint are described in detail in RDI's Answering Brief in Appeal 75053.

> and subject to the conditions set forth in the Settlement and summarized herein.

II **RDI-A 288-289.** The District Court approved the a settlement among these parties, with the terms of the settlement including mutual releases (but not requiring dismissal of Cotter, Jr.'s claims), each party paying their own expenses and costs, and an agreed joint press release, that included the following relevant language:

> [A spokesman for the T2 Plaintiffs] stated that the Plaintiff Stockholders brought the Derivative Claims as a result of the allegations contained in a derivative action filed by Mr. James J. Cotter, Jr. on June 12, 2015, in the District Court of the State of Nevada for Clark County. As stockholders in the Company,[the Plaintiff Stockholders] wanted to ensure that the interests of all stockholders were being appropriately protected. In connection with the litigation, the Plaintiff Stockholders conducted extensive discovery on these matters, which included depositions of Guy Adams, Margaret Cotter, Ellen Cotter, William Gould, Edward Kane, Douglas McEachern, Tim Storey and James Cotter, Jr. Following their efforts on behalf of the stockholders, [the Plaintiff Stockholders] have concluded that the Reading Board of Directors has acted in the best interests of all stockholders and has been and remains committed to acting in the interests of all stockholders. Continuing with their derivative litigation would provide no further benefit.

*** RDI-A 343, * RDI-A 8309-8323**. Significantly, no obligations of any governance changes were imposed.

Cotter, Jr. Doubles Down on his Claims

Despite the clear exoneration of the Director Defendants expressed by the T2 Plaintiffs, whose *sole* interest in the proceedings was as stockholders of RDI,

Cotter, Jr. not only failed to withdraw his claims, but instead actually filed a Second Amended Complaint, in which he challenged *still more* corporate decisions. I **RDI-A 137**. Of particular relevance here, in the new claim, Cotter, Jr. contended that the Board Of Directors had breached their fiduciary duties by failing to follow up on an non-binding expression of interest in purchasing RDI's shares filed by an entity known as Patton Vision ("the Patton Vision Inquiry").[7] I **RDI-A 184, ¶¶ 154-167.** Cotter, Jr. then demanded discovery related to the Patton Vision Inquiry, and sought to delay the trial (in his fourth request) that had been scheduled for November 2016. I **RDI-A 6145.**

Motions for Summary Judgement

The Director Defendants filed Motions for Partial Summary Judgement, seeking judgment as to whether the various decisions challenged by Cotter Jr. were breaches of fiduciary duty. *** RDI-A 539-5617 (includes exhibits filed under seal).** RDI joined in these Motions. *** RDI-A 6037-6144**. Specifically, these motions sought judgment on the following corporate decisions:

1) Cotter, Jr.'s Termination
2) The Independence of the non-Cotter Directors
3) The Patton Vision Inquiry

[7] The deficiencies as to demand futility in this Second Amended Complaint are described in detail in RDI's Answering Brief in Appeal 75053.

4) The Reactivation of RDI's Executive Committee, and decisions challenged thereby.

5) Directors Ellen Cotter's appointment of as CEO and related CEO search

6) The Estate's Exercise of the Option to Purchase Stock, and RDI's employment of Margaret Cotter.

Id. In Opposition to these Motions, Cotter, Jr. offered evidence, but such evidence did not support his claims of wrongful motives for the corporate decisions. *** RDI-A 6197-8308 (included exhibits filed under seal).** Most of his evidence depended on his own speculation, opinions, and even blatantly false statements, contained in a declaration he included with his oppositions. *** RDI-A 6352-6366; * RDI-A 8379-8390.**

The District Court granted the motion as to the activation of the Executive Committee, but granted Cotter, Jr.'s request for still more discovery, ruling that the summary judgment briefings could be supplemented after more discovery was completed. **V RDI-A 8472: 17-20; 8484:10-12.** The Court added:

> [T]he independence issue needs to be evaluated on a transaction- or action-by-action basis, because you have to separately evaluate the independence as related to each.... So you're going to give me more information like I've asked for Mr. Krum, okay, following the completion of that.

V RDI-A 8472. But even after the additional discovery had been completed, Cotter, Jr. did not present the evidence the Court had requested.

Meanwhile, in the 2017 legislative session, the Nevada legislature amended NRS 78.138 to clarify the business judgment rule and related statutes. 2017 Statutes of Nevada, p. 3998. Additionally, in July 2017, this Court issued is opinion in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 399 P.3d 334 (Nev. 2017). This ruling nullified Cotter, Jr.'s attempts to invade RDI's attorney-client privilege (then also pending before this Court in Case No. 73256), as this Court indicated in its Order issued in that matter on September 28, 2017. Even more significantly, the *Wynn* decision, and the 2017 clarifications to NRS 78.138, reiterated that the business judgment rule presumption applied to all board decisions, was intended to prevent judicial second guessing with corporate decision making, and that NRS Chapter determined Nevada law. These clarifications of Nevada law made clear that Cotter, Jr's theory that the Director Defendants bore the burden to showing that the various challenged corporate decisions satisfied the "entire fairness" test was erroneous. However, Cotter, Jr. did not withdraw his claims.

The Director Defendants renewed their Motions for Summary Judgment, to which RDI joined. **VI RDI-A 8730-8773, 8797.** Cotter, Jr. again opposed these motions. **VI RDI-A 8830--9562.** Even though the evidence presented in opposition to the Defendants' summary judgment motions was essentially the same as that presented previously, the additional year of discovery having failed to turn

up anything material, the District Court granted summary judgment in favor of Directors Codding, Gould, Kane, McEachern and Wrotniak, finding that Cotter, Jr. had failed to present evidence sufficient to show the existence of a material issue of fact as to their independence. **VII RDI-A 9595.** The Court granted judgment on all claims to the five directors, thus showing that Cotter, Jr. had not presented evidence sufficient to overcome the business judgment presumption. ***Id.***

RDI and the Director Defendants pointed out that this ruling mooted the majority of Cotter, Jr.'s claims as all but two of the challenge corporate actions had been approved by a majority of these now indisputably independent directors, and therefore, were immunized from challenge on the basis of purported interest pursuant to NRS 78.140. Yet, Cotter, Jr. did not withdraw his claims. To the contrary, he requested Rule 54(b) certification so that he could appeal the decision, decide the absence of evidence showing any wrong doing, resulting in Appeal No. 75053. **VII RDI-A 9602-9609, 9611.**

Those five Directors then ratified the remaining challenged corporate decisions, as expressly permitted under NRS 78.140. **RDI -A 9908-9914 (Ex. B, filed under seal)**. This ratification occurred at a board meeting at which Cotter, Jr. was present. ***Id.*** Still, Cotter, Jr. did not withdraw his claims.

The January Trial

Trial against the remaining three Director Defendants was scheduled to

commence on January 8, 2018. On the first day of that trial, Cotter, Jr requested a continuance based on circumstances of which he had been aware for some time, and about which he refused to give complete details, having thus required RDI and the Director Defendants to fully prepare for trial. **VII RDI-A 9616 (filed under seal); VII RDI-A 10667.**

It was subsequently discovered that Cotter Jr. would not have been able to present certain of his designated expert witnesses if trial had proceeded in January, as he had failed to pay their fees. **VI RDI-A 9633-9773**. Ordered to produced current billing statements of all experts who would testify at trial, Cotter, Jr. was forced to concede that at the trial now scheduled for July 2018, he would not be presenting any expert on damages suffered by the Company. **VII RDI-A 9625:11-16; VIII RDI-A 10667, 10730.** *Thus, it became apparent that the relief Cotter, Jr. hoped to recover was limited to his own reinstatement.* There was no feasible prospect of an award of damages, because Cotter Jr. could present no evidence showing that RDI was damaged as a result of his termination., and accordingly, RDI *could not benefit from the litigation*. Yet Cotter, Jr., still claiming to be a derivative Plaintiff, did not withdraw his claim.

In May 2018, the remaining Director Defendants brought a motion for summary judgment based on the ratification. **VII RDI-A 9859.** Even though Cotter, Jr. had obtained a rebuttable presumption in his favor, imposed due to a

claimed failure of the Defendants to provide documents in a sufficiently expedited manner, the District Court found that there was an absence of evidence sufficient to support Cotter, Jr.'s claims and judgment was granted on all remaining claims. **VIII RDI-A 10542.**

The Motion for Attorney's Fees

Following entry of the final judgment in favor of the Defendants, the parties stipulated that the attorney fee issued would be decided in a bifurcated manner, with the parties first briefing the issue of whether the Defendants were entitled to an award of fees under NRS 18.010(2)(b) and if so, a second set of briefings would address the amount of fees. **VIII RDI-A 10553.** The Parties briefed the issue, and thereafter, the District Court determined that Defendants were not entitled to fees, stating:

> This case did not meet the standards of NRS 18.010 for the award of attorneys' fees. While I did grant summary judgment at the end based upon the ratification by the directors that I found to be independent, that does not make itself a vexatious claim.

VIII RDI-A 10773:8-12. The District Court did not address the multitude of claims that Cotter, Jr. had maintained that had not been subject to ratification, for which he was unable to produce evidence. Nor did the District Court address Cotter, Jr.'s persistent maintenance of claims, despite the repeated events that further demonstrated that his claims were without merit. Finally, the District Court did not address the evidence presented by RDI and the Director Defendants

showing that Cotter Jr. brought the action for purposes of harassment.

The Motion for Amendment of Judgment.

The final judgment granted in favor of the Director Defendants did not, due to oversight, include RDI as a party receiving judgment. **VII RDI-A 10542.** RDI filed a Rule 60 Motion to amend the judgment, pointing out that the Court had previously rejected Cotter, Jr.'s claims that RDI was a nominal party that was not entitled to full participation in the proceedings, listing the numerous ways in which RDI had participated as a party, and pointing out those claims for relief made by Cotter, Jr. would have required RDI, not the Director Defendants, to act if granted. **VIII RDI-A 10642.** The District Court denied the Motion, on the basis that RDI was a nominal Defendant. **VII RDI-A 10779.**

STANDARD OF REVIEW

This Court reviews the denial of a request for attorney's fees for an abuse of discretion. *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 563 (1993), *superseded by statute as stated in In re DISH Network Derivative Litig.*, 133 Nev., Adv. Op. 61, 401 P.3d 1081, 1093 (2017). This Court reviews the denial of a motion to amend judgment for an abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996).

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's order denying fees. Cotter, Jr.'s claims were brought and maintained for purposes of harassment to advance, in coordination with his support for the Hospital Amendment in the Trust Litigation, his efforts to take over control of the Company, and without reasonable grounds. The sanction of attorney's fees is particularly appropriate here, where Cotter, Jr. presented himself as a derivative plaintiff, and therefore, was bound to act as a fiduciary for the benefit of RDI and its stockholders generally. The evidence is clear, however, that Cotter, Jr. was acting to further his own agenda, and to further the interests of RDI or its stockholders. Recognizing that derivative litigation is unsupervised by a company's Board of Directors, the law imposes a fiduciary standard on the person who takes up the mantel of the derivative plaintiff. Accordingly, it is completely fair and equitable that a fiduciary who violates this trust for the pursuit of personal motives, should not be able to levy the cost of such pursuit upon the innocent beneficiaries of his trust. The District Court abused its discretion by failing to take these factors into consideration as part of the total circumstances, in determining whether there were reasonable grounds to maintain the claims. Additionally, the District Court made no ruling at all with respect to the ample evidence that regarding the evidence that Cotter, Jr. brought the claims for the purpose of harassment under an objective standard of what a reasonable

derivative plaintiff would do with respect to bringing and/or maintaining the claims here. Accordingly, the order denying fees should be reversed and the matter remanded for the determination of a reasonable fee award.

Additionally, the District Court erred in denying judgment in favor of RDI. Although RDI was joined in this case as a "nominal defendant," RDI was a necessary party to this litigation, who filed responsive pleadings and/or Answers to the successive complaints, requested the dismissal of Cotter, Jr.'s claims, and who participated fulling in discovery as a party. Had Cotter, Jr. prevailed on his claims and been granted the requested injunctive relief, RDI would have been burdened. As the relief requested by RDI in its Answers was ultimately granted, RDI is entitled to formal judgment in its favor.

LEGAL ARGUMENT

> *A major weakness of representative litigation in general is that the agent controlling the litigation often does not have the same interests as the principal. In the case of stockholder derivative actions, a meritless suit brought by a plaintiff without the corporation's best interest in mind can become a significant drain on the corporation's and its stockholders' resources. . . . [P]laintiffs should be particularly conscientious of the merits of a case.*
>
> Amy M. Koopmann, A Necessary Gatekeeper:
> The Fiduciary Duties of the Lead Plaintiff
> In Stockholder Derivative Litigation,
> 34 J. Corp. L. 895, 896 (2009).

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES BECAUSE COTTER, JR.'S CLAIMS WERE BROUGHT WITHOUT REASONABLE GROUNDS.

The District Court's refusal of attorney's fees was an abuse of discretion, as Cotter, Jr. brought his claims without reasonable grounds. By enacting NRS 18.010(2)(b), the Nevada Legislature established Nevada's public policy that groundless litigation should be thwarted and deterred by the imposition of attorneys' fees. That statute provides, as relevant here:

> the court may make an allowance of attorney's fees to a prevailing party. . . when the court finds that the claim . . . of the opposing party was *brought or maintained without reasonable ground or to harass the prevailing party.* The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

NRS 18.010(2)(b)(emphasis added). Here, the District Court's finding that the requirements of the statute were unmet appears to have been based on an improper analysis, as it was based on an argument that was not presented by RDI or the Director Defendants. Specifically, the District Court ruled that, *some* of the claims against *three* of the Director Defendants were not vexatious simply because they had been dismissed on the basis of ratification. The District Court did not address all of

the claims brought by Cotter, Jr., and did not consider 1) whether such claims were groundless at the time originally raised; 2) whether it became clear during the course of the litigation that some or all of his claims were groundless; 3) whether Cotter, Jr. was acting pursuant to his fiduciary duties, as a derivative plaintiff, which required that the claims brought be of potential benefit to RDI and its stockholders; and 4) whether the evidence showed that Cotter, Jr. brought the claims for purposes of harassment. The District Court's failure to consider the total circumstances was an abuse of discretion.

In determining the propriety of an award of fees under NRS 18.010(2)(b), a district court must determine whether the non-moving party had reasonable grounds to bring or maintain his claims, which "*analysis depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiff's averments.*" *Bergmann*, 109 Nev. at 675 (emphasis added). If there is evidence in the record to support the conclusion that the claims were brought or maintained without reasonable grounds, or to harass another party, an award of fees is justified. *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 687 (Nev. 1995). In deciding this issue, the trial court is *required* to construe NRS 18.010(2)(b) liberally *in favor of* awarding attorney's fees. *See Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory."). As this Court stated, the "statutory language is clear" in that "it

encourages the district court to award attorney fees" and "reflects the Legislature's intent to liberalize attorney fee awards." *Trustees of Plumbers & Pipefitters Union Local 525 Health & Welfare Tr. Plan v. Developers Sur. & Indem. Co.*, 120 Nev. 56, 62-63, 84 P.3d 59, 63 (2004).

In *Capanna v. Orth*, 134 Nev. Adv. Op. 108, at *13 (Nev. Dec. 27, 2018), this Court upheld an award of attorney's fees granted against a doctor in a malpractice case, where there was no evidence to support the doctor's defense as to liability, but there was evidence to support his defense as to the claimed damages. Thus, attorney's fees may still be awarded when there is evidence to support one or more elements of a cause of action or defense, but the evidence is lacking as to the elements relating to the actual misconduct or resulting damages. Additionally, fees are appropriately awarded when a plaintiff has brought multiple claims, some of which lack reasonable grounds. *Bergmann*, 109 Nev. at 676, 856 P.2d at 563 ("The prosecution of one colorable claim does not excuse the prosecution of [other] groundless claims."). In such circumstances, the District Court should allow fees incurred in opposing the groundless claims. *Capanna, supra.*

Here, the District Court ruled that fees were not warranted, stating:

> This case did not meet the standards of NRS 18.010 for the award of attorneys' fees. While I did grant summary judgment at the end based upon the ratification by the directors that I found to be independent, that does not make itself a vexatious claim.

VIII 10773:8-12. However, this ruling does not reflect that the "entire circumstances" were considered, and thus, indicates that the appropriate legal analysis was not applied.

A failure to apply clear legal principles is an abuse of discretion. *Bergmann* 109 Nev. at 674 ("[W]here a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion."). Where a trial court fails to make express findings of fact and conclusions of law, the appellate court must examine the record to determine whether an abuse of discretion has occurred. *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830 (Nev. 1986) (holding that examination of the record was necessary to determine whether court's denial of expert witness fees was an abuse of discretion). Here, review of the record shows that the denial of fees was an abuse of discretion.

A. Liberal Construction of NRS 18.010 Requires Cotter, Jr.'s Fiduciary Duties as a Derivative Plaintiff, as Well as the Heightened Proof Standards Required for Claims Against Corporate Directors to be Considered in Determining Whether his Claims were Groundless.

The District Court had a duty to liberally construe NRS 18.01 (2)(b) in favor of awarding fees, as indicated in the plain language of the statute. As applied here, such liberal construction must obviously be directed to the determination of whether there were reasonable grounds to justify bringing or maintaining claims against corporate directors, on behalf of the corporation.

The legislature did not define the term "reasonable grounds" as used in the statute. However, the legislature's use of the word "reasonable" indicates that an objective standard is intended. *Carrigan v. Comm'n on Ethics of State*, 313 P.3d 880, 887 (Nev. 2013) (legislature's use of term "reasonable" indicated an objective standard). "Implicit in NRS § 18.010(2)(b) is the Nevada Legislature's judgment that litigants in this state must be cautious in their pursuit of legal claims, and take upon themselves the responsibility of ensuring that there is a reasonable basis for those claims before asserting them in court." *Greenwood v. Ocwen Loan Servicing LLC*, No. 316CV00527RCJVPC, 2018 WL 3550217, at *2 (D. Nev. July 24, 2018). "'Reasonable grounds' is an objective benchmark not satisfied by mere subjective belief." *Weinfeld v. Minor*, 3:14-cv-00513-RJC-WGC, at *7-8 (D. Nev. Mar. 11, 2019). Accordingly, the determination of whether a claim is groundless must include consideration of objective factors.

This Court has stated that "[f]or purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009). However, this standard cannot mean that it is enough to present evidence that supports only one out of numerous elements of a claim or defense to avoid a finding of groundlessness;

such a limitation would hardly constitute a liberal construction of the statute.[8] Instead, this test must, at minimum, require that the supportive evidence go specifically to the purported wrongfulness of the conduct.

1. To satisfy the test of "reasonable grounds," the evidence must support claims brought in a representative capacity.

In litigation where the plaintiff acts for himself, such a determination need only consider whether a reasonable person would perceive the evidence as sufficiently supportive of the claims to justify his own personal risks in bringing the litigation. But when a claim is raised in a derivative capacity, a heightened analysis must apply, due to the heightened duty a derivative plaintiff has.

"[A] derivative plaintiff serves in a fiduciary capacity as representative of persons whose interests are in plaintiff's hands and the redress of whose injuries is dependent upon her diligence, wisdom and integrity." *In re Fuqua Indus., Inc. S'holder Litig.,* 752 A.2d 126, 129 (Del.Ch.1999). Accordingly, here, Cotter, Jr. had a duty to objectively consider whether there were reasonable grounds to bring a claim on behalf of RDI. "By agreeing to serve as the figurehead for the litigation,

[8] If evidence to support a single element of a claim were sufficient, then only the most blatantly fictional of claims could satisfy this test. Evidence of the existence of a contract would be enough to call a breach of contract claimed sufficient grounded, even if there were no evidence of a breach of damages. Evidence of a breach of fiduciary duty would be sufficient, even if the evidence show no more than that a fiduciary duty was owed by virtue of a position held. This cannot have been the Court's intent in stating this test.

the lead plaintiff takes on the duty to be informed about the litigation, the prospects of success, and who is likely to pay the bill." Koopmann, "34 J. Corp. L. at 914. A derivative plaintiff (or, at minimum counsel for a derivative plaintiff) knows that the corporation will be required to advance defense costs, and accordingly, the analysis of whether the evidence supports the claim must involve a cost-benefit analysis, *i.e.,* is the evidence sufficiently supportive of the allegations to justify the costs the corporation will incur if the claims are prosecuted, including the risk that indemnification cannot be avoided ?

Any determination of whether evidence supports a claim must also consider the degree of proof required to prevail on the claim. Cotter, Jr.'s claims were brought against directors of a Nevada corporation, based on actions taken in their corporate capacities. Under Nevada law, heightened proof requirements, including overcoming statutory presumptions apply to such claims. If the evidence will not support claims with these heightened standards, then the claims should be deemed groundless.

Requiring consideration of an objective analysis of the litigation's prospect of providing a benefit to the corporation, and requiring that, to show "reasonable grounds" there must be evidence that supports a conclusion that wrongful conduct against the corporation occurred, would promote the goals intended by both NRS 18.010(2)(b) and shareholder derivative litigation.

In enacting NRS 18.010(2)(b), the Nevada legislature codified the traditional equitable exception to the "American Rule" that provides that each party pays their own attorney's fees. See *Smith v. Crown Financial Services*, 111 Nev. 277, 281 (Nev. 1995) (explaining American Rule); *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005) ("The bad faith exception to the American Rule applies in cases where the court finds litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs of litigation"). As the statute itself plainly states, the intent is behind this codification of the exception is to "punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." NRS 18.010(2)(b).

The very concept of shareholder derivative litigation is that shareholders should have a means to require the corporation to bring suit in order to rectify a wrong done to it by those who are responsible for the corporation and refuse to seek a remedy. As the U.S. Supreme Court stated:

> Equity came to the relief of the stockholder, who had no standing to bring civil action at law against faithless directors and managers. Equity, however, allowed him to step into the corporation's shoes and to seek in its right the restitution he could not demand in his own.

Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949). However, equity takes a risk in allowing a corporation's claims to be raised by a shareholder. As Justice Jackson continued, in *Cohen*:

> [A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. "The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent.

Id. at 548-549. Applying NRS 18.010(2)(b) liberally to ensure that self-appointed champions such as Cotter, Jr. actually have "reasonable grounds," (*i.e.,* evidence that shows wrongful conduct occurred), to believe that the litigation will result in a benefit to the company assures that both equity and legislative intent are carried out.

Indeed, awarding attorney's fees against a derivative plaintiff who brought claims without a basis to believe the corporation would benefit is a logical corollary to the "common fund" and "substantial benefit" exceptions to the American rule, both commonly applied in shareholder cases. The former "permits a litigant who expends attorneys' fees in winning a suit which creates a fund from

which others derive benefits to require those passive beneficiaries to bear a fair share of the litigation costs." *Guild, Hagen & Clark, Ltd. v. First National Bank*, 95 Nev. 621, 623 (Nev. 1979) (internal quotations and citations omitted). Similarly, the latter "allows recovery of attorney fees when a successful party confers a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Thomas v. City of North Las Vegas*, 122 Nev. 82, 91 (Nev. 2006) (internal quotations and citations omitted). These exceptions are based on equitable principles of fairness, i.e., showing fairness to the actual litigant, whose share of the collective benefit might be eaten up by fees and costs, and to prevent an unjust advantage to other who receive the collective benefit, but without cot.

Here, Cotter, Jr. presented himself as the champion of RDI, but instead of advocating claims that could yield a benefit to RDI, he pursued claims that had no such possibility, sought discovery of information that, as a director of the Company, he already had, and made claims against directors whom he had himself voted to place on the board. As a result, RDI was forced to incur more than $15,000,00 in attorney's fees (a sum that does not even include fees incurred for defense against the T2 claims, which were brought in reliance on Cotter, Jr.'s claims). RDI, and all of its shareholders were injured as the result of Cotter, Jr.'s

action. Reverse application of the "substantial benefit" doctrine would provide an equitable remedy for the unfairness of RDI, and thus, all of RDI's shareholders, bearing the cost of the defense fees.

2. Cotter, Jr.'s evidence could not support the heightened standards to which his claims were subject.

Here, for any of the Directors Defendants be personally liable, Cotter, Jr. would have had to show that the Director Defendant engaged in intentional misconduct, fraud, or a knowing violation of law. NRS 78.138(7). Additionally, Cotter, Jr. would have had to present evidence sufficient to overcome the business judgment rule. NRS 78.138(3). However, Cotter, Jr. never proffered any evidence to support a finding that any of the Director Defendants, let alone *all* of them, engaged in intentional misconduct, fraud, or a knowing violation of the law. Indeed, Cotter, Jr. never even alleged any conduct that could be construed as fraud, and did not allege any violations of the law, knowing or otherwise, in the Complaint.[9] Accordingly, the evidence presented by Cotter, Jr. would need to support a claim that each of the Director Defendants engaged in "intentional misconduct." However, the claimed "intentional misconduct" here was the purported placement of the

[9] In the First Amended Complaint, Cotter, Jr. alleged misstatements in SEC filings; however, all of these allegations were essentially based on purported omissions of his theories as to the motivations for corporate actions, or his interpretations of his Employment Contract, including the purported self-dealing of the Director Defendant. As shown in Part A, above, Cotter, Jr. had no evidence to show that knowing violations of law occurred.

interests of Ellen Cotter and Margaret Cotter ahead of those of RDI, the same basis on which demand futility was based.[10] But, as shown in Part B, below, Cotter, Jr. could not present any evidence that supported a finding that Directors Codding, Gould, Kane, McEachern, or Wrotniak engaged in such conduct, as the District Court's grant of summary judgment showed.

As for Cotter, Jr.'s claims regarding Director Adams, Cotter, Jr.'s theory was that Director Adams was beholden to the Ellen Cotter and Margaret Cotter because he relied on income received from contracts with Cotter-controlled entities, and that Ellen Cotter and Margaret Cotter, as Executors of the Estate, controlled such payments. However, a claim of disinterest based on such grounds would have required a showing that the purported controlling director has direct power over the supposed controlled director's receipt of the income. *See Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002) ("A director may be considered beholden to (and thus controlled by) another when the allegedly controlling entity has the *unilateral power* . . . to decide whether the challenged director continues to receive a

[10] But for Cotter, Jr.'s allegations about the futility of demand, much time and millions of dollars in legal fees might have been saved. His decision to include the entire board as defendants (including Directors Gould and Storey, the two directors who voted a*gainst* his termination), could only have been was a strategy designed to advance his personal interests, particularly given his inclusion of Director Storey, as well as his own acknowledgement that Directors Gould and McEachern were independent. **II RDI-A 2116-2123**

benefit, financial or otherwise, upon which the challenged director is so dependent. . .") (emphasis added). Cotter, Jr never presented any evidence to show that the contract sums due to Adams were subject to any discretionary control by the estate executors.

In addition to the claims regarding director independence, Cotter, Jr.'s made claims that certain conduct constituted/indicated a breach of fiduciary duty. But such claims were all subject to specific statutory standards of proof. For example, to prove his claim that the use of Class A, non-voting stock to exercise the option to purchase voting stock was a breach of fiduciary duty, Cotter, Jr. would have had to prove that an actual fraud had occurred. *See* NRS 78.211 (providing that the Board's determination of consideration for the issuance of shares is conclusive, in the absence of fraud). However, Cotter, Jr. did not even *allege* that any fraud had occurred with respect to this claim. Instead, he merely asserted that payment for stock with another class of stock "provided no value to the company," a claim barred by NRS 78.211. **I RDI-A 513, ¶ 107.**

Furthermore, in making this claim, Cotter, Jr. ignored the fact that RDI's Stock Option Plan *expressly permits* the exercise of an option to purchase of Class B Voting stock with payment of Class A Non-voting stock payment with the same fair market value. II RDI-A 4695, § 6.1.6. Thus, this claim cannot be considered anything other than groundless from its inception.

Similarly, to prove his claim that approval of the few challenged grants of compensation to the directors and salaries for Margaret Cotter and Ellen Cotter were breaches of fiduciary duty, Cotter, Jr. would have been required to overcome the *statutory presumption* that such compensation was fair. NRS 78.140(5) (providing a rebuttable presumption that compensation to Directors, *in any capacity,* approved by Board of Directors, is fair, and requiring such presumption to be overcome by a preponderance of the evidence). Significantly, decisions of this type are not subject to challenge based upon the participation of any interested directors, as the Directors are authorized to make such decisions "without regard to personal interest. *Id.* Cotter, Jr. had no evidence to support a claim that any of the challenged compensation was unfair to RDI; certainly, he offered nothing to overcome the evidence that RDI had engaged in a salary comparison study performed by an outside agency, which determined that compensation paid by RDI was in the low range of the average. **VIII RDI-A 9422-9433**

And finally, as to all of his claimed breaches of fiduciary duty, Cotter, Jr. was required to overcome the presumption that directors act in good faith, on an informed basis, with the best interests of the corporation in mind. Cotter, Jr. was never able to present evidence that supported his claim that each of the Director Defendants the directors had acted contrary to what they believed was best for RDI.

As there was no evidence to support Cotter, Jr.'s claims against the Director Defendants, the District Court abused its discretion in denying fees.

B. Cotter, Jr.'s Claims Against Directors Codding, Gould, Kane, McEachern, and Wrotniak were Groundless at the Time He Brought them.

Here, there can be no reasonable dispute that Cotter, Jr.'s claims against Directors Codding, Gould, Kane, McEachern, and Wrotniak were groundless from the date of filing. The sole theory proffered in support of the claims against these Directors was that they approved corporate decisions challenged by Cotter, Jr. based upon the wishes of Ellen Cotter and Margaret Cotter, rather than upon the exercise of their own independent judgment. Accordingly, for these claims to be well-grounded, Cotter, Jr. needed to present evidence showing the existence of such a particularly close or intimate personal affinity that would cause the non-interested director to forego his or her integrity and risk his or her reputation in order to avoid the loss of the relationship with the Ellen and Margaret Cotter. *Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004). Here, Cotter, Jr. never even alleged facts sufficient to show affinity, let alone produced evidence to support his claims. The District Court failed to consider Cotter, Jr.'s lack of evidence to support these claims.

Most obviously, the claims brought against Directors McEachern and Gould were groundless, as Cotter, Jr frankly *admitted* in his deposition that these two Directors were independent of influence from his sisters. And indeed, Cotter, Jr.

never, over the course of the three iterations of his complaint, alleged any facts sufficient to show that Directors Gould or McEachern were in any way beholden to the Ellen Cotter and Margaret Cotter; nor did he present evidence to oppose summary judgment on this issue as to these two directors. Instead, the only basis for a lack of independence ever alleged against these two was a purported desire to retain their positions as Directors. As a matter of law, such allegations do not suffice to support a claim that the Directors were "interested" in the transactions. *Krim v. Pronet, Inc.,* Del. Ch., 744 A.2d 523, 528 n. 16 (1999) ("[T]he fact that several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest.").

Cotter, Jr.'s claims against Director Kane were also groundless. Here, Director Kane was supposedly "beholden" to Ellen Cotter and Margaret Cotter because 1) he'd had a long standing close friendship with Cotter, Sr., such that the Cotter siblings called him "Uncle Ed,"[11] and 2) Director Kane purportedly considered what Cotter, Sr. would have wanted (as opposed to what Ellen Cotter or Margaret Cotter wanted) when he considered some decisions.

[11] Cotter, Jr. did not allege in his pleadings that he, along with his sisters, had called Director Kane Uncle Ed. However, he admitted that he also had done so in his deposition testimony. **II RDI-A-2118.** Thus, the allegation referring only to his sisters using that term was obviously misleading in its suggestion that only the Ellen Cotter and Margaret Cotter, and not Cotter, Jr., possessed a pseudo-familial relationship with Director Kane.

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 n. 56 (Nev. 2006), this court noted that allegations of close familial ties" *might* suffice to show interestedness. However, this Court then stated that "generally, 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." *Id*. (emphasis added). This Court reiterated this admonition in *Uranium Energy Corp. v. Adnani*, No. 74196, at *4 (Nev. Feb. 22, 2019) (NSOP). In *Adnani,* this court noted that it was not enough to show that family relationships exist; the plaintiff must also show how those relationship prevent a director from acting independently. *Id.* Like the Plaintiff in *Adnani*, Cotter, Jr. never alleged such facts showing why a pseudo-avuncular relationship between the Cotter siblings and Director Kane would indicate the latter was somehow beholden to the Cotter sisters (and yet, somehow, not to Cotter, Jr.)

Nor can it be said that, even if it were true that Director Kane engaged in a "what would Cotter, Sr. do" analysis in making some corporate decisions that such an analysis constitutes a derogation of duty to RDI, particularly in the absence of any evidence that Director Kane thought that Cotter, Sr. would have wanted anything other than what was best for the company. In short, Cotter, Jr. justified his claims against Director Kane on nothing more than a self-check that Director Kane

employed in his decision making. This evidence was insufficient to support a claim of breach of fiduciary duty against Kane.

Cotter, Jr.'s claims against Director Codding was based on even less. He theorized that, because Codding purportedly had a long standing close friendship with *Mary Cotter*, the mother of the three Cotter Siblings, she is beholden to Ellen and Margaret. However, even a lifelong friendship between the challenged director and the actual interested party is not alone sufficient to raise a reasonable doubt of the director's disinterest or independence; *See Beam*, 845 A.2d at 1052 (social relationships insufficient to create doubt of director independence); *Pub. Employees' Ret. Sys. v. Coulter,* C.A. No. 19191, 2002 Del. Ch. LEXIS 144, at *28-29 (Del.Ch. Dec. 18, 2002) (observing that an allegation of a lifelong friendship with an interested party is not alone sufficient to raise a reasonable doubt of a director's disinterest or independence); *Kohls v. Dunthie,* 765 A.2d 1274, 1284 (Del.Ch. 2000) (holding that a personal friendship between a member of a special committee of the board and an interested party to the challenged transaction, was insufficient to challenge the director's ability to exercise his independent judgment); *Benefore v. Jung Woong Cha,* C.A. No. 14614, 1998 Del. Ch. LEXIS 28, at *9 (Del.Ch. Feb. 20, 1998) (allegation of a longtime friendship not sufficient to raise a reasonable doubt about a director's ability to exercise his independent judgment).

However, Cotter, Jr. never even presented any evidence that established the existence of a long-standing friendship between Director Codding and Mary Cotter. Instead, he presented evidence that in 2014, Codding had been a customer of Mary Cotter, a travel agent; that a third party had, in October 2015 asked Margaret Cotter if she could assist in obtaining theater tickets for herself and Director Codding, *for which they would pay*; that Ellen Cotter had testified that she had, in the prior 15 years, met Ms. Codding 5-10 times, including once in Mary Cotter's home; and finally, that Director Codding had expressed the opinion that a Cotter should manage RDI**. IV RDI-A6653-6665, 6755, ¶ 24.** None of this evidence can reasonably be said to support a claim that Ms. Codding is beholden to Margaret Cotter or Ellen Cotter.

Similarly, Cotter, Jr.'s claims against Director Wrotniak were based on even less, as it is not even his *own* friendship that is cited as the cause of the claimed lack of independence, but instead, the friendship between Margaret Cotter and Director Wrotniak's wife. Cotter, Jr. attempted to show that Wrotniak was behold to Margaret Cotter because of request for theater tickets. However, even assuming that arranging a pair of theater tickets could somehow show a friendship deep enough to cause a person to risk his professional reputation to maintain the relationship, the evidence proffered by Cotter Jr. consisted of a request for assistance in obtaining a pair of difficult-to-obtain tickets to a show (without reference to who would pay)

and two requests for charitable donation of tickets for a specific show to which due to her management, on RDI's behalf, of the live theaters, Margaret might have been able to obtain comped tickets. **IV RDI-A66433-6652, 6755, ¶ 23.** This evidence does not support a conclusion that Director Wrotniak would be so beholden to Margaret Cotter that he would abandon his fiduciary duties.

The record does not support a conclusion that Cotter, Jr. *ever* had reasonable grounds to make his claims against the independence of Gould, McEachern, Kane, Codding, or Wrotniak.

C. Cotter, Jr.'s Claim Regarding the Patton Vision Inquiry Lacked Reasonable Grounds.

In his Second Amended Complaint, Cotter, Jr. added a claim that asserted that the Director Defendants had breached their fiduciary duties, and that Margaret Cotter and Ellen Cotter had aided and abetted those purported breaches of fiduciary, by failing to respond to the "offer" made by Patton Vision. But these claims were brought without reasonable grounds. A claim for a breach of fiduciary duty requires a showing that a person has a fiduciary duty that the duty was breached, and that the person to whom the duty is owed has suffered damages as a result of the breach; aiding and abetting adds an additional element of the defendant knowingly participating in or encouraging the breach. *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 335 P.3d 190, 198 (Nev. 2014)(citations omitted). Here, as the District Court found when it granted summary judgment on this claim in December

2017, there was no prospect of damages suffered by RDI from the failure to respond to the Patton Vision inquiry, because the purported offer was unsolicited, nonbinding and unenforceable. **VII RDI-A 9595-9601.**

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES AS COTTER, JR. MAINTAINED CLAIMS DESPITE THEIR APPARENT GROUNDLESSNESS.

As originally adopted NRS 18.010(2)(a) authorized sanctions only for the bringing of groundless claims. See, *Barozzi v. Benna*, 112 Nev. 635, 639 (Nev. 1996) (noting that then existing statute required claims t be brought without reasonable grounds.). However, the statute was amended in 2003, to permit sanctions when groundless claims are *maintained*. *See Prestige of Beverly Hills, Inc. v. Weber*, 381 P.3d 652, (Nev. 2012) (noting amendment of statute). Here, Cotter, Jr. continue to maintain claims even after it was clear that there could be no beneficial recovery for RDI. As shown above, Cotter, Jr.'s claims were brought without reasonable grounds. However, even if this Court were to find that some or all of Cotter, Jr.'s claims were not groundless at the time his complaint was originally filed, his failure to withdraw the claims when their futility became obvious warrants sanctions under NRS 78.010(2)(b).

Cotter, Jr. should have dismissed his claims against McEachern and Gould once he testified that he had no reason to question their independence. His testimony contradicted the allegations made in his verified complaints, but it is the sworn

deposition testimony that must be accepted. See *Taylor v. Ridley,* 904 F. Supp. 2d 222, 232 (E.D.N.Y. 2012) (where deposition testimony contradicted verified complaint, no reasonable fact finder could find in favor of Plaintiff's allegations).

Cotter, Jr. should have dismissed all of his claims when the T2 Plaintiffs dismissed their claims, and stated, unequivocally, their satisfaction that the Defendants had acted, and continued to act, in the RDI's best interests. This dismissal was a clear signal to Cotter Jr., whose personal whose personal interests in taking over control of the Company and getting his job back clearly prevented him from viewing his claims objectively, that critical review of the claims and evidence had revealed that RDI would not be served by continuing with the litigation.

Cotter, Jr. should have dismissed all of his claims when it became apparent that his theory regarding the application of Delaware's entire fairness doctrine, upon which he apparently pinned his hopes due to the shift of the burden of proof, could not possibly be applied in Nevada, as it is inconsistent with the plain language of numerous Nevada statutes, including NRS 78.138(3), (4), (5) and (7); and 78.140(2)(d), and (5). While the inapplicability of this doctrine was actually apparent in the plain language of the Nevada's corporate statutes even before the 2017 changes to NRS 78.120, *it was unmistakable afterwards*. The 2017 amendments clarified that the business judgment rule applies "to *all* cases, circumstances, and

matters." See NRS 78.138(8)(emphasis added), see also, April 10, 2017 Minutes of the 2017 Senate Committee on the Judiciary, pp. 36-37 (testimony that SB 203 intended to clarify existing law). Further, the 2017 legislation expressly stated that the plain meaning of the Nevada corporate statutes was not to be "supplanted or modified" by the law of other jurisdictions. NRS 78.012. In light of these legislative admonitions, Delaware's entire fairness doctrine has no application to Nevada corporations.

Next, the District Court's grant of summary judgment in favor of five of the non-Cotter Directors in December 2017 was a clear and obvious death knell to the feasibility of Cotter, Jr's claims. The inevitable consequence of that ruling was that, *even if* Cotter, Jr. could, somehow, suddenly muster evidence to support his claims against the three remaining defendants, and *even if* he prevailed in persuading the jury that the three defendants had intentionally voted against the best interests of the corporation, no damages could be awarded. This was so because the District Court's ruling meant that a majority of independent directors had approved all but two of the challenged transactions, and therefore, the votes of the three remaining defendants were inconsequential as to all but those two transactions, the termination and the stock option exercise. Moreover, even if these two remaining claims, one of which, *on its face*, showed no damage to the corporation since equal value had been exchanged, could otherwise have justified continuing the litigation; the ratification

of these two decisions by the five Independent Directors eliminated the prospect that the decisions could be voided. NRS 78.140.

Cotter Jr. had no basis for challenging the ratification, as the action was expressly authorized under Nevada law. NRS 78.140. Indeed, he never even articulated a viable challenge to the ratification. Accordingly, he had no reasonable grounds to maintain his claims in 2018 at all. Yet, he not only maintained them, but did so for several months *without revealing that he had no intention of seeking damages on behalf of the corporation.* Given Cotter Jr.'s fiduciary obligations to act in accordance with the best interests of RDI, his continued pursuit of a claim that he knew could yield no other "benefit" than the reinstatement of a CEO whom every other director had staunchly rejected, lacked reasonable grounds.

The District failed to consider Cotter, Jr.'s maintenance of claims following the apparently elimination of reasonable grounds to maintain them. Accordingly, the District Court abused its discretion.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO AMEND THE JUDGMENT TO INCLUDE RDI.

RDI was entitled to entry of judgment in its favor. The relief Cotter Jr. requested against RDI would have required orders directing Reading to take certain actions, including accepting reinstatement of Plaintiff to an executive position, termination of Reading's chosen CEO and President; adherence to specific requirements for appointment to its Board of Directors; refraining from

using committees as permitted in the Company's bylaws, and more. **I RDI_A 535, ¶3(a)-(e).** Such incursions into Reading's affairs required it to defend against Plaintiff's claims. *See Blish V. Thompson Auto. Arms Corp*, 30 Del. Ch. 538, 542 (Del. 1948) ("A corporation may defend a stockholder's derivative action . . . if corporate interests are threatened by the suit. . . ."); *National Bankers v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959) ("If the derivative action threatens rather than advances the corporate interests, the corporation may actually defend the action. "); *Swenson v. Thibaut*, 39 N.C. App. 77, 100 (N.C. Ct. App. 1978) (noting that corporation may be required to defend against claims that seek to enjoin corporation action or interfere with internal corporate governance). Accordingly, RDI properly took an active role in the matter, and was thus, as a practical matter, more than a "mere" nominal defendant.

The District Court denied RDI judgment in its favor, on the basis that it was a nominal defendant. However, a party may be considered a prevailing party when it "succeeds on any significant issue in litigation which achieves some of the benefit" it requested in its pleadings. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 485-86 (Nev. 1993). Here, in its Answers to Cotter, Jr.'s complaint, RDI requested that Cotter, Jr.'s complaint be dismissed with prejudice in its entirety, which is essentially what occurred, rendering RDI a prevailing party. **I RDI-A**

205-226; VII RDI-A 8604-8629. RDI also requested judgment in its favor. *Id.* The District Court abused its discretion in denying the request.

CONCLUSION

Disgruntled stockholders unhappy with the how the directors choose to run a company cannot use a derivative action as the means to exact vengeance. Derivative plaintiff fiduciaries cannot use a derivative action to pursue ulterior personal objectives (such as taking over control of the company and getting one's job back). As a matter of both law and equity, stockholders who choose to so misuse the derivative complaint process by bringing claims that lack reasonable grounds to satisfy both the statutory proof requirements and the requirement that there be prospective advantage to the corporation and its stockholders from the litigation.

Here, Cotter Jr. purposefully chose to bring his claims in a representative capacity, and those the reasonableness of his decision to bring and maintain his claims should be determined based on his fiduciary capacity. He chose to sue all of the directors, even though he admitted in deposition that at least two of the Director Defendants were in fact independent and where he had no reasonable basis to assert that demand would have been futile. Applying such a fiduciary standard, there is no doubt that Cotter Jr.'s claims were groundless when brought and even less doubt that he maintained those claims over the course of three years

despite increasingly blatant evidence that his claims could not benefit RDI or its stockholders. The District Court abused its discretion in failing to liberally construe NRS 78.010, in failing to consider the entire circumstances of the claims, in failing to acknowledge the ample evidence showing that the claims were brought for purposes of harassment. Accordingly, the judgment should be reversed and the matter remanded for a determination of the attorney's fees that should be awarded.

Respectfully submitted this 31st day of May 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 12,756 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 31st day of May 2019.

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CERTIFICATE OF SERVICE

This is to certify that on May 31, 2019, a true and correct copy of the foregoing **RDI's Opening Brief** 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