IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., derivatively on behalf of Reading International, Inc., Appellant, v. DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, MICHAEL WROTNIAK, and nominal defendant READING INTERNATIONAL, INC., A NEVADA CORPORATION Respondents.	Supreme Court Case No. 75053 Consolidated with Case Nos. 76981, 77648 & 77733 District Court Case No. A-15-719860-B Coordinated with: Case No. P-14-0824-42-E

Appeal (77648 & 76981)
Eighth Judicial District Court, Dept. XI
The Honorable Elizabeth G. Gonzalez

JOINT APPENDIX TO OPENING BRIEFS FOR CASE NOS. 77648 & 76981
Volume XIX
JA4559 – JA4808

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 28th day of August, 2019, a true and correct copy of the foregoing **JOINT APPENDIX TO OPENING BRIEFS FOR CASE NOS. 77648 & 76981**, was served by the following method(s):

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By: /s/ Gabriela Mercado

involved Kane in the settlement discussions. Plaintiff contacted Kane on May 22, 2015, acknowledged that Plaintiff had "made mistakes with my sisters," told Kane that he was the "most thoughtful director" and asked to "sit down with [Kane] in [San Diego] for breakfast, lunch or dinner Saturday, Sunday, Monday . . . whatever works" so that he could get Kane's "help and thoughts" because Kane was the "only one I have now who can broker peace[.]" (HDO[6] Ex. 18 at 1.) Plaintiff ended his email with the foreshadowing of his litigation intentions: "If not, we will have war and our company and family will be forever destroyed over the next week." (*Id.*) On May 27, 2015, Plaintiff emailed Kane with a 12-point settlement proposal and begged: "Is there anything you can do to broker this?" (App., Ex. 4 at 33.)

Kane *agreed with Plaintiff* and "strongly advise[d]" Plaintiff to come to a negotiated resolution. (*Id.* at 32.) But just as Plaintiff sought a negotiated resolution, Kane also sought one. He was not motivated by a desire that Margaret Cotter remain the sole trustee of the Voting Trust, as Plaintiff asserts without citation to any facts. (Opp. at 18.) To the contrary, as Kane explained to Plaintiff at the time, like Plaintiff, he believed that a settlement would end all the "ill feelings," "enhance the company, benefit [Plaintiff] and [his] sisters and allow [the Cotters] to work together going forward." Further, it would give Plaintiff the time to prove "that [he] do[es] in fact have the leadership skills to run this company." (App., Ex. 4 at 32-33.) As of May 28, 2015, although he urged a negotiation resolution, Kane "ha[d] not seen the proposal" for settlement and "ha[d] not seen or heard the particulars," including who would control the Voting Trust (*id.* at 32), did not know that Margaret Cotter would be left as the sole trustee under the settlement, and "didn't want to know it." (HDO Ex. 7 at 597:9-22.) When Kane later learned that Margaret Cotter would control the trust under the proposed deal, he reemphasized to Plaintiff on June 11, 2015 that he would "much prefer that [Plaintiff] bend a bit and work it out between you to build the trust that is necessary so that you don't lose control of the company, as you presently have." (App. Ex. 5 at 35.) Kane knew by mid-June that "there were votes there to terminate [Plaintiff]" and that he himself would be "voting against him" if Plaintiff's leadership

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[6] "HDO" refers to the Declaration of Noah Helpern filed in support of the Individual Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment.

deficiencies were not alleviated by the kind of further oversight and more harmonious management structure contemplated in the pending settlement (including, for example, oversight of Plaintiff's management by an Executive Committee). (HDO Ex. 7 at 596:13-25; HDO Ex. 5 at 193:3-195:2.) All the evidence shows Kane engaging Plaintiff on exactly the terms *Plaintiff* requested prior to his termination; none of it shows the kind of bias in favor of Ellen and Margaret Cotter and against Plaintiff required by law to challenge Kane's independence with respect to Plaintiff's termination or any other board action. *See Beam*, 845 A.2d at 1050.

3. Judy Codding

Plaintiff does not deny that he stated at his deposition that Codding "might" satisfy a "legal technical definition of independence" (HD#2 Ex. 7 at 70:18-71:6), but nevertheless continues to question her independence based solely on speculation. Plaintiff insists that Codding lacks independence due to her friendship with Mary Cotter (the three Cotter siblings' mother) because Mary Cotter has purportedly "chosen sides" in the dispute between Plaintiff and his sisters. (Opp. at 6.) Plaintiff's only support for his belief that Mary Cotter has chosen his sisters' side is that Ellen Cotter lives at Mary Cotter's home and that Mary Cotter called Kane for advice after the dispute between Plaintiff and his sisters arose. (*Id.*) The only evidence Plaintiff proffers on these points is his own declaration and deposition testimony, and even if true, neither suffice to show that Mary Cotter has chosen sides. But *even if she has chosen sides*, Plaintiff cites no evidence that Mary Cotter ever relayed her choice to Judy Codding or that it had any impact on Codding's behavior with respect to any Board action. While it is true that Ellen Cotter suggested Codding as a board member, Plaintiff offers nothing to rebut the rule discussed in the Motion that a director's involvement in selecting another board member is insufficient to show a lack of independence. (Mot. at 19.)

Plaintiff also speculates that Codding "has become close" with Ellen and Margaret Cotter (*id.* at 7), but provides no factual basis for that statement. In fact, Ellen Cotter testified that before asking Codding to consider becoming a director, she had met her only five or ten times over the course of fifteen years. (App., Ex. 16 at 307:19-308:7.) While Plaintiff cites Codding's alleged statement that either Ellen Cotter *or Plaintiff* should be CEO of RDI as if that supports

his argument (*see* Opp. at 7; HD#2 Ex. 7 at 73:17-74:11), this actually undermines his claim that Codding has shown "unwavering loyalty" to Ellen Cotter. (Opp. at 7.) Plaintiff believes this loyalty to Ellen Cotter was somehow demonstrated when Codding asked Plaintiff's view on Paul Heth's indication of interest in purchasing RDI and she indicated that it should not be considered because, according to Plaintiff, Codding "clearly ha[d] spoken to EC [Ellen Cotter] about it before the board meeting." (Opp. at 8.) Even assuming that Plaintiff's utter speculation that Codding had spoken with Ellen Cotter is correct, if simply speaking to a fellow director about a topic that was to be addressed at an upcoming board meeting was grounds to find a lack of independence, it is likely that every director on every board of every company would lack independence, which cannot be what the law intends.

Plaintiff puzzlingly states that "Judy Codding owes her role as director exclusively to the fact of her friendship with MC [Margaret Cotter]." (Opp. at 7.) But the only documents Plaintiff cites to show their purported relationship merely show *Mary* Cotter asking a Reading employee to FedEx some invoices to Codding (App. Ex. 14) and a third party, Sherry King, asking Margaret if she could possibly get tickets to a theatrical show for King and Codding when they were scheduled to be in New York, to which Margaret replied that she could "try" (App. Ex. 15). Codding's limited relationships with Ellen and Margaret Cotter are hardly the kind that would support a finding that Codding is "so under their influence that [her] discretion would be sterilized." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993).

4. Michael Wrotniak

Plaintiff argues that Wrotniak has "nothing more to recommend him as an RDI director than his and his wife's close, personal relationship" with Margaret Cotter. (Opp. at 6.) Plaintiff ignores Wrotniak's undisputed expertise in foreign trade (a very useful expertise RDI, which has extensive foreign operations). (Mot. at 22.) Moreover, Plaintiff's cited evidence actually shows that Margaret Cotter's close friendship is with Wrotniak's wife Patricia, not Wrotniak himself. The only emails Plaintiff identifies between Wrotniak and Margaret concern Wrotniak's requests for show tickets, and Plaintiff does not dispute Margaret Cotter's testimony that prior to Wrotniak joining the board, she only saw him approximately "once a year if I went to [Patricia

Wrotniak's] house for dinner[.]" (HD#2 Ex. 6 at 322:15-21.)[7] Just as with Codding, the third-party relationship identified by Plaintiff as the reason for Wrotniak's purported lack of independence is insufficient to render him biased with respect to any of the transactions at issue and thereby overcome the "presumption that directors are independent" with respect to any specific board action. (Mot. at 21); *see In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013).

5. Guy Adams

While Plaintiff generally asserts that Adams is not disinterested because he "picked sides in a family dispute," (Opp. at 16), he has failed to identify any instance where Adams "appear[ed] on both sides of a transaction or expect[ed] to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); (Mot. at 23). Plaintiff has thus tacitly conceded that Adams is disinterested in the specific corporate actions at issue here.

Plaintiff argues that Adams lacks independence because he is "financially dependent" on Ellen and Margaret Cotter (Opp. at 8), but this mischaracterizes the record. The evidence shows that Adams stands to receive additional compensation from James Cotter, Sr.'s Estate due to his 5 percent interest in certain real estate ventures, but Plaintiff ignores the fact that he has the right to this compensation as part of a pre-existing contract. Ellen and Margaret Cotter will distribute the funds as executors of the Estate, but they will not be required to "approve these payouts" (*id.*) in the sense that they would have any discretion to do otherwise. (*See* HD#2 Ex. 2 at 55:8-57:24.) Plaintiff also cites Adams' income of [redacted] per year from the Cotter Family Farms (a Cotter business overseen by Plaintiff, ironically) as evidence of his financial dependence. (Opp. at 8.) However, Plaintiff does not dispute that Adams began earning this money in *2012* (before he joined the Reading board) as part of a business deal with James Cotter, Sr. and that he is now

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[7] Plaintiff appears to have abandoned his argument that the board should have selected Plaintiff's preferred candidate over Wrotniak—he does not mention this in his Opposition, and as discussed in the Motion, it is irrelevant to Wrotniak's independence in any event. (Mot. at 22.)

paid by the Estate. (Mot. at 9, 25.) There is no evidence that Ellen and Margaret Cotter ever actually threatened Adams' position with the Cotter Family Farms, and the undisputed evidence is that Adams had not had any communications with the Cotter sisters about continuing or not continuing his work for the Farms. (HD#2 Ex. 2 at 29:3-7.) Plaintiff also does not dispute that since the Estate's assets ultimately pour over into the Trust, and control of the Trust as between Plaintiff and his sisters is currently subject to dispute, *there is no reason for Adams to prefer Ellen and Margaret Cotter over Plaintiff.* (Mot. at 25.) As a result, there is no evidence of bias or self-dealing by Adams with respect to any specific board action (including Plaintiff's termination).

Moreover, Adams' business with the Cotter Farms is immaterial to his overall economic picture. Plaintiff acknowledges that Adams is of retirement age and has a net worth of approximately [redacted]. (Opp. at 9.) Plaintiff contends that [redacted] will not be enough for Adams to support himself "for the remainder of his expected lifespan" (*id.*), but that is pure speculation, and Plaintiff's back-of-the-envelope calculation fails even to include the "potentially more than [redacted]" that Plaintiff admitted—one page earlier—that Adams will receive in the future from his interest in the real estate ventures. (*Id.* at 8.) Further, notwithstanding what Plaintiff may determine to be necessary to meet his own lifestyle needs, [redacted] is a lot of money in our country. *See* U.S. Census Bureau, Distribution of Household Wealth in the U.S.: 2000 to 2011, *available at* http://www.census.gov/people/wealth/files/Wealth%20distribution%202000%20to%202011.pdf, at 7 (showing that as of 2011, median household net worth was $68,828). There is no rule, as Plaintiff seems to urge, that only the very wealthiest people can serve on corporate boards. As previously noted (Mot. at 24), Adams' outside "business agreement" where "both parties could benefit financially" is not enough to show that Adams "could not form business decisions independently." *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM GWF, 2014 WL 994616, at *7 (D. Nev. Mar. 13, 2014). Additionally, Plaintiff appears to concede (by entirely failing to address the argument) that the fact that Adams earned fees from his work as a director for RDI does not mean that Adams lacked independence. (Mot. at 25.)

Plaintiff notes Adams' *subsequent* resignation from RDI's Compensation Committee as if that were evidence of a lack of independence. (Opp. at 9.) However, the undisputed evidence is that Adams' committee resignation was solely to avoid even the appearance of impropriety given Plaintiff's inflammatory allegations and litigation positions. In fact, Adams never agreed that he lacked independence as to Cotter income, or anything else. (Mot. at 26 n.7.) Indeed, the NASDAQ rules with respect to service on a compensation committee are stricter than those that apply to board service generally, so Plaintiff's logic does not follow: even if Adams could not serve on RDI's Compensation Committee, that would not disqualify him from making other decisions relating to RDI (including Plaintiff's termination). (*See id.*) The Board has thus taken steps to hold itself to the highest possible standards, even standards that it may not actually be required to meet due to RDI's status as a controlled company. *See* NASDAQ Rule 5615(c)(2) (exempting controlled companies from compliance with stricter standard for compensation committees). Adams has already been found to be "independent" under the NASDAQ standards that apply to board service generally. (Mot. at 26.)[8]

C. Generalized Allegations of "Entrenchment" Cannot Establish a Lack of Independence

Although he has identified a litany of Board actions supposedly tainted by a lack of independence, he fails to explain how perceived "bias" of any director actually affected any *specific* board action. Rather than presenting evidence of any specific board action compromised by a director's purported bias, Plaintiff instead points to the supposedly "omnipresent specter" that the Individual Defendants acted for "usurpation" and "entrenchment purposes." (Opp. at 19.) But generalized allegations of "usurpation" and "entrenchment" do not suffice to establish claims for breach of fiduciary duty by Nevada directors, which require a plaintiff to have *evidence* that *specific* board actions were affected by *specific* bias or lack of independence by

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[8] Although Plaintiff argues that independence under the NASDAQ rules does not necessarily govern director independence under applicable law (Opp. at 10), as was discussed in the Motion, NASDAQ rules "cover many of the key factors that bear on independence" and "are a useful source for [the] court to consider when assessing an argument that a director lacks independence." *In re MFW*, 67 A.3d at 510.

specific directors that rise to the level required by NRS 78.138(7)(a) (requiring intentional misconduct, fraud or knowing violation of the law for liability of individual directors). "A successful claim of entrenchment requires plaintiffs to prove that the defendant directors *engaged in action which had the effect of protecting their tenure* and that the action was motivated primarily or solely for the purpose of achieving that effect." *In re Fuqua Indus., Inc. S'holder Litig.*, No. CIV.A. 11974, 1997 WL 257460, at *10 (Del. Ch. May 13, 1997) (emphasis added, quotations and citation omitted). Plaintiff fails to cite a single action actually taken by the directors to protect their tenure and thus cannot establish entrenchment. *See id.* at *11 (dismissing entrenchment claims where plaintiff's complaint lacked "any facts to support these conclusory allegations of 'onerous' terms and entrenchment effects" and "fail[ed] to allege how . . . the retention of Georgia Federal served to protect the tenure of the defendant directors"); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010) (finding no "omnipresent specter" that "Staggered Board Amendments" were being used for "entrenchment purposes" because even without the amendments, the director defendants "would control a majority of the board").

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III. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court grant them partial summary judgment as to the First, Second, Third, and Fourth Causes of Action

set forth in Plaintiff's SAC, to the extent that they assert or rely upon an argument that any of the non-Cotter directors of RDI are not "independent."

Dated: October 21, 2016

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ H. Stan Johnson

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

CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2016, I caused a true and correct copy of the foregoing **REPLY IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 2) RE: THE ISSUE OF DIRECTOR INDEPENDENCE** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System.

/s/ *Sarah Gondek*
An employee of Cohen|Johnson|Parker|Edwards

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

JAMES J. COTTER,

Deceased.

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

Plaintiff,

v.

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

Defendants.

And

READING INTERNATIONAL, INC., a Nevada Corporation,

Nominal Defendant.

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

Coordinated with:

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

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

READING INTERNATIONAL, INC.'S REPLY IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 1 RE PLAINTIFF'S TERMINATION AND REINSTATEMENT CLAIMS

Date of Hearing: November 1, 2016

Time: 8:30 a.m.

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READING INTERNATIONAL, INC. hereby submits its *Reply in Support of the Individual Defendant's Motion for Partial Summary Judgment No. 1 Re Plaintiff's Termination and Reinstatement Claims and RDI's Joinder Thereto.* Reading International, Inc., ("RDI" or "Company") joins with the Individual Defendants in seeking summary judgment as to the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint ("SAC") filed by Plaintiff James J. Cotter, Jr. ("Plaintiff" and/or "Cotter, Jr.") to the extent that such claims relate the termination of Cotter Jr.'s and his request for reinstatement. In addition to joining the arguments advanced on behalf of the Individual Defendants, RDI requests judgment in its favor on these claims for the reasons set forth in the attached memorandum of points and authorities, and based on the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing.

DATED: October 21, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

Cotter, Jr.'s termination and reinstatement claims fail because there is no legal basis – in Nevada or in Delaware – for undoing at the behest of a derivative plaintiff the discretionary and operating level decision of a board of directors to terminate a corporate executive.

Even if every fact that Cotter, Jr. had asserted were true -- i.e., that Directors Guy Adams, Ed Kane, Ellen Cotter and Margaret Cotter were some way or another not "disinterested" and voted in favor of his termination because Cotter, Jr. could not reach agreement with his siblings as to the settlement of their various disputes (including with respect to the ongoing management

of the Company) and Ellen Cotter and Margaret Cotter wanted him out, no breach of fiduciary duty to the Company would be shown. The undisputed evidence is that Cotter, Jr. could ***not*** work with his sisters despite his sisters each having more than fifteen years of actual work experience with RDI. As a result, management was dysfunctional and corrective action had to be taken. However convinced Cotter, Jr. is of his own superiority, it is simply not a breach of fiduciary duty for directors to determine that executives who actually have experience in the day to day workings of the company are more valuable to that company than someone who (a) was appointed to a position because his father had wished it so and (b) had absolutely no public company management experience, or any hands on experience in either to the Company's main two lines of business: cinema exhibition and real estate.

Additionally, despite the fact that Nevada law governs these proceedings, Cotter, Jr. cites barely any Nevada authority. Instead, Cotter, Jr. insists on applying Delaware law to his claims, doggedly ignoring the significant substantive differences from that state's statutes and precedent that the Nevada legislature *knowingly* adopted when forming Nevada's corporate statutes. Moreover, despite his reliance on Delaware law, Cotter, Jr. ignores the fact that the authorities he cites have no application to the facts here. For example, he insists that Delaware's "entire fairness" analysis must be applied to the decision to terminate him as an officer of the Company, even though the Delaware "entire fairness" analysis is a test that focuses on the fairness of the applicable price being paid or received in a corporate transaction.

Furthermore, none of the authorities cited by Cotter, Jr. involve derivative attacks on employment decisions made by a board. This is not surprising given that the management of such business affairs is entrusted to the board. *See* NRS 78.120 and 78,138.[1] In the case of RDI, its Bylaws specifically provide that a majority of the entire Board of Directors may remove an

[1] NRS 78.120 provides in relevant part as follows: "Subject only to such limitations as may be provided in this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation." NRS 78.130(3) provides in relevant part as follows: "All officers must be natural persons and must be chosen in such manner, hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors." NRS 78.130(4) provides in relevant part as follows: "An officer holds office after the expiration of his or her term until a successor is chosen or until the officer's resignation or removal before the expiration of his or her term."

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officer without cause. Because the Bylaws give the board such authority and require that such authority be exercised by a majority vote of the entire Board, Cotter, Jr. has no basis for asserting a breach of either the duty of loyalty or the duty of care. Nor can he contend that the action taken by the Board was somehow defective or ineffective due to the participation of Directors Adams, Kane, Ellen Cotter and/or Margaret Cotter.[2]

In short, Cotter, Jr. has presented absolutely no authority, whether statutory, case law, or even secondary sources, that supports his termination and reinstatement claims. This is for good reason as it is generally recognized that decisions regarding hiring and firing a CEO are best left with a company's board of directors, to be exercised in real time, and not with the courts to be applied months or years after the fact. Cotter, Jr.'s claims fail on all fronts and partial summary judgment is appropriate.

LEGAL ARGUMENT

RDI is entitled to judgment in its favor on Cotter, Jr.'s termination and reinstatement claims. Cotter Jr. replied to the Independent Directors' Motion by repeating his own motion for summary judgment on these issues. However, as shown in the RDI's Opposition to Cotter, Jr.'s Motion for Partial Summary Judgment, he has failed to demonstrate any basis for entitlement to relief on his claims. Similarly, in his Opposition to the Individual Defendants' Motion, he has failed to show that materials issues of fact exist to prevent judgment. Accordingly, the Individual Defendants' Motion for Partial Summary Judgment and RDI's joinder thereto should be granted.

Summary judgment must be granted where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). A nonmoving party who bears the burden of proof at trial

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[2] Cotter Jr.'s argument would render it impossible for a corporation like RDI to remove an officer. Nevada law does not require that any directors be "independent." While public companies, like RDI, are required to have independent audit committees, there is no requirement that closely held corporations, again like RDI, have more independent directors than needed to satisfy this audit committee requirement. Specifically, there is no requirement that a majority of the Board be independent. Under Cotter Jr.'s interpretation of Nevada law, he could not be removed unless a majority of the RDI Board was "independent." There is no such requirement under Nevada law, the Federal Securities Laws or the NASDAQ Rules.

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must respond to a motion for summary judgment with evidence sufficient to establish each element of his claim by a preponderance of the evidence. *Cuzze v. Univ. and Comm. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Here, it is statutorily presumed that the Board of Director's decision to terminate Cotter, Jr. was made "in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Accordingly, Cotter, Jr. bore the burden of presenting evidence sufficient to show that his termination was the product of a breach of fiduciary duty and satisfying each and every element of his breach of fiduciary duty claims under *Nevada* law. He failed to present such evidence. Most significantly, Cotter, Jr. has failed to present any authority that supports his contention that a board's discretionary decision to terminate a CEO is subject to review in a derivative action.

I. A BOARD'S DISCRETIONARY TERMINATION OF A CEO CANNOT BE SUBJECTED TO AN ENTIRE FAIRNESS ANALYSIS.

In an attempt to manufacture a theory to sidestep Nevada law and to support his claim for reinstatement, Cotter, Jr. attempts to invoke Delaware's "entire fairness" analysis, claiming that the "process" by which he was terminated did not satisfy the test. However, there is no requirement under Nevada law that any particular process be followed or that the process be fair to him. Indeed, there is no "entire fairness" test in Nevada. In this State, when a director is on both sides of a contract or transaction, the residual test is not "entire fairness," but rather whether the contract or transaction is "fair to the corporation". *See* NRS 78.140. The "entire fairness" analysis is a creature of Delaware law, **not** Nevada Law. It is applicable to the review of *transactions* between a Delaware corporation and directors determined to be interested in a transaction under Delaware law. Here we have: 1) a Nevada corporation (RDI); 2) controlling Nevada statutes (NRS 78.120, 78.130 and 78.140); 3) RDI's Bylaw's directly authorizing the board to remove an executive without cause by the vote of a majority of the **entire Board**; and 4) an employment contract directly on point, all of which support the action taken by the entire Board.

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Moreover, there is no practical way to apply Delaware's "entire fairness" analysis to the termination of an officer's employment, because the factors to be considered in evaluating the fairness of a transaction, have no relevance to the termination of an employee. An "entire fairness" analysis necessarily includes an analysis of price. Cotter, Jr. has not cited a single decision interpreting the "entire fairness" doctrine that does not address the issue of the fairness of the price. Here, there is no price to review for fairness.

Additionally, the "entire fairness" doctrine is not even consistent with Nevada law, because Nevada law prevents the avoidance of transactions that might be unfair to the corporation in *at least* three circumstances (*see* NRS 78.140(2)) and unlike the objective standard that prevails in Delaware, under Nevada law, a director is bound only to exercise their duties in *subjective good faith*. *See* NRS 78.138 and 78.140.

II. COTTER, JR. HAS FAILED TO PRESENT ANY EVIDENCE THAT THE BOARD'S DECISION WAS IN ANY WAY A BREACH OF FIDUCIARY DUTY, LET ALONE A BREACH INVOLVING INTENTIONAL MISCONDUCT, FRAUD OR KNOWING VIOLATION OF LAW.

The Plaintiff, Cotter, Jr., bears the burden of proof both that there was in fact a breach of fiduciary duty. In proving this, the burden is on the plaintiff to overcome the Nevada business judgment rule presumption set forth in NRS 78.138(1). Nevada does not recognize any shifting of this burden of proof, other than in the case of NRS 78.140(2)(d). However, NRS 78.140 does not establish any grounds for liability on the part of directors, only for the voidance under certain circumstances of the contract or transaction under review. On the other hand, NRS 78.138(7) provides that there is no director liability unless **it is proven that**, the breach of the directors fiduciary duties "involved intentional misconduct, fraud or a knowing violation of law." Again, the Nevada statutory scheme does not recognize any shifting of this burden of proof in determining director misconduct or liability.

In addition to the proof required to overcome the Nevada business judgment presumption, Cotter, Jr. has failed to introduce any evidence that the decision made by the Directors was in any way incorrect or wrong or not in the best interests of the Company. The record reveals that:

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- At the time Cotter, Jr. was appointed CEO, he had had no public company management experience, and no hands-on operating experience in any of the Company's principal business segments: cinemas and real estate. He was placed in that position by his father, who at the time of his appointment continued to have control over every material decision with respect to the Company.
- Cotter, Jr. has admitted that, just five weeks after his appointment to the CEO position at RDI, he could not get along with his siblings, who had substantial operating roles at the Company and who had held such roles for many years.
- A majority of the entire Board determined, in light of this admitted management dysfunction, to remove Cotter, Jr. as President and CEO and to continue with the executive leadership of his siblings, Ellen Cotter and Margret Cotter in accordance with Nevada statutes and RDI Bylaws.
- The Directors making this decision were the same individuals who had been nominated and elected to the Board by James Cotter, Sr. Cotter. Jr. had no objection to the decisions made by these Directors until they began to question whether it was in the best interests of the Company for Cotter, Jr. to continue as President and Chief Executive Officer.

Critically, Cotter Jr. has provided no evidence that the Directors' decisions were in any way erroneous or not in the best interests of the Company and certainly has presented no evidence that the decision to terminate him involved "intentional misconduct, fraud or a knowing violation of law."

III. COTTER, JR. HAS FAILED TO PRESENT ANY AUTHORITY SUPPORTING THE REINSTATEMENT OF A CEO WHOSE TERMINATION WAS DISCRETIONARY WITH THE BOARD OF DIRECTORS.

Cotter, Jr. has failed to present any authority that supports the relief he requests – reinstatement following a discretionary termination. Instead, as noted above, Cotter, Jr. has cherry picked language from an assortment of cases, nearly all of which are from jurisdictions other than Nevada, and all of which relate to directors who were alleged to have engaged in some

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sort of self-dealing transaction at the expense of either the corporation itself, or of other shareholders. None of the cases cited by Cotter, Jr. are remotely analogous to the facts here, where a CEO with comparatively limited work experience with the company, admittedly could not work with two persons who both had more than fifteen years of experience with the company and where the Board determined to go with the more experienced members of the management team.

RDI's Bylaws expressly permit the Board of Directors to remove an officer with or ***without cause*** by vote of a majority of the entire Board. See RDI Bylaws, Art. IV, § 10. Accordingly, the decision is entirely discretionary with the Board. The Bylaws do not mandate any specific process or procedure be followed before an officer is removed; only that it be by vote of a majority of the entire Board. Cotter, Jr. has cited no authority that holds that a corporation must comply with a specific process or procedure before terminating a CEO, other than the procedure set forth in its bylaws.

Here, the undisputed evidence shows that *all* of the Directors believed the tension between the Cotter siblings was having a negative effect on RDI. Cotter, Jr. himself notes that one Director had opined that there were three solutions to the situation: fire Cotter, Jr.; fire Ellen and Margaret; or fire all three of them. Opposition, 5. Here, the Directors chose to keep the two individual who had the longest experience with the Company. Such a balancing of the respective values of the Cotter siblings does not support a finding of breach of fiduciary duty.

IV. COTTER JR. HAS ADMITTED THAT HE CANNOT PROVE ANY DAMAGE TO THE CORPORATION ARISING FROM HIS TERMINATION.

The Independent Defendants asserted that Cotter, Jr. could present no evidence of any injury to RDI resulting from his termination. Cotter, Jr. made no effort to rebut that claim by presenting evidence of damages. Instead, he again cited to Delaware law, contending that the analysis applicable in that state should govern this tort action. Opposition, p. 19. But Cotter, Jr. again ignores the fact that his claims are governed by Nevada law. In Nevada, the tort of breach of fiduciary duty requires proof that the purported breach caused harm. *Foster v. Dingwall*, 126 Nev. 56, 69, 227 P.3d 1042, 1051 (2010), citing *Stalk v. Mushkin*, 125 Nev. 21,

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28, 199 P.3d 838, 843 (2009) ("fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship"). If the one to whom a fiduciary duty is owed has not been injured, then no fact finder can determine that each of the elements of a breach of fiduciary duty has been proven. Because Cotter, Jr. has failed to present evidence of any such injury arising from his termination, his claims fail.

CONCLUSION

Cotter, Jr. is unable to present evidence sufficient to rebut the statutory presumption that the decisions of the Board of Directors are made in good faith, or that either RDI or its shareholders were damaged by the Board of Directors' decision to terminate his employment from the Company.

This court has given Cotter Jr. ample opportunity to try and make a claim for reinstatement. It is now time to end this exercise as it finds no support in the law or the facts. RDI has been operating under the cloud of this strained claim. It is time for this court to remove that cloud and grant partial summary judgment.

DATED: October 21, 2016.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the forgoing ***Reading International, Inc.'s Reply in Support of Joinder to the Individual Defendants' Motion for Partial Summary Judgment No. 1 Re Plaintiff's Termination and Reinstatement Claims*** to be filed and served via the Court's Wiznet E-Filing system on all registered and active parties. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 21st day of October, 2016.

/s/ Andrea Lee Rosehill

An employee of GREENBERG TRAURIG, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

JAMES J. COTTER,

Deceased.

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

Plaintiff,

v.

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

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Coordinated with:

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

READING INTERNATIONAL, INC.'S REPLY IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NO. 2 RE THE ISSUE OF DIRECTOR INDEPENDENCE

Date of Hearing: November 1, 2016
Time: 8:30 a.m.

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READING INTERNATIONAL, INC. hereby submits its *Reply in Support of the Individual Defendants' Motion for Summary Judgment No. 2 Re the Issue of Director Independence (the "Reply")*. Reading International, Inc. ("RDI" or "Company"), joined with the Individual Defendants in seeking summary judgment as to the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint filed by Plaintiff James J. Cotter, Jr. ("Plaintiff" and/or "Cotter, Jr.") to the extent that such claims rely on a claim that Guy Adams, Judy Codding, Edward Kane, Douglas McEachern, and/or Michael Wrotniak were/are not "independent" of influence by Ellen or Margaret Cotter. RDI joins in the arguments advanced on behalf of the Individual Defendants in their Motion, and also requests judgment in its favor on these claims for the reasons set forth in the attached memorandum of points and authorities.

This Reply is based on the following memorandum of points and authorities, the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing of this Motion.

DATED: this 21st day of October, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

This Court should grant partial summary judgment in favor of RDI on the specific issue, of the independence of Directors McEachern, Kane, Adams, Codding and Wrotniak.[1] Cotter, Jr. has failed to meet his burden to present admissible evidence sufficient to establish, by a preponderance of the evidence, that any RDI Director lacked independence with respect to decisions they made on behalf of the Company. Cotter, Jr. has not presented any evidence that shows any decision was made by the Independent Directors based on the wishes of Ellen or Margaret Cotter, rather than the Director's good faith belief as to what was in the best interests of RDI. Accordingly, Plaintiff has failed to overcome the statutory presumption that such directors acted independently.

Indeed, Cotter, Jr. appears to believe that by merely *alleging* a lack of independence, based on friendships with the Cotter siblings' parents, or a friendship between a director's spouse and another director, the business judgment rule magically melts away. However, Cotter Jr. bears the burden of proof on this issue. NRS 47.180(1). Moreover, even in Delaware, upon whose authority Cotter, Jr. relies exclusively, the allegations made here would be insufficient to establish a lack of independence. Because Cotter, Jr. has failed to present evidence sufficient to satisfy his burden of proof, the Motion for Summary Judgment should be granted.

LEGAL ARGUMENT

Cotter, Jr.'s anemic opposition to Individual Defendants' summary judgment motion reveals the lack of evidence to support his claims. He has produced no evidence that any of the relationships that purportedly prevent the Independent Directors from exercising business judgment in good faith are of such importance or materiality to the Independent Directors that they would risk their integrity, reputation, and personal liability for the sake of preserving the relationship. Despite the past year of expedited discovery, dozens of depositions, and production of thousands upon thousands of pages of documents, the best Cotter, Jr. can do to refute the independence issue raised in the summary judgment motion is point to random facts

[1] For purposes of this Reply, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding and Michael Wrotniak will be referred to collectively as "Independent Directors."

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that in no way deem any director not to be independent. RDI has suffered tremendously during this litigation which as has consumed insurance proceeds and required Company executives and managers to devote substantial time to this litigation that could otherwise be spent on RDI business. This Court must call a halt to this meritless action.

A. Summary Judgment May be Granted as to this Factual Issue.

Cotter, Jr. contends that summary judgment cannot be granted on the issue of director independence. He first claims that because a lack of director independence is not itself a cause of action, nor a specific element of a claim that summary judgment cannot be granted as to this issue. However, partial summary judgment orders are appropriate and this Court has the authority to determine whether there is sufficient fact support for any aspect of a claim. *See* NRCP 56(b) and (d).

Here, Cotter, Jr. contends that each of the non-Cotter Independent Defendants lack independence and thus, summarily, breached his or her duty of loyalty to RDI. However, in order for Cotter, Jr. to prevail on his claims against such Defendants, he bears the burden of proving a lack of independence. NRS 47.180(1); 78.138(3); *see also*, *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59 (Del. Ch. 2015) (directors are "presumed to be independent). If Cotter, Jr. cannot meet that burden, then his claims based on a breach of loyalty by the Independent Directors must fail. The granting of summary judgment on the factual issue of the independence of each of the Independent Director will significantly narrow any issues to be tried by a jury. This is a wholly proper use of the summary judgment device.

B. Plaintiff Effectively Conceded that Director McEachern is Independent of Influence by Ellen Cotter and Margaret Cotter.

Cotter, Jr. presented no evidence of any lack of independence on the part of Director McEachern. Accordingly there is no dispute as to McEachern's independence.

C. Plaintiff has Failed to Demonstrate any Lack of Independence in Judy Codding, Edward Kane, or Michael Wrotniak.

Cotter, Jr. bases his challenges to the independence of Directors Codding, Kane and Wrotniak on their relationships with various Cotter relatives, living and dead. But Cotter, Jr. has

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presented no evidence to suggest that such relationships are of such material importance to these directors that any would sacrifice their own honor in order to maintain such relationships. Nor has Cotter, Jr. presented any evidence that these Directors have actually abandoned their fiduciary obligations in order to maintain the relationships. The law is "clear that mere allegations that directors are friendly with, travel in the same social circles, or have past business relationships with the proponent of a transaction . . . are not enough to rebut the presumption of independence. *In re MFW Shareholders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013).

1. Cotter, Jr. Failed to Present Sufficient Evidence to Show Ms. Codding Lacks Independence.

Significantly, Cotter, Jr. bases his claims of non-independence of Ms. Codding on the basis of her friendship with his mother Mary Cotter. He has offered Exhibits 14-16 in his Opposition in an effort to show such bias. **Cotter, Jr. Appendix, Exhibits 14-16**. However, these exhibits do not support a claim of any sort of influence upon Ms. Codding by Ellen or Margaret Cotter.

a. Plaintiff's Exhibit 14 consists of a June 9, 2014 email exchange between Mary Cotter -- wife of then living and breathing CEO, James Cotter, Sr.-- to a RDI employee, asking that employee to Fed Ex travel invoices to Ms. Codding, explaining that her "computer does not connect to Margaret printer." [sic]. Mrs. Codding further asked the RDI employee to call her "at Margaret if you need any info." The signature block on the email indicates that Mary Cotter worked for Designer Travel, Inc.

The obvious inference—indeed, the only reasonable inference– from this email is that Mary Codding, on behalf of Designer Travel, Inc. arranged travel for Ms. Codding, and needed to send invoices to Ms. Codding. However, Mary was staying at her daughter Margaret's home, and her own computer was incompatible with Margaret's printer.

Despite the rather obvious implications of the email above, Cotter, Jr. contends that it indicates that "MC used her RDI computer (and assistant) to process invoices for Judy Codding's travel." Opposition, p. 7. However, the action was taken by *Mary Cotter*, who was at that time the wife of RDI's CEO. Cotter, Jr.'s attempt to use this email to show a strong relationship

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between Margaret and Ms. Codding is, not reasonable.

b. Plaintiff's Exhibit 15 consists of an October 4, 2015 email to Margaret ***from a third party***, who mentions that Ms. Codding will be in New York, and asks whether Margaret can assist in obtaining certain theater tickets, for which the third party and Ms. Codding would pay. Margaret expressed a willingness to try, noting that the tickets would be full price, and asking for credit card information.

In this case, Cotter, Jr. mischaracterized the evidence in a much smaller degree and claims that it was Ms. Codding who approached Margaret rather than the third party. However, here again, it is absurd to suggest that a query to a person in the theater industry to purchase tickets to a popular show does not suggest a close and important relationship that in anyway supports Plaintiff's theory of a lack of independence.

c. Plaintiff's Exhibit 16 consists of testimony by Ellen Cotter, which shows that, prior to asking Ms. Codding to consider serving on RDI's board, she had met her "between five and ten times" over the course of 15 years, *one* of which times was at Mrs. Cotter's home. **Cotter, Jr. Appendix, Exhibit 16, 58:22-59:11.** Not even Cotter, Jr. was able to render this testimony as suggesting a close and materially important relationship.

The remainder of Cotter, Jr.'s evidence consists of his own affidavit, in which he speculates as to Ms. Codding's purported discussions with Ellen Cotter, and contends that Ms. Codding indicated that one of the Cotter siblings—not excluding Cotter, Jr. should mange RDI. Since an opinion that a Cotter should manage RDI is not inconsistent with a good faith belief that RDI's best interests would be served by such management, such testimony does not suffice to establish any inability to make independent business judgments with respect to RDI.

2. *Plaintiff has Failed to Demonstrate any Lack of Independence of Edward Kane.*

Cotter, Jr. contends that Director Kane is unable to exercise his business judgment with respect to decisions wherein Cotter, Jr. disagrees with his sisters, based on the longstanding friendship and working relationship Mr. Kane had with Cotter, Sr. Cotter, Jr. presents testimony by Mr. Kane regarding his understanding of Cotter, Sr.'s concerns and wishes, and claims that

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Mr. Kane's views regarding Cotter, Sr.'s wishes kept him from exercising independent judgment. Motion, pp. 3-6. However, Cotter, Jr. does not explain *how* Mr. Kane's views on the wishes of Cotter, Sr. somehow prevent Mr. Kane from exercising his own judgment on behalf of RDI. Certainly there is no testimony that Mr. Kane has acted against what he believes is in RDI's best interest.

Significantly, Cotter, Jr. attempted, through careful excising of snippets of testimony from Mr. Kane, to show that Mr. Kane voted against what Kane personally wanted. Opposition, p. 5. However, contrary to Cotter, Jr.'s attempts to mislead the Court, it was not Cotter, Jr.'s unwillingness to settle the trust litigation that caused his termination, ***but instead, his unwillingness to accept the curtailment of his own authority as CEO.*** Cotter, Jr.'s own exhibit shows that Mr. Kane testified:

> Q. **If you wanted him to stay as C.E.O. --**
>
> A. Right.
>
> Q. **-- why did you vote against him?**
>
> A. Because I wanted him to stay as C.E.O., working with his sisters who were work -- willing to work with him for the benefit of the company. And to me it was a wonderful solution, and it had no adverse impact. If it didn't work out, then we would deal with it. But he would work with them and -- as an executive committee.
>
> He told me that he didn't want Guy Adams on there. And I told him, "I'll do my best to make sure that he isn't on that; just you and your sisters."
>
> And if they could work together, that's all we wanted.
>
> **Q. Are you drawing a distinction, Mr. Kane, between Ellen and Margaret working with Jim Cotter, Jr., as distinct from working for him?**
>
> [Objection]
>
> THE WITNESS: I don't think I ever made that distinction, but I think he would glean and learn a lot working with them.
>
> *After all they were the operating executives of this company.*

See Cotter, Jr.'s Opposition Appendix, Exhibit 1, 11:12-12:11 (Bold original, italics added).

This testimony shows the decision was, indeed, based on the best interest of the Company. Kane viewed the Cotter sisters more valuable to RDI than Cotter, Jr.

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3. *Plaintiff Has Failed to Demonstrate any Lack of Independence of Michael Wrotniak.*

Cotter, Jr.'s "evidence" concerning Mr. Wrotniak's purported lack of independence consists primarily of Cotter, Jr.'s own testimony concerning his sister Margaret's friendship with Mr. Wrotniak's wife, and Cotter, Jr.'s own suppositions regarding the importance of the friendship to Margaret. Opposition, p. 6. He further opines that because the Wrotniaks live near NYC, this makes them "close to" Margaret Cotter. His testimony further discusses his beliefs about the habits of the Wrotniaks' children. Opposition, p. 7. Even assuming Mr. Cotter's beliefs and speculations are accurate, none would support a finding of a lack of independence.

Cotter, Jr. also presents exhibits in an attempt to show a close relationship. **Cotter, Jr.'s Opposition Appendix, Exhibits 9 - 13.** Once again, the exhibits offer no support to Cotter, Jr.'s claims.

a. Plaintiff's Exhibit 9 consists of an email exchange between Patricia Wrotniak and Margaret Cotter in November 2014, nearly a year prior to Mr. Wrotniak's joining the board. While Cotter, Jr. contends that the email shows that Margaret provided show tickets to the Wrotniaks, in fact, it merely shows that she would see if she could get them. There is no indication that Margaret would pay for the tickets.

b. Plaintiff's Exhibit 10 shows that in February 2014 (prior to Cotter, Sr.'s death) Mrs. Wrotniak asked Margaret Cotter for tickets to Stomp for "GSP kids." Further details in the email indicate that these "kids" were apparently visiting New York for a week, and were benefiting from Mrs. Wrotniak's efforts to "get other alums involved." Thus, the Stomp tickets in question were not even for the benefit of the Wrotniaks.

c. Plaintiff's Exhibits 11 - 13 consist of November and December 2014 email exchanges that apparently indicate that Mr. Wrotniak had asked Margaret to provide tickets to a show to benefit a charity known as Little Sisters. Despite Cotter, Jr.'s implication to the contrary, nothing in the emails remotely suggests the tickets were for the Wrotniaks themselves, or that Mr. Wrotniak and Margaret had anything other than a polite relationship. Indeed, in each case, the tickets were expressly requested to be held in the name of other people.

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Cotter, Jr.'s claims that these email exchanges "bear out the compromising relationship" is nothing short of a blatant falsehood. See Opposition, p. 7.

D. Cotter, Jr. Failed to Show a Lack of Independence in Director Adams.

Cotter Jr.'s contention that RDI or the Independent Defendants have conceded that Director Adams lacked independence is false**.** Both the Motion and the Joinder challenged Cotter, Jr.'s contention, noting that Cotter, Jr. could not show that Mr. Adams materially relied on any income that was actually within the discretion of Ellen Cotter or Margaret Cotter to give or withhold. Cotter, Jr. has not presented such evidence in his Opposition. To the contrary, Cotter, Jr. acknowledges that Adams is entitled to receive 5% of the proceeds of the "four real estate developments" he manages. Opposition, p. 8. Cotter, Jr. himself acknowledges that the payments to which Adams will be entitled are substantial. While Plaintiff contends that Margaret and Ellen "approve" such payments because they are the trustees of his father's estate, he did not, and cannot, show that they have the discretion to refuse Adams the payments to which he is entitled.

Cotter, Jr.'s attempt to dispute Adams's net worth based on a $100,000 swing does not help his position. Opposition, p. 9. Notwithstanding what Plaintiff may determine to be necessary to meet his own life style needs, $900,000.00 is a lot of money and there is no indication it is insufficient to meet Mr. Adams's needs. Further, Cotter, Jr.'s morbid arguments regarding Mr. Adams's presumed life expectancy actually reveals the *lack* of materiality of the income Mr. Adams receives from the non-RDI Cotter family entities based on the contracts that predate Cotter, Sr.'s death. A director cannot be deemed to lack independence or to have a motive for entrenchment on the basis of the director fees received from the corporation. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 175 (Del. Ch. 2005), *aff'd,* 906 A.2d 114 (Del. 2006). Cotter, Jr.'s arguments simply fail.

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CONCLUSION

Cotter, Jr. failed to present evidence sufficient to show that Directors Adams, Codding, Kane, McEachern, or Wrotniak had or have such material significant personal or financial relationships with the Cotter sisters that they would not exercise independent judgment with respect to decisions involving the Cotter siblings. This Court should not allow this litigation wrought by nothing more than petulance and resentment to continue. RDI is entitled to summary judgment as to any claims premised on the purported lack of independence of its Directors.

DATED: this 21st day of October, 2016.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the forgoing ***Reading International, Inc.'s Reply to the Individual Defendants' Motion for Summary Judgment No. 2 Re the Issue of Director Independence*** to be filed and served via the Court's Wiznet E-Filing system on all registered and active parties. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED: this 21st day of October, 2016.

/s/ Andrea Lee Rosehill
An employee of GREENBERG TRAURIG, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

JAMES J. COTTER,

Deceased.

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

Plaintiff,

v.

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

Defendants.

And

READING INTERNATIONAL, INC., a Nevada Corporation,

Nominal Defendant.

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

Coordinated with:

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

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

READING INTERNATIONAL, INC.'S CONSOLIDATED REPLY IN SUPPORT OF:
1) THE INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NO. 3 RE PLAINTIFF'S CLAIMS RELATED TO THE PURPORTED UNSOLICITED OFFER;
2) THE INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NO. 4 RE PLAINTIFF'S CLAIMS RE THE EXECUTIVE COMMITTEE;
3) THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 5 RE THE APPOINTMENT OF ELLEN COTTER AS CEO; AND

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4) THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 6 RE THE ESTATE'S OPTION EXERCISE AND OTHER MATTERS

Date of Hearing: November 1, 2016

Time: 8:30 a.m.

READING INTERNATIONAL, INC., hereby submits its ***Reply in Support of: 1) The Individual Defendants' Motion for Summary Judgment No. 3 Re Plaintiff's Claims Related to the Purported Unsolicited Offer; 2) The Individual Defendants' Motion for Summary Judgment No. 4 Re Plaintiff's Claims Related to the Executive Committee; 3) The Individual Defendant's Motion for Partial Summary Judgment No. 5 Re the Appointment of Ellen Cotter as CEO; and 4) The Individual Defendants' Motion for Partial Summary Judgment No. 6 Re to the Estate's Option Exercise and Other Matters*** (the "Reply").

This Reply is based on the following memorandum of points and authorities, the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing of this Motion.

DATED: October 21, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's Oppositions to the Individual Defendants Summary Judgment Motions 3, 4, 5 and 6 have striking similarities and repetitive arguments. In an effort to conserve judicial resources, Reading International, Inc. ("RDI or "Company") is filing this consolidated Reply.

Cotter, Jr.'s strategy appears to be premised on complaints that he does not have the information he needs, misconstruing facts not relevant to the issues presented, and suggesting the Court does not have the authority to narrow the issues to go to trial. The common theme is an attempt to delay. Cotter, Jr.'s delay tactics should be recognized for what they are – an effort to avoid trial. The Individual Defendants filed summary judgment motions on discreet issues that will narrow the issues that will go to the jury and there is ample authority to support entering partial and/or full summary judgment.[1]

In an effort to avoid the inevitable trial date, the collective oppositions improperly suggest that there was a pattern of "entrenchment" by the Directors after Cotter, Jr. was removed as the CEO and President. However, Cotter, Jr. has provided no evidence (and none exists) of any of the measures normally associated with improper entrenchment, such as sudden amendments to the bylaws or articles, adoption of poison pill measures, modification of annual meeting procedures, rejection of board nominees who were willing to serve, or rejection of proposed board nominees by stockholders to replace board candidates. What is more, there is no evidence of any adoption of golden parachute measures for any directors.

The discreet issues raised by Plaintiff certainly do not rise to a level of entrenchment. Moreover, there is an utter lack of facts and law to support the individual claims proceeding.

In regard to **Unsolicited Expression of Interest (MSJ No. 3)** Cotter, Jr. primarily relies on Rule 56(f) contending he does not have sufficient information to respond to the summary judgment motion. As the Court may recall, it was Plaintiff that waited until the eleventh hour to amend his complaint to assert such a claim. As such, he only has himself to blame if he does not have the information he purportedly needs. Moreover, the late amendment does not justify

[1] RDI filed joinders to each of the Individual Defendants' Summary Judgment Motions 3,4,5 and 6 referenced herein.

extending the discovery period. Contrary to Plaintiff's assertions RDI has been diligent in discovery and has produced the documents Plaintiff requested. Additionally, RDI remains willing to assist with scheduling the depositions Plaintiff contends he so desperately needs, but it is Plaintiff that has been unwilling to travel to the Los Angeles area to hold the same. Cotter, Jr. has filed a separate motion to reopen discovery and continue trial in which he makes almost identical arguments. RDI will respond to the same in due course. However, for the purposes of the Individual Defendants' Motion for Summary Judgment on the issue of the unsolicited expression of interest, there is ample authority supporting summary judgment because there is no legal standard or requirement that was not met when RDI's Directors considered the expression of interest.

In regard to the **Executive Committee (MSJ No. 4)**. Cotter, Jr. concedes that the actual acts relating to the "activation and repopulation"[2] of the Executive Committee are not themselves actionable, and indeed, denies that he intended to allege them as breaches of fiduciary duty. Regardless of what Cotter, Jr. *meant* to plead in his *Second* Amended Complaint, he did in fact allege as support for his claims, that the Individual Defendants breached their fiduciary duties, in the "activation and repopulation" of the Executive Committee. He did, moreover, testify that the two decisions he believed constituted fiduciary duty breaches - that he actually could recall – were the selection of a record date for the 2015 RDI Annual Shareholder's meeting, and the appointment of Michael Wrotniak to RDI's Audit and Conflicts Committee. Given that Cotter, Jr. has apparently withdrawn the claim that such acts were themselves improper, the requested partial summary judgment should be granted. Plaintiff's inability to support the allegations in the SAC regarding the Executive Committee with <u>any</u> evidence warrants summary judgment in Defendants' favor.

In regard to **MSJ No. 5 regarding the appointment of Ellen Cotter as CEO,** Plaintiff has failed to establish that RDI was required to conduct a search prior to Ms. Cotter's appointment as CEO and did not provide the Court with any authority to support the standard he

[2] The purported "repopulation:" consisted solely of substituting Ellen Cotter for Cotter, Jr.

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is seeking to impose. Instead of addressing the fundamental aspects of such a claim, Plaintiff avoids the Nevada Statute that gives the Board discretion to act as they did and attempts to distract the Court with immaterial matters relating to a search that do not preclude summary judgment. Because Plaintiff failed to provide any legal standard to support his theory that the appointment of Ellen Cotter was flawed, summary judgment is warranted.

As to **MSJ No. 6**, Plaintiff virtually ignored the four discreet issues raised in the motion, specifically: 1) the approval of Cotter, Sr.'s Estate's Option Exercise; 2) the appointment of Margaret Cotter to an executive vice president; 3) the approval of compensation packages of Ellen Cotter and Margaret Cotter; and 4) the approval of additional compensation to Margaret Cotter and Guy Adams. The business judgment rule codified in NRS Chapter 78 protects the Directors for each of the decisions referenced. Summary judgment should be granted as Plaintiff failed to show otherwise.

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I. SUMMARY JUDGMENT STANDARD

Summary judgment must be granted where there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). A nonmoving party who bears the burden of proof at trial must respond to a motion for summary judgment with evidence sufficient to establish each element of his claim by a preponderance of the evidence. *Cuzze v. Univ. and Comm. Coll. Sys. Of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). Here, it is statutorily presumed that the Board of Director's actions were made "in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). Accordingly, Cotter, Jr. bore the burden of presenting evidence sufficient to show otherwise. He was also required to satisfy each and every element of his breach of fiduciary duty claims under *Nevada* law. He failed to present such evidence in opposition each of the motions identified above.

Moreover, in situations where there was a lack of facts to support his claim, Cotter, Jr. was forced to make the untenable argument that summary judgment is not available to partially address his claims. However, Rule 56 itself makes clear that partial summary judgments are entirely proper to limit and define the issues to be decided by a jury. Specifically, NRCP 56

states, in pertinent part:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor ***as to all or any part thereof.***

NRCP 56(b) (emphasis added). Additionally, the rule provides that where judgment is not granted in its entirety, the District Court should "make an order specifying the facts that appear without substantial controversy." NRCP 56(d).

II. COTTER, JR.'S OPPOSITION TO THE INDIVIDUAL DIRECTORS' SUMMARY JUDGMENT MOTION REGARDING THE UNSOLICTED EXPRESSION OF INTERESTS (MSJ NO. 3) PROVIDES NO BASIS FOR DENYING SUMMARY JUDGMENT.

Cotter, Jr.'s Opposition fails to address the merits of the Individual Defendants' Motion for Summary Judgment (MSJ No. 3) and RDI's Joinder thereto. Interestingly, RDI's joinder is not even referenced in the Opposition, although the joinder filed by Director Gould is specifically identified. Notwithstanding, RDI clearly filed a joinder to MSJ No. 3 which emphasized the steps taken by RDI's Board to ensure they were well informed regarding the unsolicited expression of interest which included discussing the nonbinding nature of the expression of interest; the price; RDI's present course, with its dual foci on entertainment and real estate; RDI's strong financial position; RDI's ability to generate capital for use in its growth strategies; the likelihood that continuing with RDI's current business strategies would yield a greater return to shareholders than an immediate sale; and the likely negative impact on RDI's employees and operations by the prospect of pursuing a change of control. Not only did Plaintiff attempt to minimize these considerations, but he also glossed over the undisputed facts that the unsolicited offer was discussed at two different Board meetings.

Not only are these considerations fully ignored by Cotter, Jr., but the Opposition fails to point to any authority that indicates that RDI's Board did not act appropriately and was required to do anything additional when evaluating the unsolicited expression of interest. Plaintiff's only attempt to address the requirements of NRS 78.138 and NRS 47.180 is his own self-serving affidavit which is nothing more than supposition and conjecture. However, a genuine issue of

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material fact cannot be created by conflicting sworn statements of the party against whom summary judgment is sought. *Aldabe v. Adams*, 81 Nev. 280, 402, P. 2d 34 (1965) (overruled on other grounds). As such, Cotter, Jr.'s repeated references to his own self-serving declaration cannot defeat summary judgment.

Moreover, Cotter, Jr.'s attempt to delay a ruling by requesting additional discovery is unavailing. As the Court well knows, Cotter, Jr. requested leave to amend a mere three months before trial and after the close of percipient discovery. If Plaintiff had sought leave to amend at the time of trial he would not be allowed to push the reset button and conduct discovery and he should not be allowed to do so now. In cases in which requested amendments would cause undue delay, the Court has discretion to deny the request outright. *See*, e.g. *Moore v. Kayport Package Express. Inc.,* 885 F.2d 531, 535 (9th Cir. 1989), *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 105-106 (1973) (recognizing that undue delay, bad faith motive are grounds to deny a motion to amend), *Canal Properties, LLC V. Alliant Tax Credit V., Inc., 220 Fe. Appx 699 (2007)(not selected for publication)*(upholding denial of proposed amendment that would have required a delay in trial, discovery to be reopened, and increase in litigation costs to all parties).

Here, the Court allowed the amendment and when Plaintiff came back again and asked for discovery the Court limited the scope of the same. Contrary to Cotter, Jr.'s assertions, RDI complied with the subsequent October 3, 2016 order which called for the production of documents relating to a purported offer that Ellen Cotter received in May of this year. This is illustrated by the minutes and other documents referenced in Plaintiff's Opposition. Moreover, discussions were also had about scheduling the deposition of the person most knowledge of RDI regarding the purported offer. RDI is not to blame for Plaintiff's failure to schedule the deposition of the PMK or the other depositions that Plaintiff contends he needs.

Critically, Plaintiff's focus on purported discovery disputes is a red herring. Plaintiff has also filed another motion to continue trial and reopen discovery, RDI will address Plaintiff's lack

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of diligence in pursuing discovery therein.[3] However, for purposes of the instant summary judgment motion, the focus must be on if Plaintiff can meet the requisite legal standard to proceed. He cannot and the purported discovery issues are a mere distraction. Because Cotter, Jr. cannot point to a legal standard or requirement that RDI's Board did not meet when evaluating the unsolicited expression of interest, summary judgment is warranted.

III. SUMMARY JUDGMENT IS WARRANTED ON MSJ NO. 4 AS RDI'S USE OF THE EXECUTIVE COMMITTEE WAS NOT IMPROPER AND NO FIDUCIARY DUTIES WERE BREACHED BY DIRECTORS.

The Opposition to the Individual Defendants' Motion for Summary Judgment regarding use of the Executive Committee is interesting in that therein Plaintiff appears to concede the actual acts relating to the "activation and repopulation" of the Executive Committee are not themselves actionable. However, Plaintiff then refers to a barrage of evidence in an attempt to confound and confuse the issues. Summary judgment is warranted because Cotter, Jr. failed to show any breach of fiduciary duty and relating to the executive committee and has not and cannot show any injury to RDI or its stockholders.

A. COTTER, JR. HAS FAILED TO SHOW ANY BREACH OF DUTY RELATED TO THE EXECUTIVE COMMITTEE.

Cotter, Jr.'s Opposition makes no attempt to present admissible evidence to support any claim that 1) the "activation" of the Executive Committee was itself in any way improper, or 2) that the Executive Committee itself has made any decision that was improper. This is likely because Nevada law expressly allows board functions to be delegated. *See* NRS 78.125(1). And because RDI's Bylaws permit the Board of Directors to form committees having at least one director, and to delegate to such committee powers of the Board of Directors in the management of the company. *See* RDI Bylaws, Art. II, § 10. Indeed, the only thing that Cotter, Jr. has offered against the Executive Committee is that a former Board Member was opposed to its use.

[3] RDI adamantly disputes any allegations that it has delayed proceedings and/or failed to comply with Court orders. Cotter, Jr.'s attempt to impose obligations beyond what the Court ordered is a continuing problem which will be addressed at an appropriate time with the Court.

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Here, Cotter, Jr. contends (in his Opposition, rather than in his SAC) that the Executive Committee was used as part of an entrenchment scheme, because the Committee purportedly shut out retired Director Storey and Cotter, Jr. himself. However, there is no evidence of entrenchment. Moreover, as noted above, Cotter, Jr. was able to think of only *two* actions by the Executive Committee to which he objected, neither of which involved any "entrenchment" measures. Additionally, Cotter, Jr. failed to advise the Court that the minutes from the Executive Committee meetings are provided to the entire RDI Board for acceptance. Significantly, Cotter, Jr. has not alleged that the Executive Committee has actually undertaken *all,* **or** even a sizable portion of the decisions traditionally made by the Board as a whole. Nor has he alleged that the Executive Committee has made decisions that have somehow "entrenched" the position of any of the Directors.

In the absence of allegations — let alone evidence — of such conduct, the "activation" of a committee that has existed at RDI for more than a decade cannot possibly be construed as a cog in the wheel of the vast scheme Cotter, Jr. *wants* to think exists. Cotter, Jr.'s recitation of a treatise on Delaware precedent relating to the duties of directors, to which he devoted the bulk of his Opposition, does not alter the lack of evidence of any improper motive, or any damage, resulting from any act related to RDI's Executive Committee.

B. COTTER, JR. FAILED TO PRESENT ANY EVIDENCE OF INJURY TO RDI OR ITS SHAREHODLERS ARISING FROM ANY ACTION RELATED TO THE EXECUTIVE COMMITTEE.

Cotter, Jr. made no effort to show any damage arising from any action related to the Executive Committee. Cotter, Jr.'s reliance on Delaware authority, wherein separate courts of equity try claims for breaches of directors' duties are unavailing, given that this matter is governed by Nevada law. In Nevada, damages are an element of a breach of fiduciary duty claim. No jury can find that Cotter, Jr. is entitled to judgment on his claims related to the Executive Committee, because he is unable to satisfy the basic claim elements. In Nevada, a derivative action for breach of fiduciary duty requires proof of an actual injury resulting from the tortious conduct of a defendant who owes a fiduciary duty to the derivative plaintiff. *Foster v. Dingwall*, 126 Nev. 56, 69, 227 P.3d 1042, 1051 (2010), citing *Stalk v. Mushkin*, 125 Nev. 21,

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28, 199 P.3d 838, 843 (2009) ("fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship"). In the absence of evidence of such harm, no jury could find that the Individual Defendants breached their fiduciary duty. Accordingly, RDI is entitled to judgment as a matter of law on Cotter, Jr.'s claims, to the extent such claims relate to the Executive Committee.

IV. SUMMARY JUDGMENT RELATED TO THE APPOINTMENT OF ELLEN COTTER AS CEO (MSJ NO. 5) IS WARRANTED.

The Opposition to the Individual Defendants' Motion for Summary Judgment regarding issues related to the appointment of Ellen Cotter as CEO attempts to create issues of fact where none exist and references information that is wholly immaterial to the analysis required for summary judgment. Notably, why or how the Korn Ferry search for a CEO evolved over time has no impact on the legal standard that Plaintiff must meet. Indeed, as detailed in MSJ No. 5, RDI's Board was not even required to conduct a search prior to appointing a CEO. The Opposition does not address this issue nor does it point to any statute or law that mandates a formal CEO search. This is likely because, there is no legal authority that requires what Plaintiff wants.

Notably, the Nevada statute on point, NRS 78.130(3)[4] indicates that the manner in which officers are chosen may be prescribed by the company's bylaws or determined by the board of directors. To get around this, Plaintiff goes back to his theory of an "entrenchment scheme." However, once again there is no evidence of entrenchment. The undisputed facts indicate that Ellen Cotter had a long standing track record at RDI having worked for the Company for more than seventeen years and overseeing RDI's domestic cinema operations. Ms. Cotter also had a

[4] NRS 78.130 provides:

1. Every corporation must have a president, a secretary and a treasurer, or the equivalent thereof.
2. Every corporation may also have such other officers and agents as may be deemed necessary.
3. All officers must be natural persons and must be chosen in such manner, hold their offices for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors. Any natural person may hold two or more offices.
4. An officer holds office after the expiration of his or her term until a successor is chosen or until the officer's resignation or removal before the expiration of his or her term. A failure to elect officers does not require the corporation to be dissolved. Any vacancy occurring in an office of the corporation by death, resignation, removal or otherwise, must be filled as the bylaws provide, or in the absence of such a provision, by the board of directors.

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long standing relationship with RDI's management and during her tenure as interim CEO proved to the Independent Directors that she had what it takes to run the Company. There is nothing improper about RDI's Board selecting Ms. Cotter to be CEO as she was both more qualified for the position than Cotter, Jr. and had demonstrated an ability to get along with others.

In regard to allegations relating to the independence of Directors, RDI adopts by reference herein the briefing related to MSJ No. 2 regarding Director Independence. Plaintiff has not established a lack of independence relating to any of the RDI's Directors. Moreover, there is no attempt by Plaintiff to establish that a lack of independence motivated the search for CEO or the decision to appoint Ellen Cotter to the position of CEO.

In a last ditch effort to try and justify moving forward, Plaintiff takes a skewed position regarding the application of the business judgment rule. However, NRS 78.138(3) provides a presumption that the actions of the directors and officers of a corporation are presumed to have been made in good faith. Specifically, the statute states that "Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis with a view to the interests of the corporation." NRS 78.138(3). Here, the decision to appoint Ellen Cotter as permanent CEO of RDI falls squarely within the confines of the statute.

Finally, summary judgment is warranted on this issue because Plaintiff has not and cannot establish any damages to the Company as a result of Ms. Cotter's appointment as CEO. Damages is a requisite element of a claim for breach of fiduciary duty claim. *See* Section III (B) *infra*. On page 27 of the Opposition, Plaintiff contends that he "has produced evidence of damages." However, the Opposition fails to point to any evidence of damages that can be directly linked to Ms. Cotter. Accordingly, summary judgment is warranted.

V. PLAINTIFF HAS FAILED TO MEET HIS BURDEN TO PROCEED ON CLAIMS SETFORTH IN MSJ NO. 6.

Once again, Plaintiff has attempted to throw everything, including the kitchen sink, into his Opposition but at the same time misses the target. Notably, there were four discreet issues in which the Individual Defendants and RDI sought summary judgment in MSJ No. 6: 1) the approval of Cotter, Sr.'s Estate's Option Exercise; 2) the appointment of Margaret Cotter to an

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executive vice president; 3) the approval of compensation packages of Ellen Cotter and Margaret Cotter; and 4) the approval of additional compensation to Margaret Cotter and Guy Adams. The Opposition fails to squarely address these issues and instead attempts to distract the Court from the issues that can and should be decided on summary judgment.

First, in regard to the Board's decision to allow the exercise of the 100,000 stock option, the decision was consistent with Section 6.1.6 of RDI's Stock Option Plan. The Stock Option Plan expressly authorizes that exercise of an option to purchase Class B stock by presenting Class A stock with the same fair market value. The option was granted prior to James Cotter, Sr.'s death and was determined by the Court to belong to Cotter, Sr.'s Estate. The Opposition's rambling statements regarding duties owed by directors and Plaintiff's unique interpretation of the business judgment rule serve no purpose. Here, the Directors acted in accord with the Stock Option Plan and RDI received the fair market value for the stock exchanged. Plaintiff has no claim regarding the exercise of the stock option.

Second, Cotter, Jr. failed to present evidence to overcome the presumption that the appointment of Margaret Cotter to a management position at RDI was in bad faith. Although, Plaintiff likes to question his sister's qualifications, that is not enough. There is no evidence of reckless indifference or deliberate disregard for stockholders by the Board's decision to appoint a woman with years of experience with the Company to a vice president position. Instead, the evidence indicates that RDI Board considered Ms. Cotter's service to the corporation as an independent contractor, which services had exceeded the scope of her contractual agreement and extended into other areas.

Third, the Board's approval of compensation packages for Ellen and Margaret Cotter was well reasoned, based on information obtained from outside sources, vetted by the Compensation Committee and discussed at multiple board meetings before a decision was made. There was no bad faith, intentional misconduct, fraud or knowing violation of the law. As such, the decision clearly falls within the confines of Nevada's business judgment rule and summary judgment is warranted.

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Fourth, the approval of additional compensation to Margaret Cotter and Guy Adams is also not actionable. As explained in Summary Judgment Motion No. 6, the $50,000 compensation paid to Mr. Adams was specifically tied to services he provided that went well beyond what he was compensated for as a Director. In regard to the $200,000 payment to Margaret Cotter, the evidence presented by the Individual Defendants shows that Ms. Cotter had given up the rights to certain future compensation. Furthermore, both NRS 78.140(5) and RDI's Bylaws permit the Board to award compensation to directors. The actions taken by the Board were consistent with Nevada's statutory scheme as well as RDI's Bylaws and thus Cotter, Jr.'s attempt to impose liability on the Directors for such action is not legally sound and summary judgment appropriate.

In regard to allegations relating to the independence of Directors, RDI adopts by reference herein the briefing related to MSJ No. 2 regarding Director Independence. Plaintiff has not established a lack of independence relating to any of the RDI's Directors. Moreover, there is no attempt by Plaintiff to establish that a lack of independence motivated any decision by a Board remember related to the specific issues at hand. Similarly, RDI adopts by reference its prior arguments regarding the purported "entrenchment". There are no facts supporting the same.

CONCLUSION

Cotter, Jr. has virtually ignored the legal standard that must be met to defeat summary judgment in responding to motions 3, 4, 5 and 6 attempts to distract the Court with facts that are immaterial to the decisions at hand. Nevada law is different than the Delaware law that Plaintiff primarily relies on and the actions by RDI's Board members relating to each of the issues identified herein were wholly appropriate.

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Wherefore, RDI is entitled to partial summary judgment as to any claims premised on the unsolicited offer, activation and actions of the Executive Committee, appointment of Ellen Cotter as CEO, exercise of the 100,000 stock option, the appointment of Margaret Cotter to Executive Vice President, the approval of compensation packages of Ellen Cotter and Margaret Cotter, and the approval of additional compensation to Margaret Cotter and Guy Adams.

DATED: October 21, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the forgoing ***Reading International, Inc.'s Consolidated Reply in Support of: 1) The Individual Defendants' Motion for Summary Judgment No. 3 On Plaintiff's Claims Related to the Purported Unsolicited Offer; 2) The Individual Defendants' Motion for Summary Judgment No. 4 Re Plaintiff's Claims Related to the Executive Committee; 3) The Individual Defendant's Motion for Partial Summary Judgment No. 5 Related to the Appointment of Ellen Cotter as CEO; and 4) The Individual Defendants' Motion for Partial Summary Judgment No. 6 Related to the Estate's Option Exercise and Other Matters*** to be filed and served via the Court's Wiznet E-Filing system on all registered and active parties. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 21st day of October, 2016.

/s/ Andrea Lee Rosehill
An employee of GREENBERG TRAURIG, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

JAMES J. COTTER,

Deceased.

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

Plaintiff,

v.

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

Defendants.

And

READING INTERNATIONAL, INC., a Nevada Corporation,

Nominal Defendant.

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

Coordinated with:

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

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

READING INTERNATIONAL, INC.'S REPLY IN SUPPORT OF DEFENDANT WILLIAM GOULD'S MOTION FOR SUMMARY JUDGMENT

Date of Hearing: October 27, 2016
Time: 1:00 p.m.

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READING INTERNATIONAL, INC. ("RDI" or "Company") hereby submits this *Reply in Support* of *William Gould's Motion for Summary Judgment and RDI's Joinder thereto.* In addition to joining the arguments advanced on behalf of Gould in his Motion, RDI requests judgment in its favor for the reasons set forth in the attached memorandum of points and authorities, and based on the pleadings and papers filed in this action, and any oral argument of counsel made at the time of the hearing.

DATED: this 21st day of October, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

The introductory section of Plaintiff's Opposition to Gould's Motion for Summary Judgment reads much like his Oppositions to the summary judgment motions filed by Directors Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding and Michael Wrotniak (collectively "Individual Defendants"). Plaintiff's strategy appears to be to avoid the specific allegations in his own complaint and the specific issues in which summary judgment is sought and throw random facts and law at the Court in hopes of manufacturing an issue that may defeat summary judgment. However, to move forward against Director Gould, Plaintiff must present evidence in support of his claims and meet the requisite legal standard. Here, there are no facts that support any breach of fiduciary duty claim against Gould.

Because Plaintiff is unable to meet the standard, the Opposition sets forth unsupported theories that Gould collaborated in an ongoing entrenchment scheme. Glaringly absent from the Opposition, however, are allegations that you would typically see in an entrenchment case.

Cotter, Jr. has provided no evidence (and none exists) of any of the measures normally associated with improper entrenchment, such as sudden amendments to the bylaws or articles, adoption of poison pill measures, modification of annual meeting procedures, rejection of board nominees who were willing to serve, or rejection of proposed board nominees by stockholders to replace board candidates. What is more, there is no evidence of any adoption of golden parachute measures for any directors. The discreet issues raised by Plaintiff certainly do not rise to a level of entrenchment.

Plaintiff has not come forward with facts or law to support his claims against Gould and thus summary judgment is warranted.

LEGAL ARGUMENT

The summary judgment motion filed by Gould lacks evidence to support Plaintiff's claims against Gould in the Second Amended Complaint ("SAC"). After the filing of Gould's Motion, Cotter, Jr. was obligated to present admissible evidence to show that there are material issues of fact preventing summary judgment, or summary judgment must be granted. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). Additionally, because a plaintiff is required to prove each element of his cause of action, if any element cannot be proven by admissible evidence, then summary judgment is proper. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). Plaintiff did not meet his burden.

In an attempt to side-step the summary judgment requirements, Plaintiff argues that the allegations in the SAC do not stand alone and "must be viewed and assessed collectively." Opposition, p. 11. However, Rule 56 itself makes clear that partial summary judgments are entirely proper to limit and define the issues to be decided by a jury. Specifically, NRCP 56 states, in pertinent part:

> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor ***as to all or any part thereof.***

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NRCP 56(b) (emphasis added). Furthermore, the rule provides that where judgment is not granted in its entirety, the District Court should "make an order specifying the facts that appear without substantial controversy." NRCP 56(d).

Here, there is ample basis to narrow (if not eliminate) the issues that go to trial relating to Director Gould. Specifically the Court can make findings and issue summary judgment on the following: 1) Gould did not breach his fiduciary duty relating to the termination of Cotter, Jr.; 2) RDI's use of the Executive Committee is supported by law; 3) the appointment of Codding and Wrotniak to RDI's Board was proper; 4) the search for a new CEO of RDI and Ellen Cotter's appointment to the CEO position was appropriate; and 5) compensation of RDI's executives and Board members warranted. As there are minimal arguments in the Opposition that were not argued by Plaintiff in relation to the summary judgment motions filed by the Individual Defendants (which RDI joined), RDI adopts by reference the motions and replies thereto.[1]

In an attempt to create a claim, Plaintiff's statement of facts refers to purported "untimely emails" and Gould's correspondence with other directors prior to Cotter, Jr.'s termination. Such references do not support a breach of fiduciary duty claim. Similarly, Cotter Jr.'s twisting of the evidence relating to RDI's disclosures and accusations that Gould was "collaborator" in wrong doing are not supported by the record and do not support a breach of fiduciary duty claim.

Cotter, Jr., bears the burden of proof that there was in fact a breach of fiduciary duty. In proving this, the burden is on the plaintiff to overcome the Nevada business judgment rule presumption set forth in NRS 78.138(1). Nevada does not recognize any shifting of this burden of proof, other than in the case of NRS 78.140(2)(d). However, NRS 78.140 does not establish

[1] Specifically, RDI adopts and incorporates by reference: 1) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's Termination and Reinstatement Claims and RDI's Joinder thereto; 2) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 2) Re: Director Independence and RDI's Joinder thereto; 3) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 3) Re: the Unsolicited Expression of Interest and RDI's Joinder thereto; 4) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 4) Re: RDI's Executive Committee and RDI's Joinder thereto; 5) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 5) Re: the CEO Search and Ellen Cotter's appointment to CEO and RDI's Joinder thereto; and 6) the arguments set forth in the Individual Defendants' Motion for Summary Judgment (No. 6) Re: the Estate's Option Exercise and other issues and RDI's Joinder thereto.

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any grounds for liability on the part of directors, only for the voidance under certain circumstances of the contract or transaction under review. On the other hand, NRS 78.138(7) provides that there is no director liability unless **it is proven that**, the breach of the directors fiduciary duties "involved intentional misconduct, fraud or a knowing violation of law." Even taking Cotter, Jr.'s accusations in the Opposition at face value, Gould cannot be said to have acted fraudulently, knowingly violating the law or being involved in intentional misconduct.

It is unfortunately that Plaintiff is using this case to pursue a personal vendetta against the Directors that voted to terminate his employment with RDI. Gould did not vote to terminate Plaintiff and has demonstrated his independence as a Director of the Company. Nothing in the Opposition provides a basis for the Court to conclude otherwise.

WHEREFORE, RDI respectfully requests that Gould's summary judgment be granted and that to the extent that allegations against Gould in the SAC are imputed against RDI, that summary judgment be entered in RDI's favor.

DATED: this 21st day of October, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of ***Reading International, Inc.'s Reply in Support of Defendant William Gould's Motion for Summary Judgment*** to be filed and served via the Court's Wiznet E-Filing system on all registered and active parties. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 21st day of October, 2016.

/s/ Andrea Lee Rosehill

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER. JR,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

DEFENDANT WILLIAM GOULD'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with Declaration of Shoshana E. Bannett]

Hearing Date: October 27, 2016
Hearing Time: 1:00 P.M.

Assigned to Hon. Elizabeth Gonzalez, Dept. XI

Trial Date: November 14, 2016

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Relying on more than 700 pages of documents and testimony, Defendant William Gould's Motion for Summary Judgment ("Opening Brief") walked through the evidence in this case and showed that there are no genuine issues of material fact that would allow a factfinder to reasonably conclude that Gould breached any fiduciary duties, let alone acted with the requisite mindset of intentional misconduct, fraud, or knowing violation of law. The undisputed evidence shows that Gould, the only defendant-director who voted against the termination of Plaintiff James J. Cotter, Jr. ("Plaintiff" or "Cotter, Jr.")—and whom everyone agrees is independent and disinterested—made his decisions based on what Gould thought was best for Reading and its stockholders, regardless of how that decision impacted the long-running battle between Plaintiff and his sisters over control of Reading.

In response, Plaintiff filed a brief that closely resembles an opposition to a motion to dismiss. Almost across the board, Plaintiff simply repeats the unsubstantiated allegations of his Second Amended Complaint. But Plaintiff can no longer rely on the allegations in his complaint. To defeat summary judgment, Plaintiff must verify his allegations with admissible evidence demonstrating that there is a genuine issue of material fact. Plaintiff has utterly failed to do that here.

Indeed, even the scant 70 pages of evidence Plaintiff relies on reflect grossly mischaracterized testimony and/or fail to support the few propositions for which Plaintiff provides evidentiary citations. Plaintiff has essentially abandoned contesting the evidence. Instead, he focuses most of his efforts on a few overarching legal arguments that he contends undermine Gould's Motion for Summary Judgment. But Plaintiff's legal arguments have already been soundly refuted by courts.

First, because he cannot show that Gould acted with intentional misconduct, fraud, or a knowing violation of law, Plaintiff claims he does not have to. Based on Delaware law, Plaintiff argues that Nevada's exculpatory provision (which requires Plaintiff show Gould acted with intentional misconduct, fraud, or a knowing violation of law) is not applicable here because it does

not apply to breach of duty of loyalty claims or claims for non-monetary damages. But the Nevada Supreme Court has already applied the exculpatory provision to both types of claims. Plaintiff therefore cannot avoid the exculpatory provision, and as discussed in Gould's Opening Brief, he cannot meet its strictures as to Gould, who always tried to make the best possible decision for Reading and its stockholders.

Second, in a misguided attempt to survive summary judgment just by muddying the waters, Plaintiff argues that the Court cannot separately consider each of the alleged breach of duty claims because Plaintiff alleges that all of the actions were part of a continuing course of conduct taken for entrenchment purposes. But the very cases he relies on make clear that even where a continuing course of conduct taken for entrenchment purposes is alleged, courts still separately analyze each separate allegedly wrongful act. As discussed in Gould's Opening Brief, none of Plaintiff's claims can survive such separate analysis because the actual facts demonstrate that Gould acted consistently with his fiduciary obligations.

Moreover, Plaintiff's argument that Gould participated in a continuing course of wrongful conduct for entrenchment purposes that *began with Plaintiff's termination* is wholly illogical. As noted, unlike the other director-defendants, Gould voted *against* Plaintiff's termination. Plaintiff appears to be upset that Gould subsequently, when in Gould's view appropriate and in the best interest of Reading, sometimes voted the same way as Plaintiff's sisters. But voting in a different manner than Plaintiff does not mean that Gould is participating in his sisters' alleged scheme. Plaintiff's case is not based on any facts about Gould's decision making; it is based on what Plaintiff views as effective strategy in his war with his sisters. Indeed, Plaintiff himself cannot decide when Gould supposedly joined this alleged conspiracy. On one page of his brief, he claims that Gould joined the conspiracy in April 2015. Opp. at 2. On the very next page, he alleges that "Gould's sad role as collaborator" did not begin until June 18, 2015. Opp. at 3. In the very next sentence, Plaintiff contends that "Gould's role as collaborator . . . began soon thereafter." *Id.* Of course, even though he does not know whether or when Gould joined this alleged conspiracy, Plaintiff still sues Gould for various breaches of fiduciary duty throughout this period. Plaintiff's inconsistency cuts to the heart of the matter. Plaintiff does not know when Gould joined this

purported conspiracy, because Gould never did. To the contrary, every independent person who has looked at Gould's actions, including Plaintiff's own expert, minority shareholders, and Reading's contact from the CEO search firm, has concluded that Gould made decisions based on the merits of the issue at hand and that he did his best to make the best decisions for Reading under challenging circumstances. Plaintiff has presented no admissible evidence to the contrary and as such, summary judgment should be granted.

II. ARGUMENT

A. Plaintiff's Overarching Legal Arguments Are Specious.

1. The Court Must Analyze Each Alleged Breach Of Duty Separately, Regardless Of Whether Plaintiff Has Alleged "Entrenchment" Motives.

In his Opening Brief, Gould separately analyzed each of Plaintiff's allegations that Gould breached his fiduciary duty and demonstrated that the undisputed material facts relevant to each alleged breach establish that Plaintiff cannot prevail on any of his claims. Rather than take this on, Plaintiff pivots in an effort to escape the analysis altogether. He now argues that the motion for summary judgment should be denied because Plaintiff does not allege a series of unrelated fiduciary breaches, but an ongoing course of self-dealing undertaken for entrenchment purposes and all of the actions must assessed collectively. Opp. at 1, 10-11. This is both legally and factually wrong.

First, there is no legal basis for Plaintiff's argument. The cases he relies upon actually *refute* his argument. For example, Plaintiff relies on *In re Ebix, Inc. Stockholder Litigation*, 2016 WL 208402, at *1, 5 (Del. Ch., Jan. 15, 2016) and claims that the court there rejected the contention that bylaw amendments should be viewed individually, rather than collectively. Opp. at 11. But in *Ebix,* the plaintiffs alleged that the director-defendants took a whole series of wrongful corporate actions, including the execution of a credit agreement containing a proxy put, entry into a director nomination agreement, and the unilateral adoption of "a bundle of bylaws." *Id.* Despite similar allegations that it was a course of conduct undertaken for entrenchment purposes, the court looked separately at each of the actions that the plaintiffs contended were undertaken for entrenchment purposes. *Id.* at 16-21. And the court reached different results for

the different transactions—despite an entrenchment argument made to the whole series of transactions. Specifically, the court held that plaintiffs failed to state a claim with respect to the director nomination agreement, but did state a claim with respect to the bylaw agreements. *Id.* Contrary to Plaintiff's suggestion, the only reason the various bylaw amendments were considered together is because they were all enacted on the same day. *Id.* Plaintiff's entrenchment argument cannot be squared with *Ebix.* [1]

Moreover, Plaintiff clearly knows that his argument is invalid and that breaches of duty can and must be individually analyzed, because Plaintiff himself filed a motion for partial summary judgment against Gould based on breach of duty with respect to Plaintiff's termination (even though Gould voted against his termination). If, as Plaintiff now suggests when he is struggling to respond to Gould's motion, it is not possible to parse out each of the claims separately whenever there is an entrenchment motive alleged, there would be no basis for Plaintiff to file his motion for partial summary judgment. Plaintiff's theory is legally unsound. As in *Ebix,,* this Court should separately analyze each claim for breach of fiduciary duty and determine whether Gould made a decision based on rational business purposes. *See Sinclair Oil Corp v. Levien*, 280 A.2d 717, 720 (Del. 1971) (A director's "decisions should not be disturbed if they can be attributed to any rational business purpose.").[2]

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[1] Plaintiff also relies on a case stating that allegations about independence can be considered together, even if the various factors on their own would not show a lack of independence. *Cal. Pub. Emps. Ret. Sys. v. Coulter*, 2002 WL 31888343, at *9 (Del. Ch., Dec. 18, 2002). This does not show that breaches of fiduciary duty claims should not be separately analyzed as distinct claims. Plaintiff relies on *Chrysogelos*, *v. London,* where, unlike here, the plaintiffs alleged a separate count for entrenchment. *Chrysogelos v. London*, 1992 WL 58516, at *4 (Del. Ch., Mar. 25, 1992). Unlike with Gould, the defendants there were in essence *controlling* shareholders. *Id.* at *1. And the entrenchment motives were focused on maintaining control of the company with the ability to appoint board members, not merely hanging on to one's own board seat. *Id.* at *1, 9. The only transactions analyzed together directly impacted the ability of an outside party to take over the company. *Id.* That says nothing about whether a court must collectively analyze a year of ordinary corporate matters such as making SEC filings, forming committees, appointing directors and approving executive compensation in a situation where control of the company is not at stake for the defendant. And Plaintiff's sole remaining case on this point deals only with a single transaction and is also inapposite. *Carmody v. Toll Brothers, Inc.,* 723 A.2d 1180 (Del. Ch. 1992).

[2] Plaintiff also argues generally that the business judgment rule is not the correct standard to apply, because Adams and Kane were not independent and disinterested. Under Nevada law,

Second, even if there were any legal significance to Plaintiff's claim of entrenchment motives (and there is not), there is no factual basis for Plaintiff's claims as to Gould. While Plaintiff *alleges* in his brief that Gould acted under entrenchment motives, he does not cite any actual *evidence* that Gould had entrenchment motives. And, as Gould explained in his opening brief, there were legitimate business reasons for each action Gould took, and in each case, he believed he was acting in the best interests of the Company. Plaintiff does not provide any evidence that could explain why Gould—who both spoke out against and voted against Plaintiff's termination—would suddenly, the very same day of the termination vote—start acting out of entrenchment motives in approving the reconstitution of the Executive Committee. Indeed, the evidence in the case (as opposed to Plaintiff's allegations) shows that Gould had no particular desire to remain on the Board such that he would abandon his fiduciary duties. After all, Gould had already stepped down from the RDI Board once before, and he had to be recruited to come back. Mot. at 1; Ex. 49 at 15:1-8. And Plaintiff does not and cannot show that Gould had any financial reasons that he needed to stay on the Board. *See* Opp. at 10-11. This is not a motion to dismiss, and it is no longer sufficient to just *say* that Gould acted for entrenchment purposes. Because Plaintiff cannot point to any *evidence* that Gould acted for entrenchment purposes, for factual reasons, as well as legal reasons, his entrenchment argument cannot save his breach of fiduciary duty claims against Gould.

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there is a presumption that the business judgment rule applies. *See* Mot. at 14-15. As discussed below, Plaintiff provides no *evidence* that Adams and Kane were not independent and disinterested, and therefore, he has not rebutted the presumption that the business judgment rule applies. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 603, 172 P.3d 131, 134 (2007) ("[I]n order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific fact that show a genuine issue of material fact."). In any event, as discussed in the Opening Brief, the evidence shows that Kane is independent and disinterested. Mot. at 19, n.11.

2. Nevada's Exculpatory Statute Applies To All Breach Of Fiduciary Duty Claims, Including Breaches Of The Duty Of Loyalty.

Gould's Opening Brief made it very clear that there is simply *no* evidence that he acted with intentional misconduct, fraud, or a knowing violation of law—a necessary element to establish individual liability. So Plaintiff tries to argue that Nevada's exculpatory statute does not apply to breach of duty of loyalty claims in order to avoid to avoid the issue altogether. The Nevada Supreme Court, however, has explicitly rejected Plaintiff's argument. The Nevada Supreme Court held that to hold "a director or officer individually liable, the shareholder must prove that the director's breach of his or her fiduciary duty of loyalty involved intentional misconduct, fraud or a knowing violation of law." *In re Amerco Derivative Litig.*, 252 P.3d 681, 701 (Nev. 2011) (dismissing claim that directors knowingly signed misleading and incomplete public filings because Plaintiffs did not demonstrate that respondents "engaged in intentional misconduct or fraud").

Plaintiff ignores this binding precedent cited in Gould's Opening Brief in favor of several Delaware cases. Opp. at 27. These Delaware cases have no precedential or persuasive value where, as here, they contradict a Nevada Supreme Court decision. Moreover, the Delaware case law is all based on the Delaware exculpatory statute. Unlike the Nevada exculpatory statute, however, the Delaware statute explicitly states that it does not apply to the duty of loyalty.

Specifically, Delaware's exculpatory provision, provides

> A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) *For any breach of the director's duty of loyalty* to the corporation or its stockholders.

8 Del. Code § 102(b)(7) (emphasis added). Nevada's statute, by contrast does not contain such a limitation:

> Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its

> stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it is proven that:
>
> (a) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and
>
> (b) The breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

Nev. Rev. Stat. § 78.138(7). Section 78.138(7) has specifically enumerated exceptions. None of these exceptions is a breach of the duty of loyalty. The Delaware cases are simply inapplicable here.

Plaintiff's argument is especially disingenuous given that his own expert in this case confirmed that Nevada law differs from Delaware law in allowing its exculpatory provisions to be used in breach of duty of loyalty cases: "Nevada allows exculpation for a breach of the duty of loyalty. Delaware does not." Ex. 52 at 8:9-11.

In short, Nevada's exculpatory statute applies to Plaintiff's claims based on an alleged breach of the duty of loyalty. As discussed in Gould's Opening Brief and below, Plaintiff cannot establish any of his claims for breach of fiduciary duty because there is no evidence that Gould acted with intentional misconduct, fraud, or a knowing violation of the law.

3. Nevada's Exculpatory Statute Applies To All Breach Of Fiduciary Duty Claims, Even Those Not Seeking Monetary Damages.

Plaintiff also relies on yet another strained and misguided argument about Nevada's exculpatory statute in his efforts to avoid the "intentional misconduct, fraud, or knowing violation of law" standard. But again, his argument is based exclusively on the narrower Delaware exculpatory provision. In particular, Plaintiff contends that the Nev. Rev. Stat. § 78.138(7) applies only to monetary damages and not other types of harm to the company.[3] But the Delaware case that he relies on is based on a Delaware provision, which specifies that it applies only to "monetary damages." 8 Del. Code § 102(b)(7) ("A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for *monetary damages* for breach of

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[3] This is also a strange argument because Plaintiff is seeking monetary damages.

fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director . . . for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law."). By contrast, the Nevada statute states that directors are not individually liable for "any damages." Nev. Rev. Stat. § 78.138(7).

And of course, damages are a required element of a claim for breach of fiduciary duty under Nevada law. *Klein v. Freedom Strategic Partners, LLC,* 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009). Because damages are a necessary element of a breach of fiduciary duty claim, and Nevada's exculpatory provision applies to "any damages," the exculpatory provision necessarily applies to all kinds of damages, not just monetary damages. *See Amerco,* 252 P.3d at 701 (applying Nev. Rev. Stat. § 78.138(7)'s exculpatory provision to claims which requested injunctive relief). Plaintiff cannot escape the Nevada exculpatory statute here.

Moreover, the fact that Plaintiff has so contorted himself trying to avoid the exculpatory provision—ignoring both Nevada Supreme Court authority cited in Gould's Opening Brief and his own expert—demonstrates that he has no ability to *show* that Gould acted with intentional misconduct, fraud, or a knowing violation of law. As discussed in Gould's Opening Brief, Plaintiff's inability to do so entitles Gould to summary judgment on each one of Plaintiff's claims.

B. Plaintiff Does Not And Cannot Point To Any Genuine Issues Of Material Fact.

Plaintiff makes a half-hearted attempt to discuss the merits of some of the claims discussed in Gould's Opening Brief. As discussed below, he simply cannot show a genuine issue of material fact with respect to any alleged breach of fiduciary duty, and this is yet another basis to grant Gould's Motion for Summary Judgment.

1. Plaintiff Does Not Explain How Gould Could Have Breached Any Fiduciary Duties In Connection With His Termination When Gould Voted Against Plaintiff's Termination.

It is truly bizarre that Plaintiff continues to pursue claims against Gould related to his termination when Plaintiff concedes that Gould voted against Plaintiff's termination. Plaintiff's Opposition to Individual Defendant's Motion for Partial Summary Judgment No. 1 (Plaintiff's Termination) at 6. The law is clear: Plaintiff cannot show that Gould breached any fiduciary

duties with respect to Plaintiff's termination when Gould did not vote for termination. See *In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995) (refusing to hold directors liable for board decisions, where they abstained from the voting process related to a challenged board action); *In Re Wheelabrator Technologies, Inc., Shareholders Litigation*, 1992 WL 212595, at *10 (Del. Ch. Sept. 1, 1992) (same); *Citron v. E.I. du Pont de Nemours & Co.*, 584 A.2d 490, 499 (Del.Ch. 1990) (same). *See also* Gould's Opposition to Plaintiff's Motion for Partial Summary Judgment.

Plaintiff now argues that Gould had advance warning from Adams "of what was afoot" and failed to take action to preserve the ombudsman process "as part of a scheme to threaten Plaintiff with termination, and if the threats failed, to terminate him." Opp. at 21.[4] This makes no sense. Plaintiff concedes that Gould wanted the ombudsman process to continue, spoke out against termination, and voted against termination. Plaintiff's Opposition to Individual Defendants MPSJ No. 1 (Plaintiff's Termination) at 7, 17, & n.2. Speaking out and voting against termination *were* actions to preserve the ombudsman process. And if Gould was truly "part of a scheme to threaten Plaintiff with termination and if the threats failed, to terminate him," Gould would have just voted to terminate him. There is absolutely no factual basis for Plaintiff's convoluted conspiracy theory to try and hold Gould liable for Plaintiff's termination. This is a straightforward matter. Gould voted against termination, and, as a result, he cannot be held liable for it.[5]

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[4] Plaintiff's claim that Gould had advance notice of a "scheme to seize control [of] RDI" is not supported by the *evidence*. Gould did not know that the Board was considering terminating Cotter as CEO, until Ellen Cotter circulated an agenda for the May 21, 2015 Board Meeting that read "Status of President and C.E.O." Ex. 6 at 30; Ex. 35 at 171:22-172:25. Plaintiff relies exclusively on a purported conversation in which Adams stated only that Adams himself had given up on Plaintiff—Adams did not say anything about what anyone else was thinking or doing. At that time, Gould told Adams that he disagreed and thought Plaintiff should be given more time. Appendix to Plaintiff's Opposition to Gould's MSJ at Ex. 1, 83:12-90:10. Knowing that Adams had given up on Plaintiff did not give Gould any notice of what anyone else on the Board thought or planned to do.

[5] Plaintiff argues in a fact section that Gould knowingly approved misleading minutes from the meetings discussing his termination. Opp. at 5. The relevance of this discussion (which appears in a section on the CEO search) is unclear. Moreover, Plaintiff's assertion is not supported by the evidence. Plaintiff argues that Plaintiff objected to the minutes and said that they were a dishonest

2. The Undisputed Facts Establish That Gould Did Not Breach Any Fiduciary Duty With Respect To The Reconstitution Of The Executive Committee.

Plaintiff argues that the reconstitution of the Executive Committee was a breach of duty because it excluded directors from decision making. Opp. at 25-26. Although his Opposition does not specify which directors were excluded, Plaintiff's complaint alleges that the purpose of reconstituting the executive committee was to limit the participation of Gould, Storey, and Plaintiff in Reading's corporate governance. SAC ¶¶ 99, 183(c). Plaintiff does not cite to even a single piece of *evidence* to prove that this was the purpose for reconstituting the Executive Committee—he just relies on unsupported assertions of his litigation position. Opp at 3, 25-26 (fact and argument section discussing Executive Committee). As Gould pointed out in his Opening Brief, Plaintiff's theory is controverted by the evidence that Gould was, in fact, asked to serve on the Executive Committee. He turned it down because he did not have enough time. Mot. at 16.[6] Plaintiff does not dispute this fact. Opp at 3, 25-26. Because Gould was asked to serve on

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fiction. Opp. at 5. He contends that *Storey* abstained from approving the minutes, and that *Storey* testified that he viewed the minutes as "materially inaccurate," and that it "would have taken him hours to correct them." *Id.* First, the evidence Plaintiff relies on actually demonstrates that Storey never said that he viewed the minutes as materially inaccurate nor stated that it would take hours to correct them. Appendix of Exhibit in Support of Plaintiff's Opposition to Gould's Motion for Summary Judgment, Ex. 5. Rather, he stated that the minutes were circulated months later and were quite long, and it would have been difficult to make any kind of meaningful comment around changing them. *Id.* He did not say that any changes would have been material. *Id. Nor did he say that he communicated these thoughts to anyone. Id.* Storey did not vote *against* approving the minutes, as one would expect, if he viewed them to be materially inaccurate. *Id.* He merely abstained. *Id.* From Storey's view and Plaintiff's own view, Plaintiff somehow concludes that *Gould* understood that the minutes were false and purposefully so, but voted to approve them anyway. But Gould testified that while he was aware that Plaintiff had taken issue with the accuracy of the minutes, he did not recall some of the things that Cotter, Jr. referred to. While he did recall some of the other specifics that Cotter, Jr. referred to, he felt that the minutes, as drafted, substantially reflected what had occurred. Ex. 50 at 474:14-475:13. Corporate governance expert Dr. Albert Osborne opined that Board Minutes are not a word-for-word recitation of what was stated, but rather intended to generally reflect the discussion and decisions that occurred. As a result, Osborne concluded that Gould's approval of the Board Minutes here was consistent with the care and diligence one would expect from a director. Ex. 30 at 448-449 ¶ C(a) . There is no contrary expert opinion on custom and practice with respect to Board Minutes.

[6] Citations to "Mot." refer to Gould's Motion for Summary Judgment. Citations to "Opp." refer to Plaintiff's Opposition to Gould's Motion for Summary Judgment. Citations to "Ex." refer to the Exhibits to the Appendix In Support of Gould's Motion for Summary Judgment or to the attached Declaration of Shoshana E. Bannett in Support of Gould's Reply In Support of Motion

the Executive Committee, it is clear that the purpose was not to exclude Gould, Storey, and Cotter, Jr., and summary judgment is therefore appropriate.[7]

3. The Undisputed Facts Establish That Gould Did Not Breach Any Fiduciary Duty With Respect To The Approval Of Payments To Ellen Cotter, Margaret Cotter, Or Guy Adams.

In Gould's Opening Brief, he demonstrated that his approval of (1) Ellen and Margaret Cotter's executive pay, (2) Margaret Cotter's one-time $200,000 payment, and (3) Guy Adams' bonus were not breaches of fiduciary duty, let alone breaches of duty involving intentional misconduct, fraud, or a knowing violation of law. Mot. at 25-27. Plaintiff does not respond to Gould's arguments or evidence on these topics whatsoever, and, as a result, summary judgment should be granted for the reasons stated in Gould's Opening Brief.

4. The Undisputed Facts Establish That Gould Did Not Breach Any Fiduciary Duty With Respect To Gould's Failure To Take Action To Remove Adams From The Compensation Committee Before May 2016.

Gould's Opening Brief also demonstrated that his failure to take action to remove Guy Adams from the Compensation Committee before May 2016 was not a breach of fiduciary duty, let alone a breach of duty involving intentional misconduct, fraud, or a knowing violation of law. Mot. at 27-28. Plaintiff also fails to respond to Gould's argument and evidence on this issue, and as a result, summary judgment should be granted for the reasons stated in Gould's Opening Brief.

5. The Undisputed Facts Establish That Gould Did Not Breach Any Fiduciary Duty With Respect To SEC Filings.

Plaintiff argues that Gould allowed RDI to disseminate misleading information in SEC filings and "chose to allow RDI SEC filings and press release [sic] that contained materially

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for Summary Judgment. The exhibits from both of Gould's briefs are sequentially numbered and paginated.

[7] Like Gould, Storey voted in favor of reconstituting the Executive Committee. It defies belief to think that he voted in favor of excluding himself. Ex. 7 at 34. James Cotter, Jr. was on the previous Executive Committee when he was CEO. It is not unusual to replace the former CEO with the current CEO on committees, because the CEO is typically a member of a board's executive committee. Ex. 47 at 722-723 ¶ 42.

misleading if not inaccurate information to remain uncorrected." Opp. at 6.

Moreover, Plaintiff does not cite any evidence (as opposed to unsubstantiated allegations) to prove that any RDI SEC filings were *materially misleading*. In fact, Plaintiff does not even provide evidence that the supposed SEC filings even happened. He does not attach *any* of the purported SEC filings. He merely cut and pasted the allegations from his brief. Opp. at 6-8. As Gould explained in his Opening Brief, many of the alleged "misleading" SEC filings were neither inaccurate nor misleading, but were merely accurate portrayals of management positions. Mot. at 28-30 (citing *Michelson v. Duncan,* 407 A.2d 211, 222 (Del. 1979) (not erroneous to fail to inform shareholders of statements which were inconsistent with management positions)).[8]

Plaintiff also does not address or provide evidence to refute Gould's argument that Plaintiff alleges only that the remaining allegedly misleading SEC filings should have contained additional information, but under Nevada law, one cannot state a claim for breach of fiduciary duty merely by alleging that public filings do not contain enough information. Mot. at 29.

In addition, Plaintiff does not address or provide evidence to refute Gould's evidence that with respect to his own facts and any important parts of the filings that he had knowledge of, Gould reviewed and verified, and provided comments or corrections when he had them, which was reasonable and consistent with the obligations of a director.[9] *See* Mot. at 30.[10]

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[8] Plaintiff argues that the duty of disclosure applies here, and under the duty of disclosure, there is a duty to update disclosures to stockholders and communicate with complete candor. Opp. at 13. But the duty of disclosure typically applies to requests for shareholder action. *Zirn v. VLI Corp.,* 681 A.2d 1050, 1056 (Del. 1996) (citing *Stroud v. Grace*, Del. Supr., 606 A.2d 75, 84 (1992)). None of the Forms 8-K or press releases mentioned in Plaintiff's Opposition request shareholder action. Opp. at 6-8.

[9] Plaintiff did not designate an expert witness to rebut this custom and practice evidence.

[10] Plaintiff appears to be claiming that Gould knew that the statement in the June 18, 2015 Form 8-K that Plaintiff was required to resign as a director upon termination of his employment as an executive officer was inaccurate, but that he did not take any action. Plaintiff does not cite any evidence to demonstrate that Gould took no action with respect to the SEC filing. Opp.at 6. And the actual evidence is to the contrary. As Plaintiff concedes, Gould testified that he told Ellen Cotter and Craig Tompkins at the June 12, 2015 Board Meeting that he did not believe that Plaintiff was required to resign as a director. Opp. at 6. And Gould also testified that he provided comments or corrections to SEC filings when he had them. Mot. at 30. Management apparently had a different interpretation than Gould and filed the 8-K that reflected Management's position. But Gould did not breach his fiduciary duty by speaking out and informing Ellen Cotter and Craig Tompkins of Gould's own view.

Finally, Plaintiff does not dispute that Gould was entitled to and did rely on Reading's counsel and the directors and executives most directly involved in the matters addressed in SEC filings for matters that he was not involved with. *See* Opp. at 24-25. Plaintiff argues only that Gould is relying on advice of counsel without producing the advice. *Id.* But as Gould explained in his Opposition to Plaintiff's Motion in Limine, Plaintiff never asked Gould to provide any further information or documents regarding such "advice of counsel." And even if he had, there is no further information or documents to provide. Gould already explained that he relied upon counsel to vet the information in the SEC filings. There are no documents or additional communications. Because it is undisputed that Gould was permitted to, and reasonably relied upon counsel to, vet the SEC filings at issue, and that his practice with respect to matters that he had knowledge about was reasonable, the claims related to the SEC filings should be summarily adjudicated.

6. The Undisputed Facts Establish That Gould Did Not Breach Any Fiduciary Duty With Respect To The Appointment Of Codding And Wrotniak.

Plaintiff does not respond, discuss, or provide any evidence to contradict Gould's argument that he did not breach his fiduciary duties with respect to the appointment of Michael Wrotniak. Opp. at 4, 21-22. In fact, the only thing that he says about Wrotniak at all is that Wrotniak was "a long-time personal friend of Margaret [Cotter]." Opp. at 4. Of course, Plaintiff does not cite *any evidence* to support that statement. *Id*. Plaintiff therefore does not controvert the *evidence* cited in Gould's Opening Brief that Margaret Cotter did not have an independent friendship with Wrotniak, but only knew him through a mutual friend. Mot. at 7. Nor does Plaintiff respond to Gould's case law establishing that it is not disqualifying that a director have a connection to another director or officer, especially as tangential a relationship between Codding and Wrotniak. Mot. at 17-18.

In addition, Plaintiff does not dispute that the only requirements to be a director under Nevada law and Reading's Bylaws is that a director must be 18 and a natural person, and Plaintiff does not dispute that Wrotniak satisfies those requirements. Plaintiff does not identify any issues

with the process in appointing Wrotniak. As a result, for all of the undisputed reasons stated in Gould's Opening Brief,[11] summary adjudication should be granted with respect to the appointment of Wrotniak.

Plaintiff fares no better with respect to the appointment of Codding. He summarily states without support that in Gould's motion for summary judgment, Gould "effectively admits that he did not . . . fulfill his duty of care," but that is not true. Opp. at 21. Gould's Opening Brief discussed in detail the lack of any admissible evidence from which a fact-finder could infer that Gould breached any of his fiduciary duties. Mot. at 16-20. Plaintiff does not explain what he means by that, but perhaps it is a reference to the argument in Plaintiff's "fact section" that Gould was advised of Codding's nomination only days before it happened, and "he objected to having inadequate time to perform his duties as a director," but agreed to add Codding to the Board anyway. Opp. at 4. But the testimony that Plaintiff relies on does not say that Gould felt he had *inadequate* time to perform his duties as a director. What the testimony actually reveals is that *counsel asked him* if he ever expressed the notion that the time afforded him to consider the director nominations were inadequate. And Gould rejected counsel's characterization, "Not exactly in those terms." Ex. 41 at 174:16-23. Instead, Gould noted that he expressed unhappiness that he was brought the information on short notice. *Id.* at 174:21-23. Gould never stated that he had inadequate time.

Moreover, Plaintiff does not dispute that there was a legitimate business reason for Gould to proceed with a decision on short notice—an impending proxy deadline. Mot. at 18; *see* Opp at 4, 21-22 (failing to discuss). And Plaintiff does not dispute that making a decision on an expedited basis under these circumstances is consistent with good governance practice because there is value to the stockholders in being able to vote on a full slate of directors. *Id.* Nor does Plaintiff dispute that under Nevada law, Gould was entitled to and did rely on the Special Nominating Committee here. Mot. at 18-19; *see* Opp at 4, 21-22 (failing to discuss).[12]

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[11] Mot. at 16-20.

[12] Plaintiff does acknowledge the existence of the Special Nominating Committee, although he

Plaintiff's only remaining argument on Codding's appointment is his erroneous contention that Nevada's exculpatory statute does not apply to breaches of the duty of loyalty, debunked above. As such, for the many reasons stated in Gould's Opening Brief, the claims against Gould relating to the appointment of Codding must also be summarily adjudicated. Mot. at 5-18; 18-20.[13]

7. The Undisputed Facts Demonstrate That Gould Did Not Breach Any Fiduciary Duties With Respect To The CEO Search.

Gould's Opening Brief walked through the CEO Search Process and selection of Ellen Cotter as permanent CEO in detail. Mot. at 8-11. Gould's Opening Brief also explained how and why the CEO search was conducted appropriately, how and why it was clear that Ellen Cotter did not direct the CEO search, the many rational business reasons for selecting Ellen Cotter as CEO, and the rational business reasons for asking Korn Ferry to stand down after the Search Committee, and the evidence that Gould did his best to select the best CEO for Reading. Mot. at 21-25. Plaintiff almost completely ignores Gould's evidence and arguments. Instead, based on his mischaracterizations of testimony, funny math, and the application of the wrong legal standard, he tells a fictionalized account of what transpired.

To begin with, Gould's Opening Brief cited evidence that Gould and McEachern are both independent. Mot. at 21. Plaintiff does not dispute that Gould and McEachern are independent,

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contends without evidence that it consisted of McEachern and Adams. Opp. at 4. As discussed in the Opening Brief, RDI's public filings state that the Nominating Committee consisted of Kane, Adams, and McEachern. In other sections of his Opposition brief, Plaintiff asserts with out any evidence that Kane and Adams are not independent. Opp. at 16. Nor does he provide any evidence that Kane or Adams are not independent in any of the motions that he incorporated by reference. As a result, he has not controverted the *evidence* cited in Gould's Motion, which established that Kane is independent. Mot. at 18, n.11. Plaintiff does not dispute that McEachern was independent. Because Kane and McEachern are both independent, the unanimous decisions of the Special Nominating Committee were made by a majority of independent and disinterested directors.

[13] Plaintiff argues that "the suggestion in Gould's motion . . . that a controlling shareholder's rights under NASDAQ Listing Rules somehow limits or eliminates Gould's fiduciary duties as a director is both nonsensical and, as shown herein wrong as a matter of law." Opp. at 2. This is a red herring. Gould's Motion noted only that the NASDAQ Listing Rules take into account the ability of the controlling shareholder has the right to select directors and therefore does not require a nominating committee. The point Gould was making was that the NASDAQ rules take into account a controlling shareholder's ability to select directors, so there was nothing wrong with Gould taking that information into account as one piece of the puzzle. Mot. at 16-20.

and he provides no *evidence* that they are not independent. Indeed, Plaintiff's own expert has testified that, based on the allegations in the Second Amended Complaint and deposition testimony, he could find insufficient facts to suggest to him that there was reasonable doubt about the independence or disinterestedness of Gould and McEachern. Ex. 52 at 127:14-128:3; 142:23-143:6.

Plaintiff's expert, the former Chief Justice of the Delaware Supreme Court, also testified that if a decision of the CEO Search Committee could be carried by two votes, as it could here, then the work of McEachern and Gould on the CEO Search Committee would be protected by the business judgment rule. Ex. 52 at 155:6-156:4. And Plaintiff's expert further testified that where, as here, you have two independent directors both deciding it is time to present a candidate, that would be perfectly fine. Steele Dep. at 156:9-16. In short, contrary to Plaintiff's claims in his Opposition Brief, the business judgment rule does operate to protect the work of the CEO Search Committee here. *See* Nev. Rev. Stat. § 78.138(7) ("Directors and officers, in deciding upon matters of business are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation."); *In re AgFeed USA, LLC*, 546 B.R. 318, 330 (Bankr. D. Del. 2016) (applying Nevada law and stating that under the business judgment rule, the complaint must allege facts establishing a decision that it seems essentially inexplicable on any grounds other than bad faith).[14] Plaintiff believes that it would have been better to have conducted the search differently. He would have had Korn Ferry run its proprietary assessment on all of the finalist candidates, and he would have selected a candidate that more closely matched the original Position Specification (even though he agreed that the position specification focused on the wrong experience). Mot. at

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[14] The full Board's decision to accept the recommendation and appoint Ellen Cotter as permanent CEO is also protected by the business judgment rule, because he has not provided any *evidence* (as opposed to allegations), that calls into question the independence and disinterestedness of a majority of directors that voted. There were eight votes cast. Mot. at 11. Plaintiff's failure to introduce admissible evidence regarding the independence and disinterestedness of McEachern, Gould, and Kane in order to controvert Gould's evidence that McEachern, Gould, and Kane were independent is discussed above. Similarly, Plaintiff does not introduce any evidence in his opposition to Gould's motion to dispute the evidence offered by Gould that Codding and Wrotniak are independent. Mot. at 16-17. Because there were five independent and interested directors on the full Board that voted to appoint Ellen Cotter as permanent CEO, the decision was made by a majority of independent and disinterested directors and is entitled to the business judgment rule.

23. But, as discussed in Gould's Opening Brief, the CEO Search Committee was not required to conduct a perfect search. Rather, they need only show that there were rational business reasons for their work and decision making. Mot. at 21-25.

Here, Plaintiff *does not and cannot dispute* that the reasons that the CEO Search Committee selected Ellen Cotter—that she had done a good job as interim CEO, was intelligent, had a great reputation, was well-liked at Reading, had the kind of personality that could help Reading get through the difficulties they had been having, and had experience in operations and theater, and would represent stability—are rational business reasons to select a CEO. Mot. at 21-25. His entire Opposition depends on his incorrect assumption that the entire fairness standard will be applied to the work of the CEO Search Committee.

Moreover, many of the alleged facts that Plaintiff relies on for his claim that there is evidence that the work of the CEO Search Committee would not pass muster on an entire fairness review, are not supported by the record. For example, Plaintiff contends that Ellen Cotter "obviously" only met 20% of the qualifications in the position specification, without analysis. Opp. to Individual Defendants' MPSJ No. 5 (Appointment of Ellen Cotter as CEO) at 8. But a comparison of the position specification, with the reasons given by the Board and Ellen Cotter' experience, actually show that she met nearly 80% of the qualifications, which, as Robert Mayes testified, is typical. Ex. 44 at 59:12-16.

Position Specification	**Ellen Cotter**
Minimum of 20 years of relevant experience within the real estate industry, with at least five years in an executive leadership position within dynamic public or private company environments	
Proven track record in the full cycle management of development investments, from planning and entitlement through infrastructure development, land sales, joint ventures, and vertical construction with a proven record of value creation	
A track record of raising debt and equity capital, with additional exposure to joint ventures, M&A, and institutional/investor relations	Ellen Cotter worked on M&A transactions as a lawyer. Ex. 53 at 16:5-11. Ellen Cotter's experience and involvement in the Company's public reporting activities and working in a public company environment. Ex. 4.
Proven management and leadership skills with a track record of successfully recruiting, motivating, mentoring, and retaining high performance talent within a multi-disciplinary organizational environment	Ellen Cotter's experience and performance as a senior executive of the Company, and her performance since June 12, 2015, as the Company's interim President and Chief Executive Officer. Ex. 4.
Strategic thinking capability to assess macro trends that will impact RDI's business, and ability to anticipate and act ahead of the markets, and make complex decisions to protect and	Ellen Cotter's experience and performance as a senior executive of the Company, and her performance since June 12, 2015, as the Company's interim President and

Position Specification	Ellen Cotter
optimize the company's portfolio and performance	Chief Executive Officer and the scope and extent of Ellen Cotter's knowledge of the Company, its assets, personnel and operations, including its overseas and real estate assets, personnel, and operations. Ex. 4..
A hands on "player I coach" orientation with the ability to lead by example and via consensus building	The performance of Ellen Cotter in uniting the current senior management team behind her leadership under the unusual and stressful circumstances of recent months. Ex. 4.
Results orientation and fiduciary mindset	Ellen Cotter's experience and performance as a senior executive of the Company, and her performance since June 12, 2015, as the Company's interim President and Chief Executive Officer. Ex. 4.
Exceptional communication skills and ability to inspire	"She had the kind of personality that could help get through some of these difficulties dealing with other people." Ex. 42 at 368:8-24.
Unquestioned integrity	"She had a great reputation . . .we all thought highly of her, every one of us." Ex. 42 at 368:8-24.
Ideally, in possession of substantive relationships among domestic and global debt and equity sources	
Ideally, an executive who has been involved in a multi-faceted, highly complex entity level "disruption" and has the energy and emotional resilience to lead, deal with, and make decisions on difficult issues	The performance of Ellen Cotter in uniting the current senior management team behind her leadership under the unusual and stressful circumstances of recent months. Ex. 4.
Ideally, experience in brand development	Ellen M. Cotter has been with our Company for more than 17 years, focusing principally on the cinema operations aspects of our business. During this time period, we have grown our Domestic Cinema Operations from 42 to 248 screens, and our cinema revenues have grown from US$15.5 million to US$125.7 million. Ex. 28 at 324. For more than the past ten years, Ms. Cotter has served as the Chief Operating Officer (COO) of our domestic cinema operations, in which capacity she has, among other things, been responsible for the acquisition and development, marketing and operation of our cinemas. *Id.* at 328.
Ideally, C-suite-level experience within a public company	Ellen Cotter's experience and performance as a senior executive of the Company, and her performance since June 12, 2015, as the Company's interim President and Chief Executive Officer. Ex. 4.
A significant depth of international experience, and the ability to work with diverse cultures in diverse places	The scope and extent of Ellen Cotter's knowledge of the Company, its assets, personnel, and operations, including its *overseas* and real estate assets, personnel, and operations. Ex 4. Prior to her appointment as COO Domestic Cinemas, she spent one year in Australia and New Zealand, working to develop our cinema and real estate assets in those countries. Ex. 28 at 328.

Additionally, Plaintiff contends that in an effort to fabricate evidence suggesting Korn Ferry had vetted Ellen Cotter, Reading counsel and CEO Search Committee Recording Secretary *Craig Tompkins* instructed Korn Ferry to create an Ellen Cotter resume in the Korn Ferry format *after Ellen Cotter had been selected.* Opp. at 23. Further, he claims that Korn Ferry representative Robert Mayes was *unequivocal* that Tompkins had requested the resume in January after Ellen Cotter had been selected. Opp. to Individual Defendant's MPSJ No. 5 (Appointment of

Ellen Cotter as CEO) at 9. Far from being unequivocal, Mayes did not testify at all about when Tompkins *requested* that he put a candidate report together. He was asked only about when the report was *prepared* and he testified only that "he *thinks* it was just after the New Year." Ex. 51 at 64:15-17 (emphasis added). And even if he is correct that he prepared the report just after the New Year, that is still before Ellen Cotter was presented to the full board on January 11, 2016. Moreover, Mayes did not testify that "he created a resume in the Korn Ferry format," as Plaintiff contends, but rather that he "formulated a resume from the internet," *also* "did some basic internet research," *and* then "wrote a brief overview of her candidacy based on [his] interaction with her as a search committee member." Mayes Dep. at 64:5-10. The inferences that Plaintiff relies upon are drawn from evidence that simply does not exist.[15]

Plaintiff also argues that although Gould stated that one of the reasons for asking Korn Ferry not to undertake its proprietary assessment was to save some money, Reading did not actually save any money because Mayes testified he was paid for the proprietary assessment. Opp. to Individual Defendant's MPSJ No. 5 (Appointment of Ellen Cotter as CEO) at 9. But that ignores the evidence cited in Gould's motion that Reading did save $35,000 by avoiding the proprietary assessment. Mot. at 10.[16] And it ignores the evidence cited in Gould's motion that even Korn Ferry did not think that the proprietary assessment would be a useful evaluation tool for Ellen Cotter and suggested that it be used only as an onboarding tool. Mot. at 10. Plaintiff also belittles the idea of saving $35,000. Opp. to Individual Defendant's MPSJ No. 5 (Appointment of Ellen Cotter as CEO) at 9. But spending an additional $35,000 on an assessment the CEO Search Committee knew it would not need would be a waste of corporate assets.

The above examples are just a few of Plaintiff's blatant mischaracterizations of the evidence on the CEO Search. The fact that Plaintiff has to engage in this kind of fictionalization of the evidence demonstrates that he cannot defeat summary judgment based on the actual

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[15] It is also unclear why anything *Tompkins* did or did not do is relevant to whether *Gould* acted with intentional misconduct, fraud, or a knowing violation of law.

[16] The Mayes testimony and the invoices showing Reading saved $35,000 are not in conflict because Korn Ferry did receive $35,000 out of the $70,000 fee.

evidence.

Finally, Plaintiff does not respond to Gould's argument that there is no evidence that he acted with intentional misconduct, fraud, or a knowing violation of law. Plaintiff ignores the evidence that even Mayes testified that Gould took the CEO Search process seriously, attended all Search Committee calls, that he was not absent and that he never did anything that made him think that Gould was doing anything other than trying to find the right person for the job. Mot. at 25. That is confirmed by Plaintiff's expert, who as discussed above, testified that there is no evidence to cause reasonable doubt that Gould was not independent. Plaintiff's expert defines an independent director as one whose "decision is based on the merits of the matter at hand." Steele Rep. at 24. If Gould made his CEO Search recommendation and appointment based on the merits of the matter at hand, then he did not act with intentional misconduct, fraud, or a knowing violation of law. Based on actual facts, as opposed to allegations and mischaracterizations of the record, Plaintiff cannot show that Gould breached his fiduciary duty with respect to the appointment of Ellen Cotter as permanent CEO, let alone that he did so with intentional misconduct, fraud, or a knowing violation of law, and, as a result, summary judgment must be granted.

8. The Undisputed Facts Demonstrate That Gould Did Not Breach Any Fiduciary Duties With Respect To The Unsolicited Expression of Interest.

Gould's Opening Brief did not separately analyze Plaintiff's claims regarding the unsolicited expression of interest, but rather incorporated the Individual Defendants' Motion for Partial Summary Judgment on this topic, which Gould joined. Plaintiff devotes a single paragraph to addressing these claims and does not cite to any evidence. Gould responds by incorporating by reference Section II.C of the Individual Defendants' Consolidated Reply in Support of their Motions for Partial Summary Judgment Nos. 3-6.

III. CONCLUSION

For the foregoing reasons, and the reasons stated in the Defendant William Gould's Motion for Summary Judgment, Individual Defendants' Motion for Partial Summary Judgment

No. 3, and Section II.C of the Individual Defendants' Consolidated Reply in Support of their Motions for Partial Summary Judgment Nos. 3-6, all of Plaintiff's claims against Defendant Gould should be summarily adjudicated in favor of Gould.

October 21, 2016

BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C.

By _____

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Attorneys for Defendant William Gould

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Cir. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the forgoing **Defendant William Gould's Reply in Support of Motion for Summary Judgment** to be filed and served via the Court's Wiznet E-Filing system. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 21 day of October, 2016.

Kaitlin Arnold
EMPLOYEE

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER. JR,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

DECLARATION OF SHOSHANA E. BANNETT IN SUPPORT OF DEFENDANT WILLIAM GOULD'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with Defendant William Gould's Reply in Support of Motion for Summary Judgment]

Hearing Date: November 1, 2016
Hearing Time: 8:30 A.M.

Assigned to Hon. Elizabeth Gonzalez, Dept. XI

Trial Date: November 14, 2016

DECLARATION OF SHOSHANA E. BANNETT

I, Shoshana E. Bannett, declare as follows:

1. I am an active member of the Bar of the State of California and counsel with Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, a professional corporation, attorneys of record for Defendant William Gould in this action. I make this declaration in support Defendant William Gould's Reply in Support of Motion for Summary Judgment . Except for those matters stated on information and belief, I make this declaration based upon personal knowledge and, if called upon to do so, I could and would so testify.

2. Attached hereto as **Exhibit 47** is a true and correct copy of excerpts of Expert Witness Alfred E. Osborne, Jr., Ph.D.'s Rebuttal to the Expert Report of Myron Steele, dated September 28, 2016.

3. Attached hereto as **Exhibit 48** is a true and correct copy of excerpts of Expert Witness Myron T. Steele's Expert Report, dated August 25, 2016.

4. Attached hereto as **Exhibit 49** is a true and correct copy of excerpts of the Deposition of William Gould, Volume 1, taken June 8 , 2016.

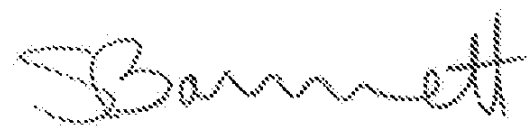
5. Attached hereto as **Exhibit 50** is a true and correct copy of excerpts of the Deposition of William Gould, Volume 2, taken June 29, 2016.

6. Attached hereto as **Exhibit 51** is a true and correct copy of excerpts of the Deposition of Robert Mayes, taken August 18, 2016.

7. Attached hereto as **Exhibit 52** is a true and correct copy of excerpts of the Deposition of Myron T. Steele, taken October 19, 2016.

8. Attached hereto as **Exhibit 53** is a true and correct copy of excerpts of the Deposition of Ellen Cotter, Volume 1, taken on May 18, 2016.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct, and that I executed this declaration on October 21, 2016, at Los Angeles, California.



Shoshana E. Bannett

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Cir. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that on this day, I caused a true and correct copy of the forgoing **Declaration of Shoshana E. Bannett in Support of Defendant William Gould's Reply in Support of Motion for Summary Judgment** to be filed and served via the Court's Wiznet E-Filing system. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this 21 day of October, 2016.

Kaitlin Arnold
EMPLOYEE

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EXHIBIT 47

DR. ALFRED E. OSBORNE, JR.'S REBUTTAL TO THE EXPERT REPORT OF MYRON STEELE

Executive Committee Meetings were accepted by the full Board. JCOTTER 11389-11393.

41. Steele does not opine that the Executive Committee acted beyond its charter or took actions that were improper under Nevada law or RDI's Bylaws. Instead, Steele contends that the Executive Committee was problematic, because the purpose of the Executive Committee was to minimize the involvement of JJC and the other directors who voted against his termination. Steele Rep. at 33. But WDG, who voted against terminating JJC, was asked by EC to join the Executive Committee. Gould Dep. at p. 25. WDG declined because he could not allocate the time that such a commitment might require. Gould Dep. at p. 25. That fact alone suggests to me that the purpose of the Executive Committee was not to exclude JJC, Storey, and WDG.

42. And I find no other real evidence of any effort by the Executive Committee to minimize the involvement of JJC, Storey, and WDG in the business affairs of the company. On the contrary, there is evidence that Board members not on the Executive Committee had access to the Executive Committee members. In addition, there are rational business reasons to not include a director, like Storey, on an executive committee because he lives in New Zealand, which could impede quick decision-making—one of the primary purposes of an executive committee. Finally, replacing the former CEO (JJC) with the current CEO (EC) is sensible and also

commonplace. The CEO is typically a member of a board's executive committee.

43. In sum, it is my opinion that an executive committee is an appropriate forum to make time-sensitive and/or routine decisions in between full board meetings and also for deeper, more focused examinations, analyses, and discussions of complex issues to later present to the full board for action. As such, in my opinion, WDG's, EC's, MC's, EK's, DM's, and GA's actions in voting to reactivate and populate the Executive Committee were appropriate and consistent with good governance practice and their obligations as directors.

VIII. THE BOARD'S RESPONSE TO THE UNSOLICITED EXPRESSION OF INTEREST

44. Justice Steele opines that "***[i]f*** a finder of fact finds that the Board's rejection of the Offer was not the product of an independent and disinterested majority, and [***if*** it] was born out of the desire to keep EC and MC … in office, then the rejection out of hand intentionally breached the duty of loyalty." Steele Rep. at 34 (emphasis added). This reasoning is flawed. As an initial matter, the first IF premise is wrong. Whatever assessment led to the Board's rejection was the product of an independent and disinterested majority. The second IF presumes that the rejected Offer was a result of some desire to keep EC and MC in their jobs. I have seen no evidence to support the second IF.

and internal candidates. The Spitz contentions are without merit and are not supported by the conduct of the RDI Board and its CEOSC.

Executed on September 28, 2016

ALFRED E. OSBORNE, JR.

EXHIBIT 48

I. Qualifications and Experience

I am a partner at Potter Anderson & Corroon LLP ("Potter Anderson"), one of the largest and most-recognized Delaware law firms with expertise in litigation and transactional matters involving Delaware corporations, Delaware limited liability companies, and other Delaware business entities. I am the former Chief Justice of the Delaware Supreme Court, serving in that capacity from 2004 until my retirement on November 30, 2013. Before serving as the Chief Justice, I served as a Justice on the Supreme Court, a Vice Chancellor of the Delaware Court of Chancery (Delaware's court of equity), and a Judge on the Delaware Superior Court (Delaware's general jurisdiction law court). I have presided over litigation involving major corporate, limited liability company and limited partnership governance disputes. I have written frequently on issues of corporate document interpretation and corporate governance, and I have published more than 300 opinions resolving disputes among members of limited liability companies, partners of limited partnerships, and between shareholders and management of both publicly traded and close corporations. Before my time as a judicial officer, I spent 18 years in private practice litigating before the Delaware courts.

I have served as an Adjunct Professor of Law at the University of Pennsylvania Law School and Pepperdine University Law School. I continue to serve as an Adjunct Professor at the University of Virginia Law School. I received my B.A. from the University of Virginia and my J.D. and LLM degrees from the University of Virginia School of Law. I also received an Honorary Doctor of Laws degree from the University of Delaware. A copy of my curriculum vitae is attached as Exhibit A to this report. Potter Anderson is being compensated at its standard rates for the work performed in connection with this report. My hourly rate for the matter is $1,075.00, and the hourly rate of Diva Bole, an associate who assisted me on the matter, is $310.00. Potter Anderson's

settlement of the litigation relating to the Trust.[175] If a finder of fact finds that they removed JJC as CEO, limited the ability of JJC, Storey, and Gould to participate in Board discussions, acted to ensure that they were appointed to their respective management positions, and used their positions as controlling stockholders to control the direction and actions of the Board in order to retain their positions in the Company and benefit financially, they were interested in the challenged actions from a Delaware law perspective.

Certain of the Directors May Not Be Independent

Independence, on the other hand, does not ask whether a corporate fiduciary "derives a benefit *from the transaction* that is not generally shared with the other shareholders. Rather, it involves an inquiry into whether the [corporate fiduciary]'s decision resulted from that director being *controlled* by another."[176] Control may exist where a corporate fiduciary has close personal or financial ties or is beholden to another.[177]

A director is independent if his decision is based on the merits of the matter at hand, rather than extraneous influences.[178] In determining whether a personal or financial interest compromises the independence of a director, the court must determine whether the conflict is material.[179] A friendship must rise to the level in which "the non-interested director would be more willing to risk his or her reputation than risk the relationship with the interested director."[180] A close personal friendship in which the director and the person with whom he or she has the questioned relationship

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[175] MC, 275-76.

[176] *Orman v. Cullman*, 794 A.2d at 25 n.50.

[177] *Id.*

[178] *Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014).

[179] *In re Orchard Enter. S'Holder Litig.*, 88 A.3d 1, 25 (Del. Ch. 2014).

[180] *Frank*, 2014 WL 957550 at *22.

(iii) If a finder of fact finds that the appointment of EC and MC to their respective current positions and the revised compensation and bonuses that they and Adams were given was not approved by an independent and disinterested majority, then entire fairness would apply and the Defendants, as controlling stockholders or those who acquiesced to the wishes of controlling stockholders, would be liable for a breach of loyalty if the finder of fact finds that the process used to grant the compensation and bonuses was not entirely fair; and

(iv) If a finder of fact finds that the Board's rejection of the Offer was not the product of an independent and disinterested majority, and was born out of the desire to keep EC and MC, the controlling stockholders, in office, then the rejection out of hand intentionally breached the duty of loyalty.

Myron T. Steele

Dated this 25th day of August 2016.

EXHIBIT 49

DISTRICT COURT

CLARK COUNTY, NEVADA

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

VIDEOTAPED DEPOSITION OF WILLIAM GOULD

TAKEN ON JUNE 8, 2016

VOLUME 1

JOB NUMBER 315485

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

Q. How long have you been a member of the RDI board of directors?

A. Well, I haven't -- it's been about, I would say, 15 years. But it wasn't a continuous time. There was a period of two or three years when I was not on the board. I was on the board and then I was off for two or three years and then was asked to come back.

Q. How did it come to pass that you left the RDI board?

A. At the time there was a question of needing independent directors to fulfill the requirements of the S.E.C.

And since our law firm at that time had done work for Reading, they felt it would be better that they get somebody totally independent.

Q. And do you -- do you now or have you ever served on a board of directors of any public company other than RDI?

A. No.

Q. Have you ever been a member of the board of directors of any other company?

A. Yes.

Q. How many?

A. Five.

REPORTER'S CERTIFICATE

I, PATRICIA L. HUBBARD, do hereby certify:

That I am a duly qualified Certified Shorthand Reporter in and for the State of California, holder of Certificate Number 3400, which is in full force and effect, and that I am authorized to administer oaths and affirmations;

That the foregoing deposition testimony of the herein named witness, to wit, WILLIAM GOULD, was taken before me at the time and place herein set forth;

That prior to being examined, WILLIAM GOULD was duly sworn or affirmed by me to testify the truth, the whole truth, and nothing but the truth;

That the testimony of the witness and all objections made at the time of examination were recorded stenographically by me and were thereafter transcribed by me or under my direction and supervision;

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

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

IN WITNESS WHEREOF, I have subscribed my name this 13th day of June, 2016.

PATRICIA L. HUBBARD, CSR #3400

EXHIBIT 50

DISTRICT COURT

CLARK COUNTY, NEVADA

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

VIDEOTAPED DEPOSITION OF WILLIAM GOULD

TAKEN ON JUNE 29, 2016

VOLUME 2

Job No.: 319129

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

MR. FERRARIO: I know.

MR. RHOW: Look for Marshall Wizelman at the top.

MR. KRUM: I have it. It was previously marked as Exhibit 349.

MR. FERRARIO: Here it is, 349.

THE WITNESS: I'm prepared.

BY MR. KRUM:

Q. Do you recognize Exhibit 349?

A. I do.

Q. What is it?

A. These are drafts of minutes of four board meetings.

Q. Do you recall that these minutes were consistent with Mr. Ellis's email raised for approval at the August 4, 2015 RDI board of directors meeting?

A. Yes.

Q. Do you recall that at that meeting and/or in advance of the meeting Jim Cotter, Jr., had taken issue with the accuracy of the minutes?

A. Yes, I do.

Q. You voted to approve the minutes, correct?

A. Yes.

Q. Did you do so because you remembered that -- everything that is recited in the minutes and determined them to be accurate on a word-for-word basis because you viewed the recitation of the conclusion as accurate or on some other basis?

A. My feeling was I did not remember all the discussions that had gone on in the meetings and some of the specifics that Mr. Cotter had referred to I couldn't recall and some of the things other had. But I felt, as I look back at these meetings, they substantially reflected what occurred, substantially.

Q. Did you ever see any other drafts of meeting minutes for these meetings?

A. I don't recall.

Q. Do you know who prepared or who participated in the preparation of these minutes?

A. My -- I don't know for certain, but I know that Bill Ellis and Craig Tompkins did.

Q. Did you ever hear or learn or were you ever told that as to some of all of these minutes that are part of this exhibit, Akin Gump participated in preparation of them?

A. Yes, I did.

REPORTER'S CERTIFICATE

I, PATRICIA L. HUBBARD, do hereby certify:

That I am a duly qualified Certified Shorthand Reporter in and for the State of California, holder of Certificate Number 3400, which is in full force and effect, and that I am authorized to administer oaths and affirmations;

That the foregoing deposition testimony of the herein named witness, to wit, WILLIAM GOULD, was taken before me at the time and place herein set forth;

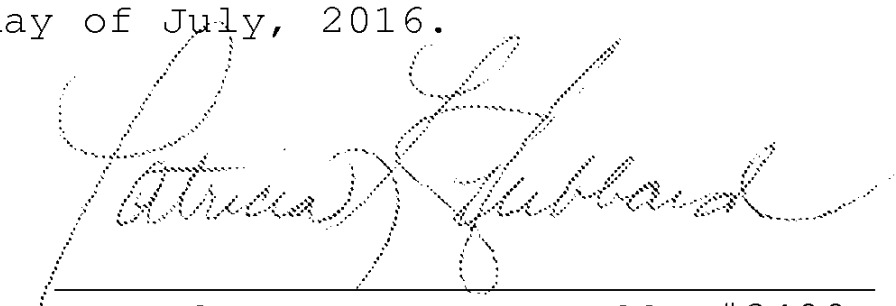
That prior to being examined, WILLIAM GOULD was duly sworn or affirmed by me to testify the truth, the whole truth, and nothing but the truth;

That the testimony of the witness and all objections made at the time of examination were recorded stenographically by me and were thereafter transcribed by me or under my direction and supervision;

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

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

IN WITNESS WHEREOF, I have subscribed my name this 6th day of July, 2016.



PATRICIA L. HUBBARD, CSR #3400

EXHIBIT 51

DISTRICT COURT

CLARK COUNTY, NEVADA

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

VIDEOTAPED DEPOSITION OF ROBERT MAYES

TAKEN ON THURSDAY, AUGUST 18, 2016

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400
Job No.: 331292

A. Correct.

Q. And what did you do to prepare this candidate report, if you prepared it?

A. We did this at the behest of, I believe, Craig Tomkins and formulated a resume from the internet, did some basic internet research, and then I wrote a brief assessment -- well, it's not an assessment. I wrote a brief overview of her candidacy based on my interaction with her as a search committee member.

Q. So it was based partially on your opinion of her?

A. Yeah. Starting with the professional attributes on page three.

Q. Do you recall when this candidate report was prepared?

A. I think it was just after the new year.

MR. KRUM: Excuse me. Taking Kara's line here, does this document have a production number?

MS. LINDSAY: It was produced by Korn Ferry.

MR. KRUM: Okay. Thanks.

BY MS. LINDSAY:

Q. Directing your attention to -- I'm done

REPORTER'S CERTIFICATE

I, PATRICIA L. HUBBARD, do hereby certify:

That I am a duly qualified Certified Shorthand Reporter in and for the State of California, holder of Certificate Number 3400, which is in full force and effect, and that I am authorized to administer oaths and affirmations;

That the foregoing deposition testimony of the herein named witness, to wit, ROBERT MAYES, was taken before me at the time and place herein set forth;

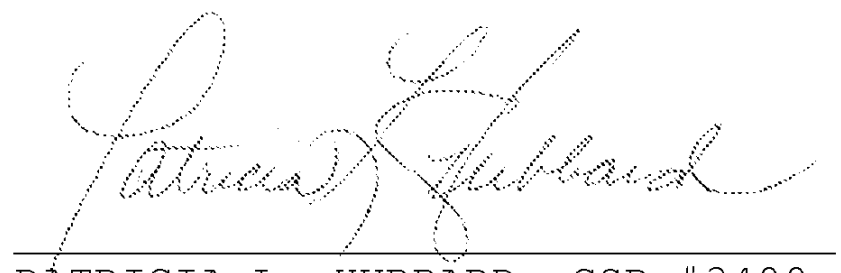
That prior to being examined, ROBERT MAYES was duly sworn or affirmed by me to testify the truth, the whole truth, and nothing but the truth;

That the testimony of the witness and all objections made at the time of examination were recorded stenographically by me and were thereafter transcribed by me or under my direction and supervision;

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

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

IN WITNESS WHEREOF, I have subscribed my name this 19th day of August, 2016.



PATRICIA L. HUBBARD, CSR #3400

EXHIBIT 52

- - -

R O U G H D R A F T

- - -

CASE: Cotter, et al., vs. Reading International, et al.

DATE: October 19, 2016

WITNESS: MYRON STEELE

- - -

This transcript draft is uncertified and may contain untranslated stenographic symbols, an occasional reporter's note, a misspelled proper name, and/or nonsensical word combinations. All such entries will be corrected in the final certified transcript.

Due to the need to correct entries prior to certification, you agree to use this realtime draft only for the purpose of augmenting counsel's notes and not to use or cite it in any court proceeding.

Please keep in mind that the final certified transcript's page and line numbers will not match the rough draft due to the addition of title pages, indices, appearances of counsel, paragraphing and other changes.

assets adoption of exculpation for breach of duty of loyalty as opposed to Delaware's 102B7, which would not allow that to occur.

Q. All right. And so you in that presentation -- or I guess panel discussion is the way you described it.

A. Yes.

Q. -- that was a discussion between was it lawyers -- I'm sorry -- lawyers or judges from Nevada and yourself?

A. All I remember are two attorneys practicing in the area from Nevada. I don't remember a Nevada judge being part of the panel.

Q. And you recall that there was a discussion on the panel of the differences between the Nevada exculpation statute and the Delaware

exculpation statute?

A. That's the only part of it that I recall discussing.

Q. And do you remember that there was a discussion during that time that the Nevada exculpation statute -- that's a mouthful, I'll get it out -- that the Nevada exculpation statute was broader than the Delaware statute?

A. Well, the distinction as I understood it at the time was that Nevada allows exculpation for a breach of duty of loyalty. Delaware does not.

In terms of Mr. Gould's service on the CEO search committee --

A. Right.

Q. -- did you see anything that indicated that he was acting in a way that was not independent?

MR. KRUM: Same objection.

THE WITNESS: No.

BY MR. SEARCY:

Q. In respect to Mr. McEachern's independence on the search committee, did you see anything that indicated that he was acted in an

interested fashion?

MR. KRUM: Same objection.

THE WITNESS: No.

BY MR. SEARCY:

Q. If you'll turn to Page 31 of your expert report.

A. (Witness complies.)

Q. On the second paragraph, the -- the last sentence, it's actually the first full paragraph but second paragraph on the page, where it starts out: "Moreover, a finder of fact" --

A. Yes.

Q. -- "could find that these actions constituted intentional misconduct..."?

A. Yes.

A. I skimmed the entire deposition.
Q. Okay. So there were no parts of Mr. Gould's deposition that you read carefully?
A. That's correct.
Q. And I take it the fact that you skimmed through it meant that for purposes of your opinions, you didn't view his testimony to be important.
A. Well, I think his testimony is important. I think all of the directors' testimony is important. I looked at the pleading. Having

looked at the pleading and then skimming his deposition, I reached the conclusion that I could find insufficient facts to suggest to me there was a reasonable doubt about his independence or his disinterestedness. So his deposition as a result became less important to me.

Q. But separate and apart from disinterestedness or a lack of independence, were you or are you offering any opinion as to whether Mr. Gould might have breached a fiduciary duty?
A. I am not.
Q. All right. And so that -- that's what I wanted to get to next.
In terms of your report -- and I first thought it was an oversight, but now from your testimony, I'm beginning to think it was

always is.

Q. I take it that it would be reasonable for two directors to disagree as to how much discussion might be necessary on a particular issue.

A. Oh, I agree with that.

Q. Two directors might disagree as to the proper process that should be followed leading up to a final decision.

A. They could. Even two independent, objective directors could disagree on that.

Q. And there's nothing wrong --

A. But that's the question.

Q. Whether --

A. Whether they're independent and disinterested.

Q. The mere fact that people have voted a certain way certainly is not dispositive on this

issue of breach of fiduciary duty?

A. Correct.

MR. KRUM: Objection; incomplete hypothetical.

BY MR. RHOW:

Q. For example, on the CEO search process -- we've talked about this a little bit --

A. Right.

Q. -- you agree that at least on that committee there were two independent, noninterested

directors; right?

A. That's my recollection, yes.

Q. And to be clear, the business judgment rule would then apply to that committee's work?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: Well, there's not a majority of independent, disinterested directors voting.

BY MR. RHOW:

Q. If both vote a certain way, there is a majority.

A. If it can be carried by only two votes; yeah, that's right.

Q. And so the work of those two directors, assuming they vote the same way, is protected by the business judgment rule.

A. It would be.

MR. KRUM: Same objection.

BY MR. RHOW:

Q. It would be.

A. Yeah. Yes. Sorry.

Q. And so in that situation I just posited where you have two independent directors, both deciding that it's time to present a candidate, that would be perfectly fine.

- - -

MYRON STEELE

- - -

C E R T I F I C A T E

- - -

I do hereby certify that I am a Notary Public in good standing; that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this

DAY day of MONTH 2016.

<%signature%>

- - - - - - - - - - - - - - - -

Susan Marie Migatz
Notary Public

Job No. 2463323

EXHIBIT 53

DISTRICT COURT

CLARK COUNTY, NEVADA

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

VIDEOTAPED DEPOSITION OF ELLEN COTTER

TAKEN ON MAY 18, 2016

VOLUME 1

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400

and how long were you a corporate associate?

A. I don't -- I don't remember. But I did not spend a lot of time in the litigation department.

Q. Okay. What did you do in terms of the nature of your work when you were a corporate associate at White and Case?

A. I worked on M and A transactions.

Q. M and A meaning mergers and acquisitions?

A. Yes.

Q. So these were transactions in which the White and Case client was either acquiring another company or was being acquired typically?

A. Correct.

Q. What kind of work did you do personally on those -- those M and A matters?

A. Reviewed contracts, marked them up, compared them to send out to our clients.

Q. Are you done?

A. Yes.

Q. Okay. So, what did you do after you left White and Case?

A. I moved to Los Angeles and worked for Craig Corporation at the time.

REPORTER'S CERTIFICATE

I, PATRICIA L. HUBBARD, do hereby certify:

That I am a duly qualified Certified Shorthand Reporter in and for the State of California, holder of Certificate Number 3400, which is in full force and effect, and that I am authorized to administer oaths and affirmations;

That the foregoing deposition testimony of the herein named witness, to wit, ELLEN M. COTTER, was taken before me at the time and place herein set forth;

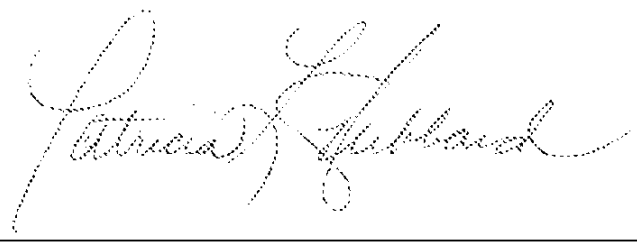
That prior to being examined, ELLEN M. COTTER was duly sworn or affirmed by me to testify the truth, the whole truth, and nothing but the truth;

That the testimony of the witness and all objections made at the time of examination were recorded stenographically by me and were thereafter transcribed by me or under my direction and supervision;

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

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

IN WITNESS WHEREOF, I have subscribed my name this 23rd day of May, 2016.



PATRICIA L. HUBBARD, CSR #3400

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

BUSINESS COURT

INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTIONS FOR PARTIAL SUMMARY JUDGMENT (NOS. 3, 4, 5, 6)

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: October 27, 2016
Time of Hearing: 1:00 P.M.

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Statutes

I. INTRODUCTION

The Individual Defendants hereby submit this consolidated reply to Plaintiff's Oppositions to their Motions for Partial Summary Judgment Nos. 3-6.

In each of his Oppositions, Plaintiff concedes that, in the absence of evidence of fraud, knowing violation of the law, or intentional misconduct, N.R.S. § 78.138(7) bars him from recovering any monetary damages from the Individual Defendants. Nonetheless, without citation to any Nevada law, Plaintiff asserts that he might still be able to pursue equitable claims, or claims for breach of a duty of loyalty, against the Individual Defendants. Plaintiff is wrong as a matter of law; in the absence of fraud, knowing violation of the law, or intentional misconduct, Nevada law bars *all* breach of fiduciary duty claims against corporate directors.

Besides being based on a false legal premise, each of Plaintiff's Oppositions fails to identify any legitimate disputed issue of material fact—beyond Plaintiff's own speculation—that would allow his breach of fiduciary duty claims to survive summary judgment. Indeed, not one of Plaintiff's Oppositions references any actual evidence of fraud, knowing violation of the law, or intentional misconduct by any Individual Defendant. Instead of evidence, Plaintiff points vaguely to his theory of motivation: "usurpation" and "entrenchment." In what appears to be classically circular reasoning, he contends that the Board's making of certain decisions is itself evidence of the "entrenchment" motive that, in turn, makes such actions breaches. But not only does Plaintiff fail to present evidence that any of the alleged wrongful Board actions were intended to "entrench" the Board members, the undisputed evidence actually shows that such actions were irrelevant to any Board member's continued tenure with the Company. Plaintiff must have *evidence* that *specific* board actions were affected by *specific* bias or lack of independence by *specific directors* rising to the level required by N.R.S. 78.138(7)(a) (requiring intentional misconduct, fraud, or knowing violation of the law for liability of individual directors). He does not, and accordingly his myriad claims of wrongdoing identified in Motions for Partial Summary Judgment Nos. 3-6 should be summarily adjudicated against him.

Motion No. 3—The Unsolicited Indication of Interest: With no evidence to show any wrongdoing, Plaintiff's only argument with respect to the unsolicited Indication of Interest is that

the Individual Defendants breached their fiduciary duties because (1) they did not hire an investment banker; (2) they relied upon the statements of RDI's management about the valuation of the company; and (3) this was a part of a plan of "entrenchment" by the Independent Directors. But these assertions do not show intentional misconduct. No case or statute requires that a board of directors hire an investment banker to evaluate an unsolicited indication of interest. Furthermore, the applicable Nevada statute explicitly allows a board to rely on information provided by company management. And *even if* Plaintiff's evidence was sufficient to show intentional misconduct—it is not—Plaintiff cannot demonstrate any injury to the Company from failing to pursue negotiations relating to a non-binding indication of interest (which was not a binding "offer"). Moreover, Plaintiff offers no evidence—just speculation—that the determination to rely on management presentations, not to use an investment banker, or not to pursue the Indication of Interest is part of an entrenchment scheme. Indeed, where, as here, RDI is a controlled company with the Cotters already controlling 70% of the stock, there is no "entrenchment" by virtue of how the Board addressed the Indication of Interest.

Motion No. 4—The Executive Committee: The evidence does not show any intentional misconduct with respect to the Executive Committee. Instead, the undisputed evidence shows that the Executive Committee is authorized both under Nevada law and RDI's Bylaws. In fact, the undisputed evidence shows that the only actions taken by the Executive Committee that Plaintiff complains of—setting the date and the record date for an Annual Stockholder Meeting —were purely administrative. It borders on the nonsensical that an Executive Committee authorized by law used for purely administrative functions was part of an "entrenchment" scheme. No evidence supports such speculation. Nor is there any evidence of any damage to the Company from the supposed improper actions of the Executive Committee.

Motion No. 5—Appointment of Ellen Cotter as CEO: The undisputed evidence shows that, after significant diligence, every member of the Board (besides Plaintiff and Ellen Cotter) determined that Ellen Cotter should lead the Company. Plaintiff argues that this decision constitutes a breach of fiduciary duty because (1) Ellen Cotter's qualifications do not match those in the "Position Specification" prepared in conjunction with Korn Ferry at the beginning of the

search process and (2) that the money paid to Korn Ferry was a waste if the Board was ultimately going to select Ellen Cotter as CEO. As a threshold matter, Plaintiff cannot show that the appointment of Ellen Cotter involved intentional misconduct because Nevada law does not restrict the discretion of boards of directors in connection with the hiring of officers. The undisputed evidence demonstrates that the Board hired Korn Ferry and developed with it the Positon Specification, before Ellen Cotter decided to become a candidate for the position, at the beginning of a months-long search process that culminated in deciding that her retention as President and CEO was in the best interests of the Company given Ms. Cotter's experience with the Company and the job she was in fact doing as interim President and CEO. Plaintiff's speculation about the Board's motivations and his suggestion that, because the Company had Korn Ferry stand down after the Search Committee came to a consensus that Ellen Cotter was likely the preferred candidate, the Company received no benefit from Korn Ferry's services in the preceding months is not evidence and, in any event, does not demonstrate the "unconscionable" conduct by the Individual Defendants that would be necessary for a corporate waste claim. Finally, Ellen Cotter's selection was clearly not a part of a plan of "entrenchment," as Ms. Cotter has even less protection than Plaintiff had as CEO, with no employment contract and her employment terminable at will without payment of any severance.

Motion No. 6—Appointment of Margaret Cotter as Executive Vice President, Compensation Packages for Ellen Cotter and Margaret Cotter, and Additional Compensation Paid to Margaret Cotter and Guy Adams: Plaintiff's Opposition to Motion No. 6 **does not cite to a single piece of evidence.** The absence of a single shred of evidence to support his allegations at this point in the ligation is dispositive; this is why summary judgment exists. Moreover, even if the Court were to accept Plaintiff's allegations as true—which is improper at the summary judgment stage—Plaintiff cannot show any harm to the Company resulting from any of the supposed misconduct by the Board, which is also dispositive.

For the foregoing reasons, and the reasons discussed in Motion Nos. 3-6, the Individual Defendants respectfully request that the Court grant them summary judgment.

II. ARGUMENT

A. Plaintiff Cannot Establish Entrenchment Because Plaintiff Fails to Cite a Single Action Actually Taken by the Individual Defendants to Protect Their Tenure

Rather than presenting evidence that any specific challenged board action was voted upon by a director with an interest in the issue, Plaintiff instead avers that the Individual Defendants acted for "entrenchment purposes." *See, e.g.*, Opp'n to Mot. No. 4 at 1-2. But generalized allegations of "entrenchment" do not suffice to establish claims for breach of fiduciary duty by Nevada directors, which require a plaintiff to have *evidence* that *specific* board actions were affected by *specific* bias or lack of independence by *specific* directors that rise to the level required by Nevada Revised Statute § 78.138(7)(a) (requiring intentional misconduct, fraud or knowing violation of the law for liability of individual directors). "A successful claim of entrenchment requires plaintiffs to prove that the defendant directors *engaged in action which had the effect of protecting their tenure* and that the action was motivated primarily or solely for the purpose of achieving that effect." *In re Fuqua Indus., Inc. S'holder Litig.*, No. CIV.A. 11974, 1997 WL 257460, at *10 (Del. Ch. May 13, 1997) (internal quotations and citation omitted) (emphasis added). Plaintiff fails to cite a single action actually taken by the Individual Defendants to protect their tenure and thus cannot establish entrenchment. *See id.* at *11 (dismissing entrenchment claims where plaintiff's complaint lacked "any facts to support these conclusory allegations of 'onerous' terms and entrenchment effects" and "fail[ed] to allege how . . . the retention of Georgia Federal served to protect the tenure of the defendant directors"); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 36 (Del. Ch. 2010) (finding no "omnipresent specter" that "Staggered Board Amendments" were being used for "entrenchment purposes" because, even without the amendments, the director defendants "would control a majority of the board").

B. Nevada Revised Statute § 78.138(7) Bars the Breach of Fiduciary Duty Claims that Plaintiff Asserts Against the Individual Defendants

Plaintiff concedes that, in the absence of evidence of fraud, knowing violation of the law, or intentional misconduct, Nevada Revised Statute § 78.138(7) bars him from recovering any monetary damages from the Individual Defendants. *See, e.g.*, Opp'n to Mot. No. 3 at 22 (arguing that the function of Nevada Revised Statute § 78.138(7) is "to limit monetary liability and

recovery"). Yet, without citation to any Nevada law, Plaintiff asserts that he still might be able to pursue equitable claims against them. *See, e.g.*, Opp'n to Mot. No. 4 at 23; Opp'n to Mot. No. 5 at 27; Opp'n to Mot. No. 6 at 20. Plaintiff's position finds no support in Nevada Revised Statute § 78.138(7). To the contrary, courts applying this statute have concluded that fiduciary duty claims are barred in their entirety—not just with respect to money damages—in the absence of fraud, knowing violation of the law, or intentional misconduct. *See Stewart v. Kroeker,* No. CV04-2130L, 2006 WL 167938, at *1, 2, 6-7 (W.D. Wash. Jan. 23, 2006) (applying Nev. Rev. Stat. § 78.138(7)(b), granting summary judgment, and stating that "plaintiffs are required to show not only that defendants' actions or omissions constituted a breach of their fiduciary duties, but also that the 'breach of those duties involved intentional misconduct, fraud or a knowing violation of law[,]'"); *In re AgFeed USA, LLC,* 546 B.R. 318, 330-31 (Bankr. D. Del. 2016) (concluding that "the second cause of action fail[ed] to state a claim for breach of the duty of loyalty because the complaint [fell] well short of alleging intentional misconduct, fraud, or a knowing violation of the law.").

Plaintiff also contends—again without citation to any Nevada law—that Nevada Revised Statute § 78.138(7) does not apply to duty of loyalty or disclosure claims. Plaintiff is wrong. The Nevada Supreme Court, in *Shoen v. SAC Holding Corp.*, expressly recognized that Nevada Revised Statute § 78.138(7) applies to duty of loyalty claims, stating: "[D]irectors and officers may only be found personally liable for breaching their fiduciary **duty of loyalty** if that breach involves intentional misconduct, fraud, or a knowing violation of the law." 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006) (citing Nev. Rev. Stat. § 78.138(7)) (emphasis added); *see also In re Amerco Derivative Litig.*, 127 Nev. 196, 223-24, 252 P.3d 681, 701 (2011) ("As noted, to hold 'a director or officer ... individually liable,' the shareholder must prove that the director's breach of his or her fiduciary **duty of loyalty** 'involved intentional misconduct, fraud or a knowing violation of law.' NRS 78.138(7)(b)[.]") (emphasis added).

In the face of Nevada law explicitly contrary to his position, Plaintiff relies on a Delaware statute, and cases discussing that Delaware statute, for his argument that his breach of fiduciary duty claims can proceed even absent any evidence of intentional misconduct, fraud, or a knowing

violation of law. This reliance is misplaced, as the relevant Nevada and Delaware statutes diverge on this issue:

Nevada Revised Statute § 78.138(7) provides, in relevant part: "[A] director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless it is proven that: . . . (b) The breach of those duties involved intentional misconduct, fraud or a knowing violation of law."	Delaware Code § 102(b) provides, in relevant part: "[T]he certificate of incorporation may also contain any or all of the following matters: . . . (7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit."

Whereas the Nevada statute exculpates directors from individual liability without limitation, the Delaware statute specifically limits the ability of a Delaware company to exculpate directors from liability for "monetary damages" for "any breach of the director's duty of loyalty" or "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law[.]" Del. Code Ann. tit. 8, § 102(b). The statutes, despite Plaintiff's urging, do not say the same thing.

Thus, in order to avoid summary judgment, Plaintiff must show either that (1) each Individual Defendant engaged in misconduct or a violation of law, knowing that the conduct was wrongful; or (2) each Individual Defendant engaged in fraud. The undisputed evidence does not support such claims. Plaintiff, despite his protests, appears to realize this. Eschewing the term "intentional misconduct" in his briefs, Plaintiff claims he has proffered evidence of "intentional acts with a purpose other than that of advancing the best interests of [RDI]." *See, e.g.*, Opp'n to Mot. No. 3 at 23-24. That is not the applicable legal standard. Plaintiff cannot, by improperly reframing the standard, circumvent the Nevada statute's obvious intent: to prevent plaintiffs from asking courts to second guess, without evidence of intentional misconduct, fraud, or a knowing

violation of law, whether an action by a board of directors was in the best interest of a corporation. As discussed below, the undisputed evidence shows that Plaintiff's claims do not meet this standard.

C. The Undisputed Evidence Demonstrates that the Individual Defendants Did Not Breach Their Fiduciary Duties in Connection with Evaluating the Unsolicited Indication of Interest

1. Plaintiff Has Not Proffered Any Evidence of Intentional Misconduct Involving the Indication of Interest

The evidence shows that "the Board of Directors believe[d], based on Management's presentation, its own familiarity with the Company, its assets, operations, and opportunities and considering the various factors set forth in NRS 78-138.4, that interests of the Company and its stockholders would be best served by the continued independence of the Company[.]" (E. Cotter Decl. in Support of Mot. No. 3 ¶ 17; E. Cotter Decl. in Support of Mot. No. 3 Ex. 3 at RDI0058041 (June 23, 2016 Draft Minutes of the Meeting of the RDI Board).) In his Opposition, Plaintiff speculates about the Individual Defendants' alleged "entrenchment" motives, but does not proffer any evidence of intentional misconduct.[1] Instead, Plaintiff asserts that the Individual Defendants (1) did not hire an investment banker and (2) relied upon the statements of RDI's management about the valuation of the company. *See* Opp'n to Mot. No. 3 at 4. These assertions, though undisputed, do not show intentional misconduct. Tellingly, nowhere does Plaintiff assert that the $17 price set out in the Indication of Interest was adequate or that *Plaintiff himself* would have supported a transaction at that price. *See generally* Opp'n to Mot. No. 3.

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[1] In his Opposition to Motion No. 3, Plaintiff sets forth a mishmash of allegations, none of which have to do with Board's actions with regard to the unsolicited Indication of Interest. *See* Opp'n to Mot. No. 3 at 23, 24 n.10 (identifying "actions to threaten Plaintiff with termination[,]" the "activation and repopulation of an executive committee," "effectively firing Korn Ferry and . . . completely ignoring the criteria set by the CEO search committee[,]" and "hiring and paying [Margaret Cotter]" as "intentional acts"). None of these supposed "intentional acts" have anything to do with the Indication of Interest. *See Shoen,* 122 Nev. at 640 ("directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that **breach involves intentional misconduct**, fraud, or a knowing violation of the law.") (emphasis added). Indeed, none of these acts were even contemporaneous with the Board's consideration of the Indication of Interest.

No case or statute requires corporate directors to hire an investment bank (and incur the resulting costs) to evaluate an unsolicited indication of interest. "[D]irectors knowledgeable about the corporation have no legal obligation to obtain fairness opinions by independent bankers." *Estate of Detwiler* v. *Offenbecher*, 728 F. Supp. 103, 152 (S.D.N.Y. 1989) (citation omitted). In *Detwiler,* the court held that "[i]n light of their extensive knowledge of [the company], [two defendants] had no obligation to obtain an independent valuation of the Company." *Id.* at 151, 153. Moreover, *Nevada law* explicitly permits corporate directors to rely on information provided by company management. *See* Nev. Rev. Stat. § 78.138(2) ("In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by: (a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented; . . . but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted."). Finally, where, as here, the company itself is controlled, it defies logic to suggest that its controlling shareholders need to respond to an unsolicited indication of interest. Accordingly, the Individual Defendants acted in fulfillment of their fiduciary duties when they relied on their own knowledge about the Company and information provided by management in evaluating the Indication of Interest. Plaintiff's "effort to graft a requirement of retaining an independent financial advisor as a prerequisite to invoking the business judgment rule is an unwarranted extension of the law." *See Cottle* v. *Storer Commc'n, Inc.*, 849 F.2d 570, 578-79 (11th Cir. 1988) (where directors retained a financial advisor, stating that, under *Smith* v. *Van Gorkom*, 488 A.2d 858 (Del. 1985), the "board need not necessarily have retained" any "outsider as an advisor[,]" concluding that the directors were "entitled to the presumption that they acted properly[,]" and affirming summary judgment in favor of directors).

2. <u>As a Matter of Law, a Company Is Not Damaged By a Board's Response to a Non-Binding Indication of Interest</u>

Plaintiff's Opposition to the Indication of Interest Motion (No. 3) entirely avoids the issue of damages.[2] Damages, however, are a required element of a claim for breach of fiduciary duty, *see Brown* v. *Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (A claim for breach of fiduciary duty requires a plaintiff to demonstrate "the existence of a fiduciary duty, the breach of that duty, and that the breach proximately caused the damages.") (applying Nevada law), and the Indication of Interest claim fails as a matter of law. Where, as here, a company receives a non-binding proposal subject to conditions, such as due diligence and the execution of definitive agreements, that does not "constitute[] [an] offer[] the acceptance of which would bind the offeror to acquire [the company,]" a plaintiff cannot demonstrate injury. *See Cooke* v. *Golie,* No. CIV. A. 11134, 2000 WL 710199, at *13 n.38 (Del. Ch. May 24, 2000). In *Cooke,* the Court noted that the proposals considered by the board "represented non-binding offers subject to a number of conditions" including "the completion of due diligence and the execution of definitive agreements" and concluded that "none of the proposals which the board considered . . . constituted offers the acceptance of which would bind the offeror to acquire [the company]." *Id.* In the absence of a binding offer, the Court concluded that plaintiffs could not demonstrate an injury. *Id.* ("The plaintiffs, therefore, could not demonstrate an injury-that they lost the value between another superior deal and the allegedly inferior USA deal-because they could not demonstrate that [the company] would have consummated any other deal whatsoever.").

[redacted] Thus, because Plaintiff does not dispute that the Indication of Interest was non-binding, here, as in *Cooke,* Plaintiff cannot demonstrate injury to the Company from the

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[2] Plaintiff mentions the word "damages" only once, in the context of Delaware's exculpatory statute. *See* Opp'n to Mot. No. 3 at 22.

Board's decision not to pursue the Indication of Interest—a deficiency fatal to all claims to the extent they are based on the unsolicited Indication of Interest.

3. Additional Discovery Is Unnecessary, and No Amount of Additional Discovery Will Cure the Deficiencies in Plaintiff's Indication of Interest Claim

Plaintiff asks this Court to deny the Individual Defendants' Motion because he needs additional discovery about the Board's decision not to pursue the unsolicited Indication of Interest. As a preliminary matter, it is unclear what additional discovery Plaintiff needs; he participated in all relevant Board meetings, has been given the relevant documents, and is knowledgeable enough about the relevant events to have submitted a sworn declaration. (*See* Plaintiff's Decl. in Support of Opp'n to Mots. for Partial Summary Judgment ¶¶ 1, 39, 41.) Moreover, in light of the undisputed evidence, such discovery would be futile. No additional discovery will change the undisputed fact that the Indication of Interest was non-binding, which dispositively establishes that Plaintiff's breach of fiduciary duty claim fails for lack of damages. Discovery therefore cannot yield any "facts essential to justify" Plaintiff's opposition. *See* Nev. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit **facts essential to justify the party's opposition**, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.") (emphasis added); *J.E. Dunn Nw., Inc. v. Corus Const. Venture, LLC*, 127 Nev. 72, 84 n.7, 249 P.3d 501, 508 n.7 (2011) (noting that the party seeking a continuance must "express [ ] how further discovery will lead to the creation of a genuine issue of material fact[]" and concluding that district court did not abuse its discretion by refusing to grant additional time to conduct discovery because "there would be no genuine issue of material fact") (quotation marks and citation omitted); *Feliciano v. Am. W. Homes, Inc.*, 128 Nev. 895, 2012 WL 3079106, at *2 n.5 (2012) (concluding "the district court was within its discretion in determining that a continuance would have been futile" given "the unlikelihood that these depositions would have produced evidence of [defendant's] intent to harm [plaintiff]").

Plaintiff claims he "has a reasonable expectation that this discovery will show that the Independent Director Defendants had no independent understanding of RDI's value when they rejected the Offer[,]" Opp'n to Mot. No. 3 at 12, and that "discovery will also show that the Independent Director Defendants nevertheless accepted [Ellen Cotter's] valuation of RDI's real estate holding as the unmitigated truth." *Id.* Even if such were the case (it is not), the uncontested portions of the minutes from the June 23, 2016 board meeting show that RDI's management presented the Board with information about the valuation of the Company. (*See* HD to Mot. No. 3 Ex. 1 at 6-10.) As discussed above, the Board was fully in compliance with its duties under Nevada law in relying on its own knowledge and a presentation by the Company's CEO, Ellen Cotter, in evaluating the Indication of Interest. *See* Nev. Rev. Stat. § 78.138(2). Additional discovery cannot change that. Plaintiff claims that "discovery likely will show that the Individual Director Defendants did nothing to make a good faith, informed decision regarding" the Indication of Interest, Opp'n to Mot. No. 3 at 10, but the undisputed facts show that, at the relevant Board meetings on June 2, 2016 and June 23, 2016,[3] the best interests of stockholders were discussed *repeatedly* by the Board.[4]

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[3] Plaintiff received draft minutes of these meetings and submitted proposed edits. His edits do not challenge the substantive portions of the minutes relied upon by the Individual Defendants in support of Motion No. 3, including with respect to discussions of stockholder best interests. (*See generally* Decl. of Noah Helpern ("HD") to Mot. No. 3 Ex. 1.)

[4] At the Board meeting on June 2, 2016, the Board resolved that management should prepare background information in preparation for a Board meeting at which the Board could consider in greater detail whether it would be in the best interests of the Company and its stockholders to continue with its current business plan as an independent company or to consider a process that could include negotiations regarding the unsolicited Indication of Interest. (E. Cotter Decl. in Support of Mot. No. 3 ¶ 5; E. Cotter Decl. in Support of Mot. No. 3 Ex. 2 at JCOTTER017257 (June 2, 2016 Draft Minutes of the Meeting of the RDI Board).) At the Board meeting on June 23, 2016, the Board discussed the likelihood that the successful implementation of that plan would bring far greater benefits to the Company and its stockholders than a sale at the present time. (E. Cotter Decl. in Support of Mot. No. 3 ¶ 15; E. Cotter Decl. in Support of Mot. No. 3 Ex. 3 at RDI0058040 (June 23, 2016 Draft Minutes of the Meeting of the RDI Board).) Furthermore, the resolution for which the Individual Defendants voted provided that "the Board of Directors hereby determines that the interests of the Company and its stockholders would be best served by the continued independence of the Company . . . and that the transaction described in the Indication of Interest is not in the best interests of the Company or its stockholders." (E. Cotter Decl. in

Plaintiff also claims that "[a]dditional Rule 56(f) discovery will likely reveal evidence that a majority of the RDI directors were not independent, or did not act independently, of the controlling shareholders ([Ellen Cotter] and [Margaret Cotter])." Opp'n to Mot. No. 3 at 10. Such argument should be rejected out of hand. **Plaintiff has had more than a year to take discovery regarding director interestedness and independence**, which have always been at the heart of his claims. As the Court is well aware, the discovery in this case has been extensive. The time for discovery has passed, and Plaintiff now needs to live with the facts he has, or has not, established.[5]

Plaintiff notes that the Individual Defendants have not produced a single document, Opp'n to Mot. No. 3 at 3, but the Individual Defendants do not have any responsive documents to produce. This should not be a surprise to Plaintiff, because (1) no documents were distributed at the Board meetings where the Indication of Interest were discussed, and (2) Plaintiff himself has represented that he has no documents to produce.[6]

Support of Mot. No. 3 ¶ 17; E. Cotter Decl. in Support of Mot. No. 3 Ex. 3 at RDI0058041-42 (June 23, 2016 Draft Minutes of the Meeting of the RDI Board.)

[5] Plaintiff's speculation that Ellen and Margaret Cotter were trying to entrench themselves by orchestrating opposition to the Indication of Interest actually runs contrary to the undisputed facts about their financial interests. Ellen Cotter and Margaret Cotter's executive compensation pales in comparison with the amount they would have netted, assuming that the non-binding Indication of Interest resulted in a sale of all RDI shares at $17 per share. (*See* HD to Mot. No. 3 Ex. 2 (May 18, 2016 DEF 14A) at 34-35 (showing Ellen Cotter's base salary is $450,000, with a potential target bonus opportunity of $427,500); HD to Mot. No. 3 Ex. 2 (May 18, 2016 DEF 14A) at 47 (showing Margaret Cotter's base salary is $350,000, with a short term incentive target bonus opportunity of $105,000); HD to Mot. No. 3 Ex. 2 (May 18, 2016 DEF 14A) at 7 (showing Ellen Cotter directly owns 799,765 shares of RDI's Class A stock and 50,000 shares of RDI's voting stock, and Margaret Cotter directly owns 804,173 shares of RDI's Class A stock and 35,100 shares of RDI's voting stock).) As a matter of law, by casting votes of confidence in RDI's long-term strategy, rather than seeking to cash-in on a short-term windfall, Ellen Cotter and Margaret Cotter and the directors who voted with them demonstrated a lack of self-interest. "The choice to remain with a long-term strategy at the expense of short-term personal gain indicates, if anything, a lack of self-interest on the part of the directors." *Kahn v. MSB Bancorp, Inc.*, No. CIV. A. 14712-NC, 1998 WL 409355, at *3 (Del. Ch. July 16, 1998), *aff'd*, 734 A.2d 158 (Del. 1999) (noting that "the directors collectively own about 11% of [the company's] stock and would have profited handsomely from the rejected offers[]" and granting defendants' motion for summary judgment because plaintiffs failed to rebut the business judgment presumption).

[6] Claiming "no fault of his own," *see* Opp'n to Mot. No. 3 at 10, Plaintiff asserts he has not been able to depose Douglas McEachern, Guy Adams, and Judy Codding due to "stonewalling by Defendants[.]" Opp'n to Mot. No. 3 at 3. Plaintiff is clearly wrong; the Individual Defendants have repeatedly proposed dates for the depositions of Douglas McEachern, Guy Adams, and Judy

D. The Undisputed Evidence Demonstrates that the Individual Defendants Did Not Breach Their Fiduciary Duties in Connection with Any Action of the Executive Committee

1. Plaintiff Admits in His Opposition that the Actions of the Executive Committee Do Not Support a Breach of Fiduciary Duty Claim

Summary judgment on Plaintiff's claims related to the Executive Committee is warranted for the threshold reason that Plaintiff admits that he "has not asserted and rejects the notion that the allegations in the SAC regarding the creation (meaning activation and repopulation) and misuse of an executive committee to perpetuate their entrenchment scheme has been claimed to constitute a stand-alone breach of fiduciary duty . . . ." Opp'n to Mot. No. 4 at 3 n.1. In other words, Plaintiff concedes that the Board's conduct with respect to the Executive Committee is insufficient to support a claim for breach of fiduciary duty.

2. The Undisputed Evidence Shows that Executive Committees Are Authorized By Nevada Law and that the Executive Committee Made Purely Administrative Decisions

Plaintiff cannot demonstrate intentional misconduct with respect to "repopulating" the Executive Committee, or any actions it subsequently took, because it is undisputed that such committee is authorized under Nevada law and RDI's Bylaws. Nevada law expressly authorizes the establishment of committees by boards of directors. Nevada Revised Statute § 78.125(1) provides:

> Unless it is otherwise provided in the articles of incorporation, the board of directors may designate one or more committees which, to the extent provided in the resolution or resolutions or in the bylaws of the corporation, have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation.

Codding. (*See, e.g.*, HD to Reply in Support of Mot. Nos. 3-6 Ex. 1 at 3 (showing that, on August 22, 2016, counsel for the Individual Defendants proposed dates for the depositions of Judy Codding, Douglas McEachern, and Guy Adams); *id.* Ex. 2 at 6 (showing that, on August 31, 2016, counsel for the Individual Defendants proposed a date for Judy Codding and Douglas McEachern); *id.* Ex. 2 at 4 (showing that, on September 1, 2016 counsel for the Individual Defendants requested confirmation that Plaintiff intends to take depositions of Judy Codding and Douglas McEachern on the date proposed); *id.* Ex. 2 at 2 (showing that, on September 8, 2016, counsel for Plaintiff stated: "we will not be proceeding with the depositions of Ms. Codding and Mr. McEachern on September 13.").)

In addition to being expressly permitted by Nevada law, the Executive Committee is also authorized by RDI's Bylaws, which provide, in relevant part:

> The Board of Directors may, by resolution adopted by a majority of the whole Board, designate one or more committees of the Board of Directors, each committee to consist of at least one or more directors of the Corporation which, to the extent provided in the resolution, shall have and may exercise the power of the Board of Directors in the management of the business and affairs of the Corporation . . . .

(HD to Mot. No. 4 Ex. 1 at 6.)

In the face of these undisputed facts and law, Plaintiff recites his usual laundry list of "intentional act[s] with a purpose other than that of advancing the best interests of RDI[,]" but only one supposed "intentional act" actually involves the Executive Committee. *See* Opp'n to Mot. No. 4 at 20-21 ("Do they really expect the Court to determine on summary judgment that the activation and repopulation of an executive committee, about which director Storey complained at the time and which he testified was intended to and had the effect of limiting his ability to serve as a director of RDI, was not an intentional act with a purpose other than advancing the best interests of RDI?"). As purported evidence that this was improper, Plaintiff asserts that director Storey complained that the Executive Committee had the effect of "limiting his ability to serve as a director of RDI[.]" Opp'n to Mot. No. 4 at 21. However, that Mr. Storey at the time may have subjectively felt excluded does not transform a perfectly routine Board decision into an intentional breach of fiduciary duty. Plaintiff has failed to proffer evidence of any intentional misconduct involving the Executive Committee.

Beyond Plaintiff's insufficient speculation regarding "intentional acts[,]" *see* Opp'n to Mot. No. 4 at 20-21, Plaintiff alleges that the Executive Committee has been used as part of an "entrenchment scheme[,]" *see, e.g.*, Opp'n to Mot. No. 4 at 1-2, supposedly "exercis[ing] broad authority and [taking] action after action that ordinarily would have been taken (or not taken) by the full Board, with the effect being to limit, if not extinguish, the participation of at least Plaintiff and Storey as directors." Opp'n to Mot. No. 4 at 4. Yet the only actions of the Executive Committee that Plaintiff refers to are setting the date and the record date for an Annual Stockholder Meeting. Opp'n to Mot. No. 4 at 2, 4. These types of administrative activities are

precisely why companies have Executive Committees. Even if the Executive Committee did in fact exclude Plaintiff and Storey from decision-making about setting dates, that does not show intentional misconduct on the part of any Individual Defendant.

3. There Is No Evidence of Damages Resulting from Any Action Relating to the Executive Committee

Plaintiff has not proffered any evidence of any damages relating to or resulting from any action of the Executive Committee. Plaintiff identifies two decisions made by the Executive Committee, neither of which are even alleged to have damaged the Company. *See* Opp'n to Mot. No. 4 at 2, 4, 24-25.[7] Thus, Plaintiff has failed to demonstrate injury—a deficiency fatal to all claims to the extent they are based on the "repopulated" Executive Committee.[8]

E. The Undisputed Evidence Demonstrates that the Individual Defendants Did Not Breach Their Fiduciary Duties in Connection with the Appointment of Ellen Cotter as CEO

1. Plaintiff Cannot Show Intentional Misconduct Because the Individual Defendants Acted in Compliance with Nevada Law

As a threshold matter, Plaintiff cannot show that the appointment of Ellen Cotter involved intentional misconduct because Nevada law does not restrict the discretion of corporate directors to hire officers. Nevada law does not specify how officers are to be chosen and provides only that officers "must be chosen in such manner . . . as may be prescribed by the bylaws or determined by the board of directors." *See* Nev. Rev. Stat. § 78.130. "[I]n corporate law, the election of officers

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[7] Plaintiff's purported damages expert is silent on damages from the "repopulated" Executive Committee. *See* Report of Tiago Duarte-Silva.

[8] The same list of purported evidence of damages—*e.g.*, "injury to and impairment of RDI's reputation and goodwill resulting in a diminished ability to attract and retain qualified senior executives, including in particular increased costs if able to do so and, separately, the payment of duplicative or redundant compensation including, for example, monies paid to third-party consultants (e.g., Edifice) and/or monies paid to [Margaret Cotter] arising from the fact that [Margaret Cotter] has no prior real estate development experience, which requires the third-party consultants be paid to do what is part of her job"—can be found in Plaintiff's Oppositions to Motion No. 4 and Motion No. 5. *See* Opp'n to Mot. No. 4 at 24-25; Opp'n to Mot. No. 5 at 27-28. The list does not serve as evidence of damages because Plaintiff does not even attempt to explain how any such damages were proximately caused by any actions or decisions related to the Executive Committee. The sections below discuss only the purported damages relevant to the claims being discussed.

is generally left to the board of directors." *Carlson v. Hallinan*, 925 A.2d 506, 527 (Del. Ch. 2006). Plaintiff's own purported legal expert, Myron Steele, admits: "I am aware of no case law that discusses the fiduciary duties and standards applicable to the appointment of officers." Report of Myron Steele at 29.[9] And Plaintiff does not—and cannot—identify any statutes, cases, or other authority requiring that a board of directors undertake a particular process before appointing an officer, much less that a board follow the rigid procedure that Plaintiff contends the Board had to adhere to in selecting Ellen Cotter as CEO (but which he acknowledges was not followed in connection with his own selection as CEO).[10]

Under any set of reasonable standards, the undisputed evidence shows that the Board engaged in a thorough process in evaluating and selecting a permanent CEO, in full satisfaction of their fiduciary duties. Such evidence shows that:

- A Search Committee was formed. (*See* HD to Mot. No. 5 Ex. 3 at JCOTTER008291.)
- RDI engaged Korn Ferry, (*id.*), a search firm that even Plaintiff's own expert refers to as "reputable." Report of Richard Spitz, ¶ 43.
- Korn Ferry "researched over 200 prospective candidates, had contact with approximately 60, interviewed 11, and ultimately presented six external candidates to [RDI's Search] Committee." (HD to Mot. No. 5 Ex. 3 at JCOTTER008292.)

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[9] The dearth of case law on the appointment of officers by boards of directors is unsurprising. Actions such as Plaintiff's threaten to transform every officer appointment into a derivative attack on a board's exercise of its duties, thereby requiring Nevada courts to become arbiters, months after the fact, of the intimate judgments a board must make in appointing officers. Plaintiff's attempted expansion of fiduciary duty law to cover appointments is bad policy.

[10] Plaintiff's unprincipled criticism of the appointment of Ellen Cotter is hard to stomach not only because it is not substantiated by law but also because it is hypocritical for Plaintiff to cast stones when no search was conducted before he was appointed as CEO. (*See* HD to Mot. No. 5 Ex. 1 (May 16, 2016 James Cotter, Jr. Dep.) at 75:20-23.) Plaintiff admits that he did not make any objection to the process by which he was appointed CEO at the board meeting on August 7, 2014 and that he did not consider the procedure for his appointment to be a breach of the RDI Board's fiduciary duties. (*See id.* at 191:5-192:19.) Under Plaintiff's flawed logic, the Board would have been better off if it had appointed Ellen Cotter as CEO without undertaking a search, as was the case for Plaintiff.

- The Search Committee interviewed seven candidates, six of whom were external. (*See* HD to Mot. No. 5 Ex. 6; *id.* Ex. 3 at JCOTTER008292, JCOTTER008294; *id.* Ex. 7.)
- Three days prior to an RDI Board meeting scheduled for January 8, 2016, a Draft Report and Recommendation of the CEO Search Committee describing, among other things, the background of the search, the work of the Search Committee, the topics discussed by the Search Committee, and the Search Committee's determination, was circulated to all nine members of RDI's Board. (*See* HD to Mot. No. 5 Ex. 10 at JCOTTER008284-85, JCOTTER008291-97.)
- On January 8, 2016, a telephonic meeting of the RDI Board was held for the sole purpose of considering the Search Committee Report. (HD to Mot. No. 5 Ex. 11 at RDI0054762.) William Gould reviewed with the RDI Board the Search Committee Report, "going through in some detail the procedures followed by the CEO Search Committee . . . ." (*Id.*) The directors participated in a discussion, (*id.* at RDI0054763), and a motion was made to accept the Search Committee's Report and recommendation to appoint Ellen Cotter as permanent CEO and President. (*Id.* at RDI0054764.)

It strains credulity to suggest that such process was undertaken in a furtherance of a scheme to commit intentional misconduct at the expense of Reading stockholders.

Again, beyond his own speculation, Plaintiff has not proffered any evidence that the Board's stated reasons—in both contemporaneous documentation and in depositions—for selecting Ellen Cotter as CEO are in fact a massive cover-up for a secret entrenchment scheme. After working with Korn Ferry and interviewing several CEO candidates, the Search Committee's "preliminary consensus [was] that, if, after the interview process, Ellen Cotter was the preferred candidate, then it likely would not make sense for the Company to incur the costs and expense of additional assessment activities by Korn Ferry given the Committee members' extensive past experience with Ellen Cotter." (HD to Mot. No. 5 Ex. 3 at JCOTTER008293). Plaintiff contends that Ellen Cotter does not meet all the qualifications in the Position Specification prepared with Korn Ferry at the inception of the CEO search. *See* Opp'n to Mot. No. 5 at 8. But the undisputed evidence shows that, as members of the Board observed Ellen Cotter's performance as interim

CEO and interviewed other candidates, it became clear to them that the best candidate for the job was already at the Company. (*See* HD to Mot. No. 5 Ex. 3 at JCOTTER008293 stating that "the members of the Committee have had significant interaction with and significant opportunity to observe the skills of, Ellen Cotter including, without limitation, her actual performance of the duties of the President and CEO since her appointment by the Board as the Interim President and CEO on June 12, 2015[]"; *id.* Ex. 5 at 368:4-369:1 ; *id.* Ex. 8 at 59:2-18.) Plaintiff has failed to point to any statutes, cases, or other authority requiring that a board of directors unconditionally adhere to an initial plan regardless of changing circumstances.[11] Plaintiff has failed to produce evidence showing that the Individual Defendants knew it was wrong to deviate from the Position Specification (which the Individual Defendants created with Korn Ferry) but did so anyway in service of a scheme to entrench themselves. The undisputed evidence shows exactly the opposite, that the Individual Defendants acted in service of the best interests of the Company and its stockholders. Anything else is mere speculation, which is insufficient to defeat a summary judgment motion. *Wood*, 121 Nev. at 732 (The nonmoving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture[.]") (citation omitted).

The undisputed evidence further shows that Plaintiff himself does not meet the Position Specification created by the Individual Defendants and Korn Ferry at the beginning of the CEO search.[12] Yet the primary purpose of Plaintiff's lawsuit is to effect his reinstatement as Reading's

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[11] Whether the Search Committee was ultimately successful in attempting to save money by having Korn Ferry stand down does not matter, because it is not a genuine issue of material fact; it is Defendants' motivations, not their effectiveness, that is at issue in this case.

[12] [redacted] Plaintiff admits that his exposure to real estate is confined to a few transactions "as a corporate lawyer" and one "cinema transaction with Reading as a lawyer." (HD to Mot. No. 1 Ex. 10 at 152:17-153:25). Indeed, Douglas McEachern testified that Plaintiff "had no real estate experience, no international experience, no management experience, no cinema experience and no live theater experience." (HD to Mot. No. 1 Ex. 7 at 49:25-50:7.) [redacted] Plaintiff himself admits that he had no experience at all in the cinema or theater business outside of his tenure as an RDI director. (HD to Mot. No. 1 Ex. 10 at 152:13-153:19.) [redacted]

CEO. If Plaintiff genuinely contends that appointing a person who does not meet the Position Specification is intentional misconduct, Plaintiff should withdraw his request that the Court order the Board to reinstate him.

2. Plaintiff Has Not Proffered Any Evidence of Damages Resulting From Ellen Cotter's Selection As CEO

Plaintiff argues in his Opposition that "it is as obvious as it is indisputable that every penny paid to Korn Ferry was wasted, purposefully in order to select [Ellen Cotter]." Opp'n to Mot. No. 5 at 27. But beyond this supposed "obviousness" that Plaintiff opines about, he offers no evidence of any damage from the hiring of Korn Ferry. Plaintiff also ignores the high legal standard for claims of corporate waste. "To recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'" *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006). "A claim of waste will arise only in the rare, 'unconscionable case where directors irrationally squander or give away corporate assets.'" *Id.* Here, there is no genuine dispute; beyond Plaintiff's baseless allegations, there is no evidence that the exchange of Reading corporate funds for Korn Ferry's services was "so one sided" as to be "unconscionable." *See id.* Instead, the uncontroverted evidence shows that Korn Ferry "researched over 200 prospective candidates, had contact with approximately 60, interviewed 11, and ultimately presented six external candidates to [RDI's Search] Committee." (HD to Mot. No. 5 Ex. 3 at JCOTTER008292.)

Plaintiff also asserts he "has claimed and publicly available information shows diminution in the price at which RDI stock traded . . . on the day following disclosure of the selection of [Ellen Cotter] as permanent President and CEO." Opp'n to Mot. No. 5 at 28. That assertions is,

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[redacted] Plaintiff again admits that he had no experience with business in Australia or New Zealand other than as an RDI director. (HD to Mot. No. 1 Ex. 10 at 153:18-21.) [redacted] But Douglas McEachern has testified that Plaintiff has "an inability to operate as a manager, an inability to create trust, an inability to communicate with people." (HD to Mot. No. 1 Ex. 7 at 293:23-294:8.)

for multiple reasons, a *non sequitur*. First, what Plaintiff "claims" to be true is not relevant at the summary judgment stage. That Plaintiff makes this claim without citation to any evidence shows the deficiency of his case. Second, even assuming Plaintiff's "claims" are true, a change in stock price does not reflect a breach of fiduciary duty by any Individual Defendant. Stock prices fluctuate all the time. A claim for breach of fiduciary duty requires that a plaintiff demonstrate "that the breach proximately caused the damages." *See Brown*, 531 F. Supp. 2d at 1245. Assertions of stock price changes after Ellen Cotter's appointment as CEO are meaningless unless proximate causation is established. Third, even assuming the stock price dropped on negative market reaction to the CEO announcement, a negative market reaction is not indication of any wrongdoing. That stockholders disagree with a decision does not retroactively make it a breach of fiduciary duty. Nevada law is in place to prevent just this kind of Monday-morning quarterbacking.

F. Plaintiff Fails to Cite a Single Piece of Evidence in Connection with His Claim that the Individual Defendants Breached Their Fiduciary Duties by Hiring Margaret Cotter

In opposing the Motion for Partial Summary Judgment with respect to the hiring of Margaret Cotter (No. 6), Plaintiff does not cite to a single piece of evidence in the record. At the summary judgment stage, that is fatal to Plaintiff's claim. Plaintiff "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture," *Wood*, 121 Nev. at 732 (citation omitted), but instead must identify "admissible evidence" showing "a genuine issue for trial." *Posadas v. City of Reno*, 109 Nev. 448, 452 (1993); *Shuck v. Signature Flight Support of Nev.*, Inc., 126 Nev. 434, 436 (2010) ("bald allegations without supporting facts" are insufficient); *LaMantia v. Redisi,* 118 Nev. 27, 29, 38 P.3d 877, 879 (2002) (nonmovant must "show specific facts, rather than general allegations and conclusions"). A nonmoving party that fails to make this showing will "have summary judgment entered against him." *Wood*, 121 Nev. at 732 (citation omitted).

Rather than point to any evidence, Plaintiff asks, in his Opposition: "Do they really expect the Court to decide on summary judgment that hiring . . . [Margaret Cotter] . . . when, in fact, she had no prior experience, was not an intentional act with a purpose other than advancing the best

interests of RDI?" Opp'n to Mot. No. 6 at 16. The answer, of course, is yes. The undisputed evidence shows that Margaret Cotter was hired because it was determined that she was the best person for the job. Plaintiff does not dispute that:

- Margaret Cotter, through OBI and Liberty Theaters, LLC, managed the real estate which houses each of RDI's four live theaters in Manhattan and Chicago. (*See* HD to Mot. No. 6 ¶ 5, Ex. 4, at 3.)
- Margaret Cotter has operated and overseen these properties for over 16 years. (*Id.*)
- Margaret Cotter has secured leases, managed tenancies, overseen maintenance and regulatory compliance of these properties and headed up the re-development process with respect to these properties and RDI's Cinemas 1, 2 & 3 property. (*Id.*)
- Margaret Cotter has been actively involved in the re-development of RDI's New York properties for more than the past five years. (*Id.*)

Plaintiff's personal opinion that Margaret Cotter was unqualified, *see* Opp'n to Mot. No. 6 at 3, does not create a genuine issue of material fact and does not make the required showing of intentional misconduct.[13]

Plaintiff also alleged in his Opposition, without evidence, that "Plaintiff has claimed, and defendant's own documents and testimony have acknowledged, monies paid to third-party consultants (e.g., Edifice) . . . arising from the fact that [Margaret Cotter] has no prior real estate development experience, which requires the third-party consultants be paid to do what is part of her job." Opp'n to Mot. No. 6 at 21. Plaintiff's suggestion that the Individuals Defendant have wasted corporate assets by paying consultants, however, fails as a matter of law. Here, there is no genuine dispute that the exchange RDI's money for outside consultants' services was not "so one sided" as to be "unconscionable." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 74. Nor is there any evidence that consultants were hired due to Margaret Cotter's alleged inexperience.

[13] Furthermore, Plaintiff cannot show that the appointment of Margaret Cotter involved intentional misconduct because, as discussed above, Nevada law does not restrict the discretion of boards of directors to hire officers.

Plaintiff's personal opinion that such corporate funds might have been better spent does not defeat the Individual Defendants' Motion.

G. Plaintiff Fails to Cite a Single Piece of Evidence in Connection with His Claim that the Individual Defendants Breached Their Fiduciary Duties in Connection with Compensation Paid to Ellen Cotter, Margaret Cotter, or Guy Adams

1. Plaintiff Has Not Proffered Any Evidence of Intentional Misconduct—or Any Evidence Whatsoever—with Respect to These Claims

Plaintiff asserts in his Opposition, without any citation to evidence, that the Individual Defendants engaged in intentional misconduct by:

- Approving Ellen and Margaret Cotter's compensation packages;
- Approving an additional one-time payment of $200,000 to Margaret Cotter;
- Approving an additional one-time payment of $50,000 to Guy Adams.

See Opp'n to Mot. No. 6 at 16-18. However, despite Plaintiff's unsupported allegations, the evidence—which Plaintiff ignores—refutes any suggestion of intentional misconduct.

The undisputed evidence shows that, in connection with Ellen and Margaret Cotter's compensation, the Board took the following steps:

- The Board engaged compensation consultant Willis Towers Watson to prepare an assessment comparing the "base salary, the short term incentive (cash bonus) and long term incentive (equity awards)" of the peer and surveyed companies to that of RDI executives (HD to Mot. No. 6 ¶ 5 Ex. 4 at *5-6);
- The Compensation Committee engaged in discussion, in light of the Executive Competitive Pay Assessment prepared by Willis Towers Watson, at their meeting on February 17, 2016 (*id.* ¶ 8 Ex. 7 at RDI0046226);
- The Compensation Committee reviewed and unanimously approved the compensation package recommended for Margaret Cotter (*id.* ¶ 12, Ex. 11 at RDI0054798);[14]

[14] Margaret Cotter's current compensation as Executive Vice President is comparable to her prior compensation. (*See* HD to Mot. No. 6 ¶ 2 Ex. 1 at 125-26 ("We currently estimate that fees to be paid to OBI for 2015 will be approximately $389,000. We paid $397 ,000 and $401,000 in fees with respect to 2014, and 2013, respectively. . . . For 2016, Ms. Cotter's base salary will be $350,000, she will have a short term incentive target bonus opportunity of $105,000 (30% of her

- The Compensation Committee reviewed the Executive Competitive Pay Assessment prepared by Willis Towers Watson prior to the Compensation Committee's recommendation of Ellen Cotter's salary for 2016 (*id.* ¶ 5 Ex. 4 at 10);
- The Board engaged in discussion at its meeting on March 10, 2016 (*id.* ¶ 12 Ex. 11 at RDI0054798.)

The undisputed evidence shows that, in connection with the one-time payment to Margaret Cotter, the Board approved payment for "services rendered by [Margaret Cotter] to the Company in recent years outside of the scope of the Theater Management Agreement[,]" (HD to Mot. No. 6 ¶ 5 Ex. 4 at 3), and in light of the fact that "OBI, LLC had agreed to include as a part of its termination agreement with the Company certain waivers and releases including the termination of any rights it might have to receive compensation with respect to any show continuing at any of our theaters after the date of such termination." (*Id.*)

The undisputed evidence shows that, in connection with the payment to Guy Adams, the Board heard a summary of the extraordinary services and time devoted by Mr. Adams above and beyond the usual role of a director in the past year and, after discussion, resolved that Guy Adams be compensated $50,000 in recognition of extraordinary services to the Board. (HD to Mot. No. 6 ¶ 12 Ex. 11 at RDI0054800.)

Plaintiff does not cite a single piece of evidence, single sentence of deposition testimony, or single document to show a genuine dispute regarding the reasons the Board took these steps. Plaintiff speculates about the Board's improper motives, but that is insufficient. Plaintiff claims, again without citation to evidence, that the payment to Guy Adams was without precedent, Opp'n to Mot. No. 6 at 18, but that is both wrong and insufficient to show intentional misconduct. Indeed, in their Motion, the Individual Defendants presented undisputed evidence that Plaintiff himself approved similar payments in the past. (HD to Mot. No. 6 ¶ 13 Ex. 12, at 18; ¶ 14 Ex. 13,

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base salary), and she was granted a long term incentive of a stock option for 19,921 shares of Class A common stock and 4,184 restricted stock units under the Company's 2010 Stock Incentive Plan, as amended, which long term incentives vest over a four year period.").)

Response No. 12.). There is no genuine dispute of material fact here, and Plaintiff's speculation about the Individual Defendants' motives does not create one.

2. There Is No Evidence of Damages to the Company Proximately Caused by the Board's Compensation Decisions with Respect to Ellen Cotter, Margaret Cotter, or Guy Adams

With respect to the above-described payments, Plaintiff claims—without actually citing or referring to any evidence—that "evidence shows corporate waste and monetary damages to RDI, including from the inflated salary paid to [Margaret Cotter] and including from what amounted to a gift of $200,000 to [Margaret Cotter] (supposedly for services she had provided over a number of preceding years . . .) and a gift of $50,000 Adams (for serving as a director over the course of the preceding year, during which there was nothing memorializing his supposed special services as such, much less the notion that he should receive special compensation for those services which only were identified after the fact)." Opp'n to Mot. No. 6 at 21.[15] Plaintiff may genuinely believe that these payments were "gifts," or that may simply be rhetoric. However, whatever Plaintiff's genuine belief on this subject, he has proffered no evidence that any payment was "so one sided" as to be "unconscionable." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 74. Plaintiff therefore cannot show any injury to the Company arising from the compensation packages of Ellen Cotter and Margaret Cotter, the additional consulting fee compensation paid to Margaret Cotter, and the additional compensation paid to Guy Adams.

H. Plaintiff Fails to Cite a Single Piece of Evidence in Connection with His Claim that the Individual Defendants Breached Their Fiduciary Duties in Connection with the Estate's Option Exercise

Plaintiff's Opposition, in its discussion of the September 2015 option exercise, does not cite to a single piece of evidence, let alone identify any genuine disputed material fact. Plaintiff does not and cannot show intentional misconduct in connection with the Estate's option exercise, nor has he proffered any evidence that the Estate's option exercise caused damages. *See* Opp'n to Mot. No. 6 at 14-18 (discussing Nev. Rev. Stat. § 78.138(7) but not once mentioning the Estate's

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[15] Plaintiff does not assert damages from compensation to Ellen Cotter. *See* Opp'n to Mot. No. 6 at 19-21.

option exercise); *id.* at 19-21 (discussing damages but not once mentioning the Estate's option exercise). Partial summary judgment on this issue is therefore warranted.

Nonetheless, Plaintiff urges that partial summary judgment should be denied pursuant to Nevada Rule of Civil Procedure 56(f) because discovery is ongoing "concerning the advice of counsel on which director defendants Adams and Kane testified they relied in making the decision, as two of three members of the RDI board of directors compensation committee, to authorize the exercise of these supposed 100,000 share option." *See* Opp'n to Mot. No. 6 at 1-2. But such discovery will not change the undisputed facts, as set forth in the Individual Defendants' Motion: the Board's Compensation Committee, after conducting reasonable diligence, approved the exercise of this option using Class A shares instead of cash pursuant to the Stock Option Plan. (*See* HD to Mot. No. 6 ¶ 3 Ex. 2 at RDI0054650-52.) This entire issue is a red herring; Plaintiff does not and cannot identify what impact on the Company or its stockholders resulted from the rightful exercise of the 100,000 share option, because there was none. Plaintiff speculates that approval of the 100,000 share option was part of the secret entrenchment scheme he claims to be a victim of, but does not point to a shred of evidence in that regard even after more than a year of discovery. Additional discovery on advice of counsel issues will not change the fact that Plaintiff has offered nothing but speculation about supposed intentional misconduct by anyone regarding the 100,000 share exercise. Summary judgment is therefore appropriate.

III. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court grant them summary judgment as to the First, Second, Third, and Fourth Causes of Action set forth in Plaintiff's Second Amended Complaint, to the extent that they assert claims and damages related to (1) a purported unsolicited offer to buy all of the outstanding stock of RDI; (2) the Executive Committee; (3) the appointment of Ellen Cotter as CEO; (4) the Estate's Option exercise; (5) the appointment of Margaret Cotter as Executive Vice President; (6) Ellen Cotter and Margaret Cotter's compensation packages; (7) the additional consulting fee compensation to Margaret Cotter; and (8) the additional compensation to Guy Adams.

Dated: October 21, 2016

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ H. Stan Johnson

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

DECLARATION OF COUNSEL NOAH S. HELPERN IN SUPPORT OF THE INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTIONS FOR PARTIAL SUMMARY JUDGMENT (NOS. 3, 4, 5, 6)

I, Noah Helpern, state and declare as follows:

1. I am a member of the Bar of the State of California, and am an attorney with the law firm of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), attorneys for Defendants Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, Judy Codding, and Michael Wrotniak. I make this declaration based upon personal, firsthand knowledge, except where stated to be on information and belief, and as to that information, I believe it to be true. If called upon to testify as to the contents of this Declaration, I am legally competent to testify to its contents in a court of law.

2. Attached hereto as Exhibit 1 is a true and correct copy of an email dated August 25, 2016 from Marshall Searcy to Mark Krum and others.

3. Attached hereto as Exhibit 2 is a true and correct copy of an email dated September 12, 2016 from Mark Krum to Marshall Searcy and others.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on the 21st day of October, 2016, in Los Angeles, California.

/s/ *Noah Helpern*
Noah Helpern

CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2016, I caused a true and correct copy of the foregoing **INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF MOTIONS FOR PARTIAL SUMMARY JUDGMENT (NOS. 3, 4, 5, 6)** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System.

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Troy Gould	
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William Gould	wgould@troygould.com

Dated this 21st day of October, 2016.

/s/ C.J. Barnabi
An employee of Cohen|Johnson|Parker|Edwards

EXHIBIT 1

From: Marshall Searcy
Sent: Thursday, August 25, 2016 6:49 PM
To: 'Krum, Mark' <MKrum@lrrc.com>; Nick Santoro <NSantoro@santoronevada.com>; ferrariom@gtlaw.com; erhow@birdmarella.com; sbannett@birdmarella.com
Cc: Christopher Tayback <christayback@quinnemanuel.com>
Subject: RE: Cotter v. Cotter

Mark,
Your e-mail from today is oddly timed. Plaintiff was obligated to meet and confer before bringing his motion. Plaintiff's failure to properly meet and confer is all the more egregious in light of the plainly inaccurate statement-- in your sworn declaration-- that Defendants did not respond to your e-mail concerning Plaintiff's request for discovery. If Plaintiff had met and conferred, we might have been able to see whether there were areas of limited document production where the parties could have reached agreement. If Plaintiff is willing to withdraw his improperly filed motion, then it might make sense for the parties to meet and confer, as Defendants previously sought to do.

From: Krum, Mark [mailto:MKrum@lrrc.com]
Sent: Thursday, August 25, 2016 1:25 PM
To: Marshall Searcy <marshallsearcy@quinnemanuel.com>; Nick Santoro <NSantoro@santoronevada.com>; ferrariom@gtlaw.com; erhow@birdmarella.com; sbannett@birdmarella.com
Cc: Christopher Tayback <christayback@quinnemanuel.com>
Subject: RE: Cotter v. Cotter

I can speak this afternoon. I cannot imagine that it will take long.

From: Krum, Mark
Sent: Tuesday, August 23, 2016 6:37 PM
To: Marshall Searcy; Nick Santoro; ferrariom@gtlaw.com; Krum, Mark; erhow@birdmarella.com; sbannett@birdmarella.com
Cc: Christopher Tayback
Subject: RE: Cotter v. Cotter

Marshall,

Let's try to speak tomorrow.

Mark

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: Marshall Searcy <marshallsearcy@quinnemanuel.com>
Date: 08/23/2016 6:06 PM (GMT-05:00)
To: Nick Santoro <NSantoro@santoronevada.com>, ferrariom@gtlaw.com, "Krum, Mark" <MKrum@lrrc.com>, erhow@birdmarella.com, sbannett@birdmarella.com

Cc: Christopher Tayback <christayback@quinnemanuel.com>
Subject: RE: Cotter v. Cotter

Mark K.,
Do you want to set a time on Thursday afternoon to discuss this discovery issue mentioned in your e-mail?

From: Nick Santoro [mailto:NSantoro@santoronevada.com]
Sent: Tuesday, August 23, 2016 2:23 PM
To: ferrariom@gtlaw.com; MKrum@lrrc.com; Marshall Searcy <marshallsearcy@quinnemanuel.com>; erhow@birdmarella.com; sbannett@birdmarella.com
Cc: Christopher Tayback <christayback@quinnemanuel.com>
Subject: RE: Cotter v. Cotter

I believe Craig is available the week of 9/12, but I will check and confirm. I can make myself available that week except for Thurs 9/15, as I have an all-day mediation scheduled that cannot be moved. Nick

---

From: ferrariom@gtlaw.com [mailto:ferrariom@gtlaw.com]
Sent: Tuesday, August 23, 2016 2:08 PM
To: MKrum@lrrc.com; marshallsearcy@quinnemanuel.com; erhow@birdmarella.com; sbannett@birdmarella.com
Cc: christayback@quinnemanuel.com; Nick Santoro
Subject: RE: Cotter v. Cotter

I have a trial set to start that week. Let's go ahead and set the depos as there is a chance the matter may resolve or I can push the start to the following week.

Mark E. Ferrario
Shareholder
Greenberg Traurig, LLP | Suite 400 North
3773 Howard Hughes Parkway | Las Vegas, Nevada 89169
Tel 702.938.6870 | Cell 702-812-3335
ferrariom@gtlaw.com | www.gtlaw.com

GT GreenbergTraurig

From: Krum, Mark [mailto:MKrum@lrrc.com]
Sent: Monday, August 22, 2016 2:28 PM
To: 'Marshall Searcy'; Ferrario, Mark E. (Shld-LV-LT); erhow@birdmarella.com; sbannett@birdmarella.com
Cc: Christopher Tayback
Subject: RE: Cotter v. Cotter

Marshall and Mark,

I still am not available the Tuesday following Labor Day and that leaves us with a short week. Additionally, unless you are agreeable to producing what I expect to be a small volume of documents relating to the offer/expression of interest and the responses of the individual director defendants, I probably should raise that issue with the court before proceeding with McEachern, Codding and Adams. Under the circumstances, it may make the most sense for us to try to schedule these depositions for the week of September 12. Let me know your position(s) on these issues. Thanks.

Mark

From: Marshall Searcy [mailto:marshallsearcy@quinnemanuel.com]
Sent: Monday, August 22, 2016 5:02 PM
To: Krum, Mark; ferrariom@gtlaw.com; erhow@birdmarella.com; sbannett@birdmarella.com

Cc: Christopher Tayback
Subject: RE: Cotter v. Cotter

One quick correction—that should be Tues Sept. 6, not 7.

From: Marshall Searcy
Sent: Monday, August 22, 2016 1:49 PM
To: 'MKrum@lrrc.com' <MKrum@lrrc.com>; 'ferrariom@gtlaw.com' <ferrariom@gtlaw.com>; 'erhow@birdmarella.com' <erhow@birdmarella.com>; 'sbannett@birdmarella.com' <sbannett@birdmarella.com>
Cc: Christopher Tayback <christayback@quinnemanuel.com>
Subject: RE: Cotter v. Cotter

Mark,
I just heard from Mark Ferrario that he's unavailable for Jim Cotter, Jr.'s deposition on the date I proposed. Accordingly, please let me know if Jim Cotter, Jr. is available on Tues. September 7, or otherwise later that week.

From: Marshall Searcy
Sent: Monday, August 22, 2016 1:19 PM
To: MKrum@lrrc.com; 'ferrariom@gtlaw.com' <ferrariom@gtlaw.com>; erhow@birdmarella.com; sbannett@birdmarella.com
Subject: Cotter v. Cotter

Mark,
I write concerning deposition scheduling. Judy Codding and Doug McEachern are available for deposition on September 1. Guy Adams can also be available on September 1; alternatively, in the event that there are additional documents ordered produced that might pertain to his deposition, he can be available on September 13.

Is Jim Cotter, Jr. available for August 31? Please let me know.,

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This message and any attachments are intended only for the use of the individual or entity to which they are addressed. If the reader of this message or an attachment is not the intended recipient or the employee or agent responsible for delivering the message or attachment to the intended recipient you are hereby notified that any dissemination, distribution or copying of this message or any attachment is strictly prohibited. If you have received this communication in error, please notify us immediately by replying to the sender. The information transmitted in this message and any attachments may be privileged, is intended only for the personal and confidential use of the intended recipients, and is covered by the Electronic Communications Privacy Act, 18 U.S.C. §2510-2521.

EXHIBIT 2

From: Krum, Mark [mailto:MKrum@lrrc.com]
Sent: Monday, September 12, 2016 1:26 PM
To: Marshall Searcy
Cc: Christopher Tayback ; ferrariom@gtlaw.com; hendricksk@gtlaw.com; Ekwan E. Rhow (erhow@birdmarella.com) ; Shoshana E. Bannett (sbannett@birdmarella.com) ; NSantoro@santoronevada.com
Subject: RE: cotter v. cotter

Marshall,

You mischaracterize our email exchange, presumably purposefully failing to distinguish our refusal to confirm that we would (much less could) proceed with the depositions without first knowing when the required documents would be produced, with our advice Thursday that, because the documents had not been produced, we would (and could) not proceed two business days later. You are correct in acknowledging that the email exchange speaks for itself.

Once again, I ask that counsel for the individual defendants and the Company advise when the documents will be produced. Additionally, when after they have been produced will Ms. Codding and Mr. McEachern will be made available for deposition?

As to what you mischaracterize as subpoenas, kindly respond to my two emails to your colleague, Noah, both of which were copied to you and both of which have been ignored by the two of you. Additionally, on what basis do you presume that these people are available on short and inadequate notice provided on the eve of a holiday weekend?

I am out of the office and have only a laptop and cell phone that has ceased working. I therefore cannot speak at 3 Pacific.

Mark

From: Marshall Searcy [mailto:marshallsearcy@quinnemanuel.com]
Sent: Friday, September 09, 2016 1:26 PM
To: Krum, Mark
Cc: Christopher Tayback; ferrariom@gtlaw.com; hendricksk@gtlaw.com; Ekwan E. Rhow (erhow@birdmarella.com); Shoshana E. Bannett (sbannett@birdmarella.com); NSantoro@santoronevada.com
Subject: RE: cotter v. cotter

Mark,

On September 1, I offered the depositions of Ms. Codding and Mr. McEachern for September 13. (I have now offered these witnesses to you on multiple occasions.) I also offered any documents pertinent to the Heth letter and the Board's consideration of it, so that Plaintiff could have the opportunity to ask Ms. Codding and Mr. McEachern about the documents if he so chose. You rejected the offer, saying that "6 business days" was not enough notice, and calling the offer "presumptuous" and "disingenuous."

Yesterday, you wrote to again decline to take the same depositions that you had already declined to take. Frankly, your e-mail seems to be nothing more than an attempt to rehabilitate your record. The e-mail chain below, however, speaks for itself.

The Court directed the time frames for responses to Plaintiff's discovery request. In light of Plaintiff's rejection of my prior offer, we will simply proceed in accordance with the Court's direction. If you wish to discuss this on Monday, I will be free at 3 p.m. pacific time.

In addition, we have 3 subpoenas to Plaintiff's experts that have yet to be responded to. We intend to call the Court on this issue and seek scheduling of these expert depositions, unless you advise promptly that Plaintiff is willing to reconsider the position taken in your e-mail to Noah from earlier today.

From: Krum, Mark [mailto:MKrum@lrrc.com]
Sent: Thursday, September 08, 2016 10:14 AM
To: Marshall Searcy <marshallsearcy@quinnemanuel.com>
Cc: Christopher Tayback <christayback@quinnemanuel.com>; ferrariom@gtlaw.com; hendricksk@gtlaw.com; Ekwan E. Rhow (erhow@birdmarella.com) <erhow@birdmarella.com>; Shoshana E. Bannett (sbannett@birdmarella.com) <sbannett@birdmarella.com>; NSantoro@santoronevada.com
Subject: RE: cotter v. cotter

Marshall,

On August 30, the Court issued two orders, each of which will require defendants (including nominal defendant RDI) to produce additional documents. On the day following the Court's Orders, August 31, 2016, you advised that Judy Codding and Doug McEachern can be available for deposition on September 13, which now is next Tuesday. One week ago, on September 1, I asked you (and other responsible counsel) to advise when documents ordered to be produced would be produced. You responded that day with an email that mischaracterized what the Court ordered and stated that you "intend to produce documents…..so that plaintiff will have the opportunity to ask Ms. Codding and Mr. McEachern about them if he so chooses." Although I have not heard from counsel for RDI, they full well know that they too are required to produce documents and need to do so prior to the depositions of any of your clients resuming (or starting, as the case may be) and concluding.

Today, one week later, on September 8, 2016, we have received no documents from you or from any other counsel for any defendant, including nominal defendant RDI. That leaves two business days between now and the day you offered Ms. Codding and Mr. McEachern, one of which is travel day for me, as all counsel know. Under the circumstances, there is no way we can be prepared to proceed with and conclude those depositions. As I hope we have made clear previously, for the benefit of all participants, we do not intend to finish these depositions on a piecemeal basis, meaning make more than one trip to Los Angeles for each deposition. Thus, to confirm, we will not be proceeding with the depositions of Ms. Codding and Mr. McEachern on September 13.

If you and other counsel who are obligated to produce documents are unwilling to either do so immediately or to commit to the particular date to do so, then we need to set a time for all of us to speak to meet and confer about these matters. I am travelling today and generally unavailable tomorrow, but presently am available Monday until approximately 1:30 p.m.

Mark

Mark G. Krum
Partner
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Lewis Roca
ROTHGERBER CHRISTIE
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
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From: Krum, Mark
Sent: Friday, September 02, 2016 10:53 AM
To: Marshall Searcy
Subject: RE: cotter v. cotter

Marshall,

What I well know is that you continue to play "hide the ball." That alone accounts for the scheduling challenges with which we are faced.

You effectively suggest that I should travel Los Angeles to find out at deposition particular matters as to which defendants are invoking reliance of counsel but have failed to produce documents consistent with what the court ordered on Tuesday, presumably to then return to court, obtain another court order and then go back to Los Angeles for further deposition. That is a very special exercise at "hide the ball."

The first sentence of your second paragraph illustrates why almost every matter results in motion practice in this case. The court stated quite clearly that I could "ask questions at the director depositions that are going on, but I'm not going to increase your time on them." You dutifully omit the part of what the court says that directly contradicts the position you take, and you rely on the part that does not matter, unless I exceed the balance of a day in conducting and completing these depositions. The second sentence of the second paragraph likewise is directly contrary to the court's order, which granted the portion of the motion that requested that documents be produced by all defendants responsive to the requests included in the motion. I asked when you intended to have the documents produced and you did not answer. Nevertheless, you insist that I commit proceeding with depositions 6 business days hence.

As to the third paragraph if your email, we understand it to indicate that you intend to proceed in the manner identified above. Should we learn at any of these depositions that any of the deponents are claiming reliance of counsel and that the documents have not been produced sufficiently in advance of the depositions for us to be prepared and use them, the relief we will see from the court not only will be to compel disclosure of the documents and information that was improperly withheld, it also will include sanctions, including with respect to other efforts to invoke reliance on counsel. In this regard and otherwise, all rights are reserved.

We have no response from you advising us when you intend to produce the documents the court ordered produced. Nor do we have a response from the company, which we understand, and given that Mr. Ferrario is in arbitration this week. Your request that we confirm that we will proceed with depositions 6 business days hence therefore is as presumptuous as it is disingenuous. See our prior email.

Dictated to a smartphone.

Mark

Sent from my Verizon Wireless 4G LTE smartphone

-------- Original message --------
From: Marshall Searcy <marshallsearcy@quinnemanuel.com>
Date: 09/01/2016 8:47 PM (GMT-05:00)
To: "Krum, Mark" <MKrum@lrrc.com>
Cc: ferrariom@gtlaw.com, Christopher Tayback <christayback@quinnemanuel.com>, Noah Helpern <noahhelpern@quinnemanuel.com>, hendricksk@gtlaw.com, ferrariom@gtlaw.com, NSantoro@santoronevada.com, "Ekwan E. Rhow (erhow@birdmarella.com)" <erhow@birdmarella.com>, "Shoshana E. Bannett (sbannett@birdmarella.com)" <sbannett@birdmarella.com>
Subject: RE: cotter v. cotter

Mark,
As you well know, the problem is that Plaintiff continues to delay taking depositions and using it as an excuse to put off his own. With respect to your e-mail from earlier today:

First, on the Heth letter ("the so-called Offer") the Court specifically advised that you would not have additional time to depose the directors on the Heth letter. Plaintiff's position that he is entitled to documents for anything other than for the corporate designee deposition seems to be contrary to the Court's order. That said, we intend to produce the documents pertinent to the Heth letter and the Board's consideration so that Plaintiff will have the opportunity to ask Ms. Codding and Mr. McEachern about them if he so chooses.

Second, with regard to Plaintiff's reading of the Court's order on advice of counsel, Plaintiff seems to be using a strained interpretation of the Court's order to delay the proceedings. Plaintiff's motion, and the Court's order, went to a single document on the ownership of options. The Court did not re-open discovery, and we certainly don't intend to try to determine from instances "too numerous to list" if Plaintiff is seeking other additional documents.

Accordingly, please confirm that Plaintiff intends to take the depositions of Ms. Codding and Mr. McEachern on the date proposed and that Mr. Cotter will be provided during that week.

From: Krum, Mark [mailto:MKrum@lrrc.com]
Sent: Thursday, September 01, 2016 12:05 PM
To: Marshall Searcy <marshallsearcy@quinnemanuel.com>
Cc: ferrariom@gtlaw.com; Christopher Tayback <christayback@quinnemanuel.com>; Noah Helpern <noahhelpern@quinnemanuel.com>; hendricksk@gtlaw.com; ferrariom@gtlaw.com; NSantoro@santoronevada.com; Ekwan E. Rhow (erhow@birdmarella.com) <erhow@birdmarella.com>; Shoshana E. Bannett (sbannett@birdmarella.com) <sbannett@birdmarella.com>
Subject: RE: cotter v. cotter

Marshall,

I cannot respond to your question until we have some idea when we are able to schedule other depositions, in view of the Court's recent rulings. Insofar as you are implying that I should make a separate trip to Los Angeles for another session of Mr. Cotter's deposition, such a suggestion perfectly contradicts the agreement I struck with counsel (including your partner, Chris Tayback) at the last session of Mr. Cotter's deposition, which was that Mr. Cotter would appear for a fourth and final (abbreviated) session of his deposition when it was scheduled to occur when I otherwise was in Los Angeles to complete other depositions.

Mark

From: Marshall Searcy [mailto:marshallsearcy@quinnemanuel.com]
Sent: Thursday, September 01, 2016 9:27 AM
To: Krum, Mark
Cc: ferrariom@gtlaw.com; Christopher Tayback; Noah Helpern; hendricksk@gtlaw.com; ferrariom@gtlaw.com; NSantoro@santoronevada.com; Ekwan E. Rhow (erhow@birdmarella.com); Shoshana E. Bannett (sbannett@birdmarella.com)
Subject: RE: cotter v. cotter

Mark,
I will respond to the rest of your e-mail shortly, however, you still have not responded to my question about when Jim Cotter Jr will be provided for deposition. Please let me know by the end of the day so that I do not have to call the Court.

From: Krum, Mark [mailto:MKrum@irrc.com]
Sent: Thursday, September 01, 2016 9:23 AM
To: Marshall Searcy <marshallsearcy@quinnemanuel.com>
Cc: ferrariom@gtlaw.com; Christopher Tayback <christayback@quinnemanuel.com>; Noah Helpern <noahhelpern@quinnemanuel.com>; hendricksk@gtlaw.com; ferrariom@gtlaw.com; NSantoro@santoronevada.com; Ekwan E. Rhow (erhow@birdmarella.com) <erhow@birdmarella.com>; Shoshana E. Bannett (sbannett@birdmarella.com) <sbannett@birdmarella.com>
Subject: RE: cotter v. cotter

Marshall,

Two days ago, on August 30th, 2016, the Court issued two orders, each of which will require defendants, meaning the individual defendants (including Craig Tompkins who is named as a defendant in the intervening plaintiffs' complaint) and nominal defendant RDI, to produce additional documents.

One order was with respect to Plaintiff's motion to compel expedited discovery regarding the so-called Offer and the actions taken by the defendants in response to it. In that regard, the Court ordered, among other things, that the documents be produced within 15 days and that, as to deponents such as Ms. Codding and Mr. McEachern, Plaintiff is free to examine them about such subjects.

To the point for the purposes of scheduling, when will the individual defendants and the Company have completed production of the documents ordered produced by this ruling? For that matter, we also need the Company to identify the Rule 30(b)(6) deponent and advise as to his or her availability. When may we expect that to happen?

The other order issued by the Court Tuesday that is relevant to scheduling was the order granting Plaintiff's motion to compel production of documents and information regarding advice of counsel. Obviously, this ruling is implicated in any circumstance in which any of your clients take the position that, with respect to any challenged action, they relied on the advice of counsel or another professional. As to Ms. Codding, for example, if she takes the position that she relied on the advice of counsel in making her decision to select Ellen Cotter as CEO, to make Margaret Cotter an employee, to give Margaret Cotter the position and compensation she was given and/or to pay Margaret Cotter what Plaintiff claims amounted to a $200,000 gift, documents reflecting any and all such advice must be produced promptly and, of course, prior to the deposition. The same is true with respect to Messrs. Adams and McEachern, except that the examples are too numerous to begin to list.

This points up the importance of defendants promptly identifying which matters it is as to which they are going to invoke the business judgment rule and assert that they relied on the advice of counsel or other professionals and, to the point for present and other purposes, producing the documents required to be produced in view of the Court's order. When will that be done?

We look forward to hearing from counsel for each of the individual defendants and from counsel for the Company regarding these matters.

Mark

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From: Marshall Searcy [mailto:marshallsearcy@quinnemanuel.com]
Sent: Wednesday, August 31, 2016 5:17 PM
To: Krum, Mark
Cc: ferrariom@gtlaw.com; Christopher Tayback; Noah Helpern; hendricksk@gtlaw.com
Subject: cotter v. cotter

Mark,
Judy Codding and Doug McEachern can be available on September 13. Can you let me know when Jim Cotter, Jr. is available that week?

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Electronically Filed
10/26/2016 10:55:40 AM

CLERK OF THE COURT

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

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

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

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

Related and Coordinated Cases

BUSINESS COURT

INDIVIDUAL DEFENDANTS' OBJECTIONS TO THE DECLARATION OF JAMES J. COTTER, JR. SUBMITTED IN OPPOSITION TO ALL INDIVIDUAL DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: Oct. 27, 2016
Time of Hearing: 1:00 p.m.

Pursuant to Nevada Rule of Civil Procedure 56(e), Individual Defendants respectfully submit the following written objections to evidence submitted in support of Plaintiff's Opposition to All Individual Defendants' Motions for Partial Summary Judgment.

INTRODUCTION

A Motion for Summary Judgment (or Opposition) depends, in part, upon the sufficiency of the affidavits filed. *See* Nev. R. Civ. P. 56(e). Affidavits must be made on personal knowledge and set forth facts that would be admissible into evidence and that show affirmatively that affiant is competent to testify. *Coblentz v. Hotel Employees & Rest. Employees Union Welfare Fund*, 112 Nev. 1161, 925 P.2d 496 (1996) (citing Nev. R. Civ. P. 56(e)).

Conclusory statements along with general allegations do not create issue of fact for summary judgment purposes. *See* Nev. R. Civ. P. 56(e); *Gunlord Corp. v. Bozzano*, 95 Nev. 243, 245, 591 P.2d 1149, 1150-51 (1979) ("The [defendant's] affidavit in other respects is conclusory rather than factual and does not reflect that he had personal knowledge . . . and was competent to testify regarding it."). Moreover, "[a] genuine, triable dispute of fact is not created merely because a party's own testimony is self-contradictory or internally inconsistent, especially when no other evidence or testimony supports the non-moving party's version of events." *Rivers v. Lopez*, 2013 WL 8148789, at *5 (Nev. Dist. Ct. Oct. 8, 2013).

Defendants object generally to Plaintiff's Declaration because it is largely based on speculation rather than personal knowledge. Such speculation is not evidence and does not, as a matter of law, create a material disputed issue of fact at the summary judgment stage. *See* Nev. R. Civ. P. 56(c); *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) ("The non-moving party's documentation must be admissible evidence, and he or she is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.") (internal quotation marks and citation omitted).

In addition, Plaintiff's speculative statements in large part contradict the well-established and undisputed evidence in this case. Plaintiff's Declaration is objectionable and should be

stricken or excluded in its entirety. Defendants note the following non-exhaustive list of specific objections to particular statements in Plaintiff's Declaration.

SPECIFIC OBJECTIONS

MATERIAL OBJECTED TO	GROUNDS FOR OBJECTION
James J. Cotter, Jr. ("Plaintiff") Declaration, para 6, page 3, lines 21 through 25. "In fact, as early as 2006, James J Cotter, Sr. ('JJC, Sr.'), then the CEO and controlling shareholder of RDI, had communicated to the RDI board of directors his proposed succession plan for the positions of President and CEO. That plan was for me to work under the direction of JJC, Sr. to learn the businesses of RDI, including by functioning in a senior executive role."	A. **Hearsay (N.R.S. § 51.065).** The testimony purportedly relates to a conversation between James Cotter, Sr. and members of RDI's Board. Accordingly, the statement is inadmissible hearsay. Plaintiff has not demonstrated that the statement is subject to a recognized hearsay exception.
Plaintiff Declaration, para 8, page 4, lines 10 through 13. "They also co-opted at least one employee, Linda Pham, who claimed at some point in 2014 that I had created a hostile work environment for her, which accusation was not well-taken and, in any event, moot with the passage of time by Spring 2015, as director Kane acknowledged at the time."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Ms. Pham's accusations were "not well-taken" or "moot".
Plaintiff Declaration, para 17, page 6, lines 18 through 26. "The term 'independent' as used in RDI's SEC filings do not refer to matters of Nevada law. It referred usually to the fact that, pursuant to the terms of the Company's listing agreement with NASDAQ, the stock exchange on which RDI stock trades, directors meet the standard of independence of NASDAQ. None of the director defendants have ever suggested to me that they	A. **New Evidence Not Disclosed in Discovery (N.R.C.P. 37(c)(1)).** When a party fails to disclose information required by Rule 16, that party is not permitted to use as evidence on a motion any information not so disclosed. Plaintiff has never previously disclosed this proffered explanation and is accordingly barred from doing so now. *See Tannoury v. Fernandez*, 2011 WL 7502238 (Nev. Dist. Ct. Nov. 30, 2011) (party's

understood use of the term 'independent' in RDI's SEC filings to communicate anything other than that non-Cotter directors were not members of the Cotter family which, in one manner or another, controlled approximately 70% of the voting stock of RDI. As among members of the RDI Board of Directors, the term 'independent' was used historically to refer to directors who were not members of the Cotter family."	failure to disclose its alleged damages during discovery precluded him from later relying on such evidence at summary judgment). B. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding what the other RDI Directors thought the term "independent" represented. C. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief as to what other RDI Directors took "independent" to mean is speculative and therefore irrelevant.
Plaintiff Declaration, para 20, page 7, lines 12 through 14. "Kane remains very close with my sisters, who still call him "Uncle Ed" (which I ceased doing after joining RDI). They continue to get together socially, including for family meals during holiday periods, which is what they admittedly did around the Christmas holidays in 2015."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Kane, Ellen Cotter, and Margaret Cotter "continue to get together socially". B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief that Mr. Kane, Ellen Cotter and Margaret Cotter "continue to get together socially" is speculative and therefore irrelevant.
Plaintiff Declaration, para 21, page 7, lines 21 through 25. "My sisters as executors of my father's estate are in position to see to it that Adams is or is not paid any monies he is owed on account of those carried interests."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding how Ellen or Margaret Cotter can not pay money legally owed to Mr. Adams.

Plaintiff Declaration, para 22, page 7, lines 25 through 28, and page 8, line 1. "When I suspected that Adams had agreed with my sisters to vote to terminate me as President and CEO of RDI, that raised the issue of whether he was financially dependent on them. I now know that he is. I learned from Adams' sworn declarations in his California state court divorce case that almost all of his income comes from RDI and from one or more companies that my sisters control. Adams is not independently wealthy."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Adams is "financially dependent" on Ellen or Margaret Cotter. B. **Hearsay/Best Evidence (N.R.S. §§ 51.065, 52.235).** The testimony is purportedly based on California court documents. Accordingly, the statement is inadmissible hearsay and violates the Best Evidence Rule. Plaintiff has not demonstrated that the statement is subject to a recognized hearsay exception. C. **Irrelevant (N.R.S. § 48.025).** Plaintiff's unsubstantiated belief that "Adams is not independently wealthy" is irrelevant.
Plaintiff Declaration, para 23, page 8, lines 13 through 16. "I believe Margaret's oldest child refers to Trisha and Michael as Aunt and Uncle. Michael's communication with me as a director has been very guarded, which I understand to reflect his knowledge of the lawsuit and his close relationship with Margaret."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that "Margaret's oldest child refers to Trisha and Michael as Aunt and Uncle." B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's "understanding" of why Michael's communication with him has supposedly been "very guarded" is speculative and therefore irrelevant.
Plaintiff Declaration, para 24, page 8, lines 22 through 27. "Her reaction to the offer to purchase all of the stock of the Company at a price in excess of what it trades in the market (the 'Offer'), first made by correspondence dated on or	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge regarding "Ms. Codding's unwavering loyalty to Ellen." Moreover, Plaintiff

about May 31, 2015, reflected Ms. Codding's unwavering loyalty to Ellen. Before the board meeting at which the Board was going to discuss the Offer, she indicated to me that there was no way that the Offer should even be considered (clearly having spoken to Ellen about it before the board meeting)."	has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Ms. Codding and Ellen Cotter had "clearly" spoken before a board meeting. B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief that Ms. Codding and Ellen Cotter had a conversation "before the board meeting" is speculative and therefore irrelevant.
Plaintiff Declaration, para 28, page 9, lines 19 through 21. "It is clear to me that Bill Gould effectively has given up trying to do what he thinks is the proper thing to do as an RDI director, and is and since June 2015 has been in 'go along, get along' mode."	A. **Contradicts Plaintiff's Prior Testimony (N.R.C.P. 37(c)(1)).** Plaintiff's statement is inconsistent with his prior testimony and should be excluded. "Technically, I believe he's independent." Plaintiff's Depo., p. 79:13. *See Rivers*, 2013 WL 8148789, at *5 ("A genuine, triable dispute of fact is not created merely because a party's own testimony is self-contradictory or internally inconsistent[.]"). B. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that Mr. Gould has "given up" doing what he thinks is proper. C. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief that "Bill Gould effectively has given up trying to do what he thinks is the proper thing" is speculative and therefore irrelevant.
Plaintiff Declaration, para 29, page 10, lines 12 through 16. "After it was activated and repopulated on June 12, 2015, it was used as a means to	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that

exclude me and then director Tim Storey, and to a lesser extent Bill Gould, from functioning as directors of RDI and, in some instances, even having knowledge of matters that were handled by the executive committee that historically and ordinarily were handled by RDI's Board of Directors."	the Executive Committee was "used as a means to exclude" him or any other RDI director. B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief that the Executive Committee was "activated" to "exclude" him or any other RDI director is speculative and therefore irrelevant.
Plaintiff Declaration, para 32, page 11, lines 14 through 19. The stated reasons are reasons thay [*sic*] no outside candidate could have met. The stated reasons are reasons that do not approximate, much less match, the criteria that the CEO search committee created and KF memorialized as the criteria to identify candidates and ultimately select a new President and CEO. The stated reasons for selecting Ellen were, as I heard them explained at the January board meeting, effectively distilled into a single consideration, namely, that Ellen and Margaret were controlling shareholders."	A. **Conclusory/Argumentative.** Without factual support, Plaintiff asserts that Ellen Cotter was made CEO because of "a single consideration, namely, that Ellen and Margaret were controlling shareholders." He says this despite the undisputed fact that Craig Tompkins drafted a seven-page memo addressed to the entire RDI Board listing over 18 reasons for why Ellen Cotter was the preferred candidate of the CEO Search Committee, including, but not limited to: she has the confidence of the existing senior management; she knows the Company, its assets, personnel, and operations; her experience as interim CEO; and the fact that the bulk of the Company's cash flow is derived from its entertainment activities, which she is very familiar with. Helpern Decl. to Mot. No. 5, ¶ 4, Ex. 3.
Plaintiff Declaration, para 34, page 12, lines 11 through 13. "The point of the effort to exercise the supposed 100,000 share option was to ensure that Ellen and Margaret as executors would have more class B stock then [*sic*] third parties, including Mark Cuban."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence to lay the foundation or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that "point of the effort to exercise" the Estate's options was to "have more class B stock then [*sic*] third parties[.]" B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's belief that "the point of the effort to exercise" the

	Estate's options to have more Class B stock than third parties is speculative and therefore irrelevant. C. **Contradicts Plaintiff's Own Complaint (N.R.C.P. 37(c)(1)).** Plaintiff's statement contradicts allegations in his own complaint: "Plaintiff is informed and believes that EC and MC took such actions because of a concern that, absent the exercise of the supposed option for the Estate to acquire 100,000 shares . . . EC and MC might have lacked sufficient votes to control the 2015 ASM and, in effect, unilaterally elect as RDI directors whomever they choose[.]" Plaintiff's Second Amended Complaint ¶ 108. *See Rivers*, 2013 WL 8148789, at *5 ("A genuine, triable dispute of fact is not created merely because a party's own testimony is self-contradictory or internally inconsistent[.]").
Plaintiff Declaration, para 35, page 12, lines 26 through 28, and page 13, lines 1 through 3. "I understand they did so so that the 100,000 shares supposedly could be registered with the Company in the name of Ellen and Margaret as executors prior to the record date. The Company received no benefit from this, in fact suffered the injury from replacing outstanding liquid class A stock with effectively illiquid class B stock and, I am informed and believe, from covering the tax obligation that belong to the person or entity exercising the option."	A. **Lack of Personal Knowledge (N.R.S. § 50.025).** Plaintiff has not proffered any evidence or demonstrated any foundation sufficient to demonstrate his supposed personal knowledge that the Company "in fact suffered the injury" from the Estate's options exercise or that the Company "cover[ed] the tax obligation that belong to the person or entity exercising the option." B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's understanding as to why the executors of the Estate exercised the Estate's options is speculative and therefore irrelevant.
Plaintiff Declaration, para 36, page 13, lines 19 through 23.	A. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's personal belief that Margaret Cotter's additional compensation was "simply a gift" and

"Additionally, the $200,000 paid to Margaret, ostensibly for concessions Margaret previously was willing to make for free to become an employee of the Company, and reportedly for prior services rendered which the Board year after year had not chosen to pay her, is simply a gift, presumably because Margaret made less money in 2015 due to the Stomp debacle."	his guess as to why it was paid is speculative and therefore irrelevant. B. **Conclusory/Argumentative.** Without factual support, Plaintiff asserts that Margaret Cotter was paid additional sums "presumably because [she] made less money in 2015" despite the undisputed fact that the additional consulting fee compensation was for her services rendered to the Company in recent years including, but not limited to: predevelopment work on the Company's NYC properties; management of the NYC properties; and management of Union Square tenant matter. *See* RDI 8-K filed March 10, 2016.
Plaintiff Declaration, para 38, page 14, lines 3 through 4, and lines 9 through 10. "Adams in March 2016 was awarded what amounted to a $50,000 bonus for being a director." "I have no doubt that Adams was paid $50,000 for what amounted to exemplary loyalty to Ellen."	A. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff's personal belief that Mr. Adams was "paid . . . for what amounted to exemplary loyalty to Ellen" is speculative and therefore irrelevant. B. **Conclusory/Argumentative.** Without factual support, Plaintiff asserts that "Adams was paid . . . for what amounted to exemplary loyalty to Ellen" despite the undisputed fact that Adams was paid the additional compensation for services rendered to the Company in 2015 including, but not limited to: assisting Ellen Cotter in an advisory capacity in her transition of roles into interim CEO and permanent CEO; advice on investor relations; and travel to New York to assist in evaluation of Union Square project. *See* Helpern Decl. to Mot. No. 6, ¶ 12, Ex. 11.
Plaintiff Declaration, para 40, page 14, lines 22 through 24.	A. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff does not know what constitutes a business plan and his "understanding" that Ellen's supposed

"On or about June 7, 2016, in view of the Offer, I asked Ellen to provide me the Company's business plan. I understood that there was none and her failure to respond confirmed that."	"failure to respond" proves one does not exists is speculative and therefore irrelevant. B. **Conclusory/Argumentative.** Without factual support, Plaintiff asserts that RDI does not have a business plan despite the fact that it has been presented numerous times at conferences such as the 17th Annual B. Riley & Co. Investor Conference on May 26, 2016 (Helpern Decl. to Mot. No. 3, ¶ 7 Ex. 6) and the Gabelli & Company 8th Annual Movie & Entertainment Conference on June 9, 2016 (*Id*. at ¶ 8 Ex. 7). RDI's business plan is also included in the presentation titled "MISSION, VISION, & STRATEGY" dated February 18, 2016 (*Id.* at ¶ 6 Ex. 5).
Plaintiff Declaration, para 41, page 15, lines 8 through 12. "None asked questions about whether management was preparing a business plan to do so or, for that matter, simply preparing a long-term or strategic business plan. None exists. Instead, the non-Cotter directors simply ascertained that Ellen and Margaret wanted to reject the Offer and agreed that the price offered was inadequate. They all voted to proceed in the manner Ellen recommended."	A. **Conclusory/Argumentative.** Without factual support, Plaintiff asserts that no questions were asked regarding RDI's business plan or the Unsolicited Offer despite the undisputed fact that multiple discussions occurred at both the June 2, 2016 and July 23, 2016 board meetings—in fact, a comprehensive presentation was given by Ellen Cotter and other RDI executives to the entire board. *See id*. at ¶ 2 Ex. 1. B. **Irrelevant/Speculation (N.R.S. § 48.025).** Plaintiff does not know what constitutes a business plan. Moreover, his personal belief as to the thought process and reasoning of the non-Cotter directors in voting against the Offer is speculative and therefore irrelevant.

Dated: October 26, 2016

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By: /s/ H. Stan Johnson

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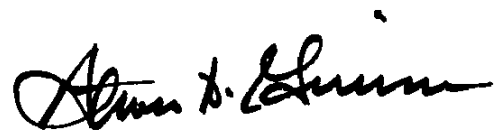

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
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JAMES COTTER, JR. Plaintiff vs. MARGARET COTTER, et al. Defendants	CASE NO. A-719860 A-735305 P-082942 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

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

APPEARANCES:

FOR THE PLAINTIFF:	MARK G. KRUM, ESQ.
FOR THE DEFENDANTS:	H. STANLEY JOHNSON, ESQ. CHRISTOPHER TAYBACK, ESQ. MARK E. FERRARIO, ESQ. KARA B. HENDRICKS, ESQ. MARSHALL SEARCY, ESQ. EKWAN RHOW, ESQ.

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 27, 2016, 12:59 P.M.

(Court was called to order)

MR. FERRARIO: So we are going to get the preview; right?

THE COURT: What?

MR. FERRARIO: Are we going to get the order?

THE COURT: What order?

MR. FERRARIO: You said you were going to tell us how you're going to --

THE COURT: Yeah, I'm going to tell you what to do. Sit down. Sit down, Mr. Ferrario.

MR. FERRARIO: Well, there's just certain --

THE COURT: We're missing an important group.

MR. FERRARIO: That's true.

(Pause in the proceedings)

THE COURT: This is John Waite, our new probate law clerk. He is coming in here merely because this case sort of is probate.

W-A-I-T-E, correct?

MR. WAITE: Correct.

(Pause in the proceedings)

THE COURT: What time were we going to start?

MR. FERRARIO: You said 1:00, I thought.

THE COURT: I thought I said 1:00, too. I was going to do one motion, then I was going to go to a phone call at

1:15, then I was going to go to the next motion, and then we were going to go to a bunch of motions.

MR. FERRARIO: I think you're going to your phone call.

THE COURT: We'll see. Kirkland and Hart couldn't do 1:00 o'clock, so we had to do 1:15.

MR. FERRARIO: So what's the first motion?

THE COURT: I'm not telling you till they get here.

Does anyone actually have a calendar of what's on today so when I tell Mr. Ferrario he's being a smart ass I can do it nicely?

(Pause in the proceedings)

THE COURT: Good afternoon, Mr. Krum. How are you today?

MR. KRUM: Good afternoon, Your Honor. I apologize to you and to counsel for being tardy.

THE COURT: It's okay. I want to start with the motion to reconsider or clarify order.

And, as I told you, you're not on a timer, but I expect you to still be concise in your arguments.

MR. FERRARIO: Are we stopping at 1:15?

THE COURT: Kevin will put them on hold or we'll call in and put them on hold. I want to get through one motion first. That was the plan.

MR. FERRARIO: Okay. Thank you, Your Honor.

THE COURT: Do you have people attending by phone?

MR. FERRARIO: Excuse me?

THE COURT: Do you have people attending by phone?

MR. FERRARIO: No. Everybody's here this time.

MR. SEARCY: There's one attorney attending by phone. Shoshana's on the line.

MR. FERRARIO: Oh. Shoshana's on the line? I'm sorry.

THE COURT: Who's on the telephone?

MS. BANNETT: Good afternoon, Your Honor. This is Shoshana Bannett.

THE COURT: Lovely. Thank you.

MR. FERRARIO: Your Honor, since you advised us when you came out here that you had spent time reading the materials, which I advised everybody here you would do, I will be concise. Because I think in reviewing our motion for reconsideration there really isn't much left for me to say.

There is from our perspective a disconnect between the comments you made at the hearing where you ruled on Mr. Krum's motion to compel and then the order that came out. And so that is something that we're going to address. But, as Your Honor is aware from reading our pleadings, we think that the Court's order is disconnected from Nevada caselaw on the point and also disconnected from the statutes that govern in this arena. And, you know, as Your Honor can see from

reviewing our pleadings, we did a comprehensive search for any case around the country that would somehow bear on this issue, and we could find nothing that would support the very broad ruling that was embodied in your written order.

The points I would like to touch on I think that perhaps got lost in the original briefing and argument is when you go to NRS 78.138 you have the presumption of the business judgment rule applying. And it's a presumption in Nevada. You don't have to invoke it. And that seems to be where I think we're getting off track here. No one has to invoke that protection. It's there. So you don't have to plead it, you don't have to assert it as an affirmative defense. It's a presumption in Nevada that applies statutorily. And the statute also goes on to tell you what a director and an officer can rely on in informing themselves. And when you get to the very end of Section 78.138(2)(c) I think we get to some of the operative language that may have gotten lost in the original briefing. It says, "A director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." So the inquiry is going into seeking the advice, do you have something in your head, Director, that would cause you not to rely on that advice that you're getting from an accountant, from an officer, from a

lawyer. And that is a critical distinction from I think Your Honor's ruling. And the statute is specific as to where the inquiry begins and ends.

Also, if you go to the NRS Chapter 49, where the privilege results, there's no exception there that would cover this. In sitting down and trying to digest this Court's ruling it has the practical effect of precluding any director from ever seeking legal advice from an attorney in fulfilling their duties without risking that advice then becoming subject to discovery. And again, that's not found in any case, any article, any treatise that we can find. And it also -- your ruling puts the directors at odds with the company. And you're familiar with the Sands-Jacobs case.

THE COURT: Maybe.

MR. FERRARIO: It was your case, so I --

THE COURT: And the Wynn case you cited, I'm familiar with that, too.

MR. FERRARIO: You'd be proud to know I read it.

THE COURT: You should have lived it.

MR. FERRARIO: No. I -- well, I lived it vicariously. You remember we were here.

THE COURT: You were here, yeah.

MR. FERRARIO: Yeah. And, you know, the Nevada Supreme Court says who the holder of the privilege is in the Jacobs case, although the facts are a little different there.

THE COURT: Not a former CEO.

MR. FERRARIO: Not a former CEO. But the court made it very clear that it's the corporation's privilege. And actually the statutes do that, as well. And so now you have a director who is presumed to have acted in good faith, so you don't need to invoke that. And that -- and again, I want to get to that point. That's different than the Wynn case. In the Wynn case they actually pled in the pleading that they relied on the report and the advice of counsel. That hasn't occurred here. No one has put that at issue.

THE COURT: That's why I asked you at that hearing and I said to I don't know if it was you or Ms. Hendricks, I said, now you guys need to make a choice.

MR. FERRARIO: But --

THE COURT: And I've been waiting for you to tell me what that choice is.

MR. FERRARIO: But what's the choice? I guess that's what we're --

THE COURT: Are you going to rely on advice of counsel for your directors in their business judgment rule defense?

MR. FERRARIO: Your Honor, we -- you see a number of lawyers sitting over here. We've all sat down and tried to role play how this would play out, okay. So here's -- if you ask a --

THE COURT: But you heard me ask that question during the hearing; right?

MR. FERRARIO: I did.

THE COURT: Okay.

MR. FERRARIO: And so we're trying to gain an understanding of where this goes. If a director is asked a question, what did you do, okay, in dealing with this issue, and let's just -- it's the hundred thousand exercise of the option, what did you do.

THE COURT: And that is the only issue which I have granted it, because that is the only issue on which I've been provided evidence that they have testified that they relied upon advice of counsel as their sole decision-making basis.

MR. FERRARIO: Your Honor, maybe we can cut this out. If Your Honor limits the ruling and it is that they relied solely --

THE COURT: Well, that's what the order says. It says on line 6, "Legal opinion referenced by Messrs. Kane and Adams in their deposition as having been relied upon relating to the 100,000 share option shall be produced by defendants, including," and I list a bunch of stuff. If any of that stuff was provided to Mr. Kane and Adams for their ability to review and rely upon, it needs to be produced. If it wasn't provided to them and it's simply the basis of counsel's work product, that's a different issue. But what I specifically said in

line 6 of the order and the reason I didn't change it any more was because it was part of being relied upon. They can't rely upon it unless they give it to him.

MR. FERRARIO: You're right. And I guess so now if --

THE COURT: Or they tell him. I guess they could tell him.

MR. FERRARIO: They could tell him.

THE COURT: Yeah.

MR. FERRARIO: If the scope of the order is such that one of directors says, all I did was rely on advice of counsel, okay, I didn't do anything else, I think that raises a little bit different issue, although I'm not sure it would change my position. What we're concerned about is where you have directors considering a number of things, and part of that mix might be advice of counsel on a point.

THE COURT: Correct.

MR. FERRARIO: Okay. It might be a point of procedure.

THE COURT: Happens all the time, Mr. Ferrario.

MR. FERRARIO: Happens all the time. In that context I take it your order would not apply --

THE COURT: Well, it depends --

MR. FERRARIO: -- because it's not the sole basis.

THE COURT: Depends upon what the testimony is.

MR. FERRARIO: No, I understand. And that's what we -- and we've gone through all --

THE COURT: And, as you know, I typically do an evidentiary hearing and I hear about what it is that the directors relied upon in making that determination, and based upon that mix of information I make a decision. But that's a fact-based decision based on case by case as it comes up. Here it was pretty clear that it was a solely based upon this opinion, this advice that was given. And I am not trying to require counsel to produce all of their work papers --

MR. FERRARIO: Well, that's how we interpreted it.

THE COURT: I'm not trying to do that. That's why I said the legal opinion referenced by them as having been relied upon shall be produced by defendants. And then I listed a whole bunch of things that could have been provided to them for them to review as part of their reliance upon that attorney's opinion.

MR. FERRARIO: Okay.

THE COURT: Or at least that was I was trying to make sure we did.

MR. FERRARIO: Well, when we read -- when we read the laundry list it appeared that, quite frankly, some of us here would be witnesses. And, you know, our work product, the dialogue we had internally, none of which was --

THE COURT: So how about I change the word "relied"

to "provided to"?

MR. FERRARIO: I think if --

THE COURT: I don't know what word you want me to use there, but I used "rely" because that's what is important in me making the determination under the business judgment rule and the protection the directors are entitled to even if the lawyer's wrong.

MR. FERRARIO: Right.

THE COURT: And that's the important factor. They're entitled to that protection if it's a good-faith reliance and the didn't know any better and the lawyer was wrong.

MR. FERRARIO: You're correct. Actually, this is a good dialogue, because it gets back to what 78.138 says, which is the director would have to have knowledge concerning the matter in question, okay, that would cause that director not to be able to rely on the advice of counsel. That inquiry can be made without delving into the advice of counsel.

Now, if -- as we're having this dialogue it leads me back to kind of the Wordley case, where there they put the advice at issue, okay. They pled it. And again in the Wynn case as we read the briefs -- we're not as familiar with it as you are, we just read the briefs -- that's at issue -- it seems to be at issue there. Here --

THE COURT: It depends who you ask and when you ask

them. Because it's changed over time.

MR. FERRARIO: Okay. But the briefing --

THE COURT: Sort of like this case. I asked them if they were going to, and then they thought about it and they made a decision.

MR. FERRARIO: Well, that was our take from the Wynn case, was that they were -- that they'd put it at issue. If -- but, again, if a director simply says, okay, that I -- in discharging my duty I consulted with counsel, okay --

THE COURT: Mr. Ferrario, I'm not going to talk to you about a hypothetical case. I am talking about the facts in this case where I have two witnesses who testified that their sole basis was they relied upon the representations or the opinion of counsel in making a determination. That's this case. That's the one I'm deciding.

MR. FERRARIO: I understand.

THE COURT: I'm not going to get involved with you in a hypothetical discussion. You can have that discussion in Carson City, if you want.

MR. FERRARIO: I'd prefer not to have to go to Carson City. And that's why I'm here doing -- having this --

THE COURT: I'm just telling you I don't want to discuss hypothetical questions on this issue, because I've tried to be very limited on a scope of this issue.

MR. FERRARIO: I understand. Okay. And that's

helpful and it may help us in kind of narrowing the scope of the order. But I think the followup question from -- that's missing from Mr. Krum's examination has to do with whether any of those directors had any knowledge concerning the matter in question that would cause them not to be able to rely on that advice. That's the discrete inquiry that wasn't made there. And if the director says, I had nothing in my possession that would cause me to question what the attorney said, then in that context that's the end of the inquiry. The confidentially attorney-client communication should not have to be divulged. That's my point. Even in that case. And that examination didn't take place there.

THE COURT: Okay.

MR. FERRARIO: And so, you know, with that I'll answer any questions Your Honor has. Again, I think it was extensively briefed and it's -- you know.

THE COURT: It was extensively briefed. It was well briefed. It was very thorough. It just -- I -- there was clearly a miscommunication of some sort. And I thought I was really clear when I put that language in there, because I monkeyed with it a little.

MR. FERRARIO: Thank you, Your Honor.

THE COURT: Mr. Krum, did you want to say anything on this motion?

MR. KRUM: I do, Your Honor.

THE COURT: Okay.

MR. KRUM: Thank you. Of course, the issue isn't an exception, it's waiver. That's what Kane and Adams did.

Second, with respect to 78.138 there was no further examination necessary. We have other evidence from a contemporaneous email from Mr. Kane in which he expresses reservations about whether Mr. Tompkins has answered the questions posed by the third compensation committee member, Mr. Storey. That's it for the law and the matters of that respect.

I want to make clear, however, Your Honor, that from our perspective this is not the same issue as it was from the perspective of the intervenor plaintiffs. For them the 100,000 share option was about whether they could secure control at the annual shareholders meeting. For us the developments of the 100,000 share option, meaning the communications that Tompkins had with directors, occurred at a point in time when Ellen Cotter and Margaret Cotter commenced the course of conduct, enlisted the agreement of Kane and Adams and McEachern that carry on to this day. So Tompkins, according to evidence in this case, chose the sisters' side. The evidence, by the way, is Mr. Kane's contemporaneous email. Mr. Kane also repeatedly expresses in email reservations about Mr. Tompkins serving in any significant role with the company. Mr. Tompkins, as it turned out, effectively became the

consigliere to Ms. Cotter and starting with his advice to Ellen Cotter in March or April that she needed to exercise this option to ensure control of the company because there was the possibility that the shares held in the name of the Trust could not be voted or should not be counted. That was the beginning of this whole scheme to secure control.

So the point of these communications, Your Honor, is not confined to a question of whether there was a fiduciary breach by Kane and Adams in approving that option, which it is, it concerns that, but it goes to the bigger part of the case. And the reason for that, Your Honor, is the timeline. Because in March the five non-Cotter directors made Mr. Storey ombudsman with the charge to work with the three Cotters and report back periodically, and then they'd revisit the situation in June. But Storey quickly alienated Ellen and Margaret Cotter, prompting Kane to intervene. And Ellen and Margaret Cotter conferred with Tompkins, and we have these developments of the 100,000 share option and at more or less the same time Kane and Adams and McEachern agreed with Ellen to vote to terminate plaintiff. So it's actually a big, big part of the case in terms of what transpired at the outset. It's not just the issue that I think we perhaps led you to believe it was previously.

The legal issues I think I just spoke to briefly. And unless you have questions, I will step down.

THE COURT: Thank you.

The motion for clarification is granted in part. If document or information was not provided to Mr. Kane and Adams, it does not fall within the delineated items that are included on the October 3rd order, okay.

Now, whoever's on the phone, we may lose you, because Kevin's now going to call in to my 1:15.

When you return from your five-minute recess we are going to go to Cotter's motion to vacate and reset pending dates and reopen discovery on order shortening time, fourth request.

(Court recessed at 1:22 p.m., until 1:26 p.m.)

THE COURT: Okay. Mr. Krum, you're up.

MR. KRUM: This is the motion to vacate, correct, Your Honor?

THE COURT: That is -- it's essentially a motion to continue trial.

MR. KRUM: Right. Thank you.

Well, as you saw, Your Honor, fact discovery isn't complete, and based on what's transpired in terms of how the defendants have failed to produce documents in response to your orders of March 30, it's not going to be complete. Expert discovery, were that the only thing we had to do, might be complete. We have some witness conflicts, and I may have a conflict. So let me talk about those four items.

Well, August 3 one of the motions you granted was a motion to compel discovery regarding the offer. That included directing the defendants to produce a pretty finite set of documents and of the company to produce a Rule 30(b)(6) witness. The individual defendants other than Mr. Gould promptly represented that they would produce the documents and offered deposition dates a couple weeks hence, to which our response was, great, when will we get the documents because we need to review them to prepare, and, oh, by the way, when will we get the documents in response to the other order, which, of course, was the advice of counsel order that was just the subject of the last motion. There were no answers to that. And then ultimately those individual defendants didn't produce a single document regarding the offer. They said, well, the company will produce the documents.

So on September 15 the company produced a modest set of documents, but in our view, Your Honor, that production is incomplete for at least two reasons, one, the documents produced include board minutes of the of the single meeting from June, I think it was, at which the directors supposedly deliberated about how to respond to the offer. Those board minutes, Your Honor, include fairly detailed information that supposedly is taken from an oral presentation Ellen Cotter gave to the directors at that board meeting. In other words, the board members were given no written material before or at

the meeting. The production is incomplete because it doesn't include whatever notes or information was used by Ellen Cotter to make that presentation, which, of course, is the very kind of information one would need to meaningfully test the company's Rule 30(b)(6) witness, as well as the three director defendants whose depositions have not been completed in terms of, well, did you understand this information, was it accurate, did you think about this, did you think about that. But we don't have that documentation.

Also, Your Honor -- and my comments now are predicated entirely upon a news article that came out a couple weeks ago; in other words, nothing I'm about to say is predicated on anything I've learned from my client or any documents that my client has received from the company, meaning it's not non-public information. And the news article a couple weeks ago reported that the offerors were back with what apparently is a somewhat revised offer, I believe, at least in terms of the participants. And so obviously, Your Honor, that situation continues to unfold, assuming that news article is correct, and theoretically, at least, there should be additional documents, starting with whatever the new offer is or the revised offer or whatever it is and continuing with whatever communications, if any, there are as among the director defendants.

So the document isn't complete, and when it is

complete and when the documentation that's going to be produced in response to your modified order regarding advice of counsel, finally then we'll be in a position to resume or commence, as the case may be, and conclude these three director depositions, as well as the deposition of Craig Tompkins.

The other half of this, of course, as you full well understand given the last motion we had, is that the defendants haven't produced a single document that you ordered to be produced on the subject of advice of counsel. From our perspective there's nothing they argued in their motion to reconsider or clarify that they could not have raised following the hearing. They chose to wait until your order was signed on October 3rd and then file a motion, and it was just heard. So I don't know when we'll receive those documents. It may well be that counsel for the defendants, including the company, don't know what exactly they're going to produce, much less when. But obviously, Your Honor, I can't commence and conclude the depositions that remain, the percipient witness depositions that remain unfinished until we have that documentation and have time sufficient to prepare to use it.

That, Your Honor, is of no fault of plaintiff. It's -- we're in substantially the same position we were on August 30. We're in exactly the same position we were in

September 15, and nowhere along the way were we in a position to resume and conclude these depositions. And if you recall, Your Honor, one of those depositions you ordered to resume, that is, with Mr. McEachern, with respect to that very subject, the offer. And I omitted him before, I think. So this is no fault of ours. And we could have proceeded with the depositions, but it would have been a waste of everyone's time, because we would have been back once or twice to order the same deponents to come back after the defendants produced the documents you ordered them to produce on August 30th.

Respectfully, Your Honor, the manner in which they've responded to these orders that you granted, the motions to compel you granted sure smack of gaming the system with the hope that the Court will let them get away with it so that the plaintiff's required to go to trial without the discovery you have ordered plaintiff to be provided. And so, again, the director depositions are Cotting, Adams, and McEachern. There's Craig Tompkins, who is obviously going to have a much different examination now when these advice of counsel documents are produced, and there's a 30(b)(6) witness who was identified to us a week or two ago as Ellen Cotter. Obviously from our perspective, Your Honor, the missing documents, being the two categories of documents and the offer that haven't been produced are critical to conduct the Rule 30(b)(6) deposition that's now Ellen Cotter that you

ordered.

On the discovery front, if I've counted correctly -- or on the expert discovery front there are a total of ten experts. Five of ten have now been deposed. Two of those depositions were postponed because of conflicts. These guys are apparently all very successful, Your Honor. They're available one or two days each month, and that's made it difficult for all counsel to schedule and proceed with those depositions. And if you want to hear about the subject of whether we've been proactive or dilatory, let me just tell you what my week went like last week. Monday I was in New York for an expert deposition, Tuesday I was in Boston for an expert deposition, Wednesday I was in Philadelphia for an expert deposition, Thursday I was back in New York for an expert deposition, Friday I was here in court. Saturday and Sunday I was with my family on the East Coast. Monday I came to Las Vegas, Tuesday I went to Los Angeles for an expert deposition on Wednesday, and came back last night. We're working pretty hard, Your Honor. We have little time and difficult scheduling. The experts are not all in Las Vegas, nor are they all in Los Angeles, where counsel for the interested director defendants presume to require them to proceed initially.

In any event, Your Honor, we have five more to go, and we may or may not get them done between now and the date

of the trial stack, because it's going to require a lot of flying around, L.A. for two or three of them, Palo Alto, and I forgot where else, Your Honor.

The opposition filed by the company asserts that plaintiff's motion does not detail why in the last two months virtually none of the discovery plaintiffs demanded in August was not completed. Well, sure it does. I just discussed that, Your Honor. They didn't peruse the documents.

The company also argues that the foreseeability of the need for additional discover is extremely questionable. Respectfully, that ship has sailed. Your Honor granted motions to compel, you ordered discovery. We're entitled to receive it. The fact that they don't provide it doesn't mean that they now can effectively not provide it because the time for us to get it and use it is insufficient. The interested director defendants assert that, quote, "Since the previous motion to vacate plaintiff has refused to schedule percipient witness depositions." That's flat out false, Your Honor. What they're talking about were these blatantly and overtly disingenuous offers by Mr. Searcy to produce witnesses without telling me whether and when he'd produce the documents. I didn't just fall off the turnip truck. I'm not going to Los Angeles to commence a deposition that I can't complete because they didn't produce the offer documents and they didn't produce the advice of counsel documents.

Counsel for the individual defendants claim that plaintiffs delay the start of expert witness discovery. That's false, too. What happened --

THE COURT: So how many percipient witnesses are there? I've got the list of directors, I've got the list of experts. How many percipients are there that aren't directors?

MR. KRUM: Tompkins I think is it, Your Honor.

THE COURT: But he used to be a director.

MR. KRUM: No. He's a -- he has an odd position of non-employee counsel. They want to make him general counsel.

THE COURT: All right.

MR. KRUM: Kane objects, my client objects.

THE COURT: But I have him in category of important people.

MR. KRUM: Right.

THE COURT: So I've got him on the list with those company-related people. I've got the experts there are five people. How many percipients are there that aren't your employee-director-related people in 30(b)(6)?

MR. KRUM: I think -- unless I've forgotten, Your Honor, it's the five, the three directors, Tompkins, and the 30(b)(6).

THE COURT: Okay. So this is the only one. So you don't have any other percipient witnesses?

MR. KRUM: If there is, Your Honor, it can only be a person or two that I've forgotten. But I don't recall any as I stand here.

THE COURT: Okay.

MR. KRUM: The -- what happened on the experts is they just sent out a notice and said, come to Quinn Emanuel in Los Angeles, have this guy from Boston and this person from Philadelphia and this person from New York all show up. They didn't call me, they didn't email me. And, of course, that came in the midst of summary judgment papers or something, and so, of course, that didn't come fast. We didn't produce them then. We ultimately worked out a schedule, and the only delay, if you want to call it that, Your Honor, was an extension of one week in providing rebuttal reports from the 18th of September to the 25th. And that was suggested by counsel for the interested director defendants, not by counsel for plaintiff. We agree.

We have one other extant scheduling conflict. The plaintiff and Ellen and Margaret Cotter are in trial in the California Trust action on November 14 and 15, and November 28th through December 1. And then finally I'm obliged to observe that I have a potential debilitating conflict that either will arise or won't, which I've previously mentioned to counsel and the Court, and it's one over which I have limited control. I'm trying to resolve it, but it hasn't been

resolved. So that issue remains outstanding.

Unless you have questions, Your Honor, I have nothing else on this motion.

THE COURT: Those were my questions for you.

MR. KRUM: Thank you.

THE COURT: Oh. Wait. I do have one more. Here's my note. When is the Trust action in California scheduled to be completed?

MR. KRUM: I don't know the answer to that, Your Honor. What I can tell you is they have dates either this week or next week, I think, and --

MR. FERRARIO: There's no set time for it. They're being -- they're getting fill-in dates.

MR. KRUM: They have dates.

THE COURT: I've never practiced in California, so I have no idea what that means.

MR. FERRARIO: He says they started -- well, go ahead. When did they start?

THE COURT: What is it?

MR. TAYBACK: They have a schedule of dates and the judge says that when we finish is when we finish and I'll give you dates as we go along. But I think it's --

THE COURT: But when do they start?

MR. TAYBACK: They've started.

MR. FERRARIO: They're like the Show Canada trial.

It keeps going.

MR. TAYBACK: And as they don't complete -- as they don't complete testimony, then he schedules other dates.

THE COURT: I stuck my tongue out at Mr. Ferrario. That is not a judicial activity. I'm sorry. I lost my judicial demeanor. Thirty-five trial days over a year and a half because I can't get people to come to court. It's okay. It worked out. I wrote a decision, it's going up on appeal, something will happen.

So they're at the pleasure of the fact finder, who is a judge --

MR. TAYBACK: Correct.

THE COURT: -- in California, who is doing it based on their own availability and schedule.

MR. KRUM: Well, the lawyers have negotiated the schedule.

MR. TAYBACK: With input from the lawyers and the witnesses.

THE COURT: Right. No. They --

MR. FERRARIO: The judge will send out dates, they get together, and then they pick.

MR. KRUM: My understanding, Your Honor, is --

THE COURT: But they're never enough to finish. It's not like a jury trial where we go till we're done whether we're going to be able to or not, because we don't take a

break for a jury.

MR. TAYBACK: Correct. They take a lot of breaks. Judge takes a lot of breaks for his other matters.

MR. KRUM: It's five days at least that I just identified. I think there are other additional days. And if they can finish in that time, then the matter is submitted to the judge, who has, I've forgotten, 30 days or 60 days to render a decision.

MR. TAYBACK: That's right.

THE COURT: Something like that. Okay. Thank you. That was my last question for you.

Mr. Ferrario.

MR. FERRARIO: Your Honor, I'm going to kind of reverse engineer this. You told us the last time we were here that we weren't going to go on the 14th because --

THE COURT: I did. Because of my murder case.

MR. FERRARIO: Right.

THE COURT: And you heard me say that to Lenhard. Or you weren't in here, but Mr. Krum heard me say it to Lenhard.

MR. FERRARIO: Right. So --

THE COURT: And then he wouldn't take me up on the dates I gave him.

MR. FERRARIO: Who, Lenhard?

THE COURT: Lenhard.

MR. FERRARIO: Well, what dates are you -- what dates are you thinking?

THE COURT: I can't give you dates, because you're a jury trial. I have to be able to finish you, and you tell me you're three weeks. So I have to have three weeks in a row. That's the problem with being a jury trial. With being a bench trial like [unintelligible], if you don't finish on that third day, then I'll pick another day like the judge in California, and we'll finish you up.

MR. FERRARIO: We're aware of that. So --

THE COURT: That's a problem.

MR. FERRARIO: It is. What we can't have is a six-month continuance. And --

THE COURT: So do you want the reality of my life after January 1st? I don't have a courtroom anymore.

MR. FERRARIO: What?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Where are you going?

THE COURT: I don't have a courtroom.

MR. FERRARIO: Why? Because you've been elevated?

THE COURT: I'll be on the tenth floor with no courtroom.

MR. FERRARIO: Doesn't Judge Togliatti have a courtroom?

THE COURT: Judge Togliatti has a courtroom. She's

not the chief judge.

MR. FERRARIO: Oh. Really? You're not going to be here?

THE COURT: No, Mark, I will not be here.

MR. FERRARIO: I don't even understand this. I mean --

THE COURT: I have to go to the tenth floor.

MR. FERRARIO: I understand that. But why can't you come up here and try cases?

THE COURT: Because somebody will be here in my courtroom with my criminal and civil docket, with the exception of my Business Court cases.

MR. FERRARIO: Well, then how are we going to have a jury -- where are we going to have the jury trial?

THE COURT: Yes. That's why we're having this discussion. Because I'm going to have to --

MR. FERRARIO: Do we still have the CLC?

THE COURT: No, we do not.

MR. FERRARIO: Oh. Don't laugh at that.

THE COURT: And besides, the electrical load on the building would be insufficient for your case.

MR. FERRARIO: Not for this one. We're only plugging in computers. All right. So -- right.

THE COURT: There's a disagreement on this side whether the electrical there would be good enough even if we

had access to it. And we do not have access to it.

MR. FERRARIO: Okay. Then that moots it.

THE COURT: Okay.

MR. FERRARIO: Look, I'm assuming we'll get a courtroom. I guess we can't have --

THE COURT: Yes, I will get a courtroom. But that's why it requires us to be ready, no changes, everything's going when we move.

MR. FERRARIO: And I want to address that. I'm not going to get -- we put in there what happened. You know, quite frankly what we're saying is kind of a continuing pattern. In the summertime we accorded plaintiff an extension of some deadlines, the expert discovery and that, and Your Honor will remember that. So the reason we got pinched on some of this is because of the courtesies that defendants accorded the plaintiff. And then that rolls into other things. Be that as it may, we have limited discovery to complete. McEachern's deposition won't even be a half day. Adams won't be a half day.

THE COURT: Adams?

MR. FERRARIO: Kane won't be a half day.

THE COURT: Tompkins?

MR. FERRARIO: Tompkins will probably be a full day.

THE COURT: 30(b)(6)?

MR. FERRARIO: 30(b)(6) will be a half a day.

UNIDENTIFIED SPEAKER: It's limited to two hours.
THE COURT: Five experts, all --
MR. FERRARIO: Oh. It's limited to two hours. Excuse me.
THE COURT: I limited it to two hours.
MR. FERRARIO: And then --
THE COURT: Five experts all over the country.
MR. FERRARIO: Five -- these expert depos have been averaging -- I think the longest was about six, seven hours, and the others have been three, four hours, they haven't been that long.
THE COURT: So let me cut to the chase. When are you going to produce the rest of the documents that we discussed this morning and resolve the issue with Mr. Krum about whether he believes your last production pursuant to the order compelling you was sufficient or not?
MR. FERRARIO: I guess what I'm troubled with, and I talked to Ms. Hendricks, who's here, and she's been handling this primarily, there was no meet and confer. We did produce the documents relating to the May 31st expression of interest letter. That's what we were ordered to do. The points he making -- he says, well, this is an ongoing saga, okay. You know, another expression comes in here. He references what's in the paper. So when does it stop? I've already had that discussion with Your Honor. His client essentially objects to

every decision that's made by the board.

THE COURT: Yes.

MR. FERRARIO: Taken literally, we will never get this case to trial, because there will always be something more for him to do. We complied with our obligation. There's been no meet and confer, we don't know what he wants. I don't know why he expects that we would just start voluntarily producing things as the company business continues in anticipation that he would just object. That makes no sense. So we have done what we're supposed to do. What we're seeing are delay tactics, which, quite frankly, the evidence hasn't turned out the way he wants, he doesn't want to go to trial. The company cannot afford to endure this burn rate anymore. It is a -- you know, it's a great company, but it is a drain on the company. And when I say burn rate I'm talking about not only money, I'm talking about the company resources the executives, everybody that's putting time into this.

I want to go back to this idea that somehow now he challenges the -- how the board handled the expression of interest, and he needs the documents. I have the minutes, and I could give them to Your Honor, but it's clear what happened there. There's no mystery. He has the minutes from the meeting. His client had, I would venture to say, through his position on the board virtually every document to the extent any were referenced by Ellen Cotter. He already had that

stuff. He's been on the board. This isn't some outsider needing this material. He gets it. So what's happening is it's just -- it's a never-ending stream of requests for additional information, things he doesn't have, blaming people. And it's just got to stop.

So what we have is this. The five experts I think -- aren't they all set -- they're all --

MS. HENDRICKS: They're not.

MR. FERRARIO: They're not all set.

MR. TAYBACK: We've offered dates. We don't have dates.

MR. FERRARIO: We need to get those set.

THE COURT: You need to get them finished.

MR. FERRARIO: They'll be finished. None of them have been very long. This isn't -- these are not bomber depos. They've been going pretty quick. Mr. Tompkins is probably the single longest depo that remains to be taken. It'll be a day, I'm pretty sure of that. Everything else -- and really by agreement we agreed to finish the plaintiff's deposition in a half day. We may need more than that because he's now interjected additional issues in the case. But that will probably be done in a matter of three to four hours. So there really isn't that much left to do. That's what I want to bring to the Court's attention.

I don't think that we have to produce what the

company is getting, and as referenced in the article that Mr. Krum said, and what the company's doing in, you know, the latest overture from the person that had the expression of interest. I don't think that's an ongoing obligation. He hasn't put that into issue in the case. And at some point we have to cut it off. You allowed him to put in the case what happened with regard to the May 31st letter. He has all of that material.

So we need a trial date as fast as you can give it to us. We can -- we can use the time that we had set aside for trial --

THE COURT: You're not done.

MR. FERRARIO: Huh?

THE COURT: You're not done.

MR. FERRARIO: Your Honor --

THE COURT: Okay. So wait. Let's stop. When are you going to produce the documents, or not, that relate to our discussion this morning -- or our discussion on Motion Number 1?

MR. FERRARIO: We will have a decision on that by tomorrow.

THE COURT: Okay.

MR. FERRARIO: At the latest Monday, but I think by tomorrow.

THE COURT: So if you're going to produce the

documents, you'll produce them in a week or 10 days?

MR. FERRARIO: No. My recollection is -- I could be wrong, but I think it's one memo.

THE COURT: Great. That's easy.

MR. FERRARIO: That's it.

THE COURT: So if you decide to produce the document, it'll be done in a week or so. Then --

MR. FERRARIO: No. It'll be faster than that.

THE COURT: Okay. Then we have the depos that have been waiting for this to go, whether it's a good idea to await it or not is an entirely different issue.

MR. FERRARIO: That's Kane and Adams. That's --

THE COURT: That's six depos that may relate to. So those depos go forward. How long is it going to take to get those scheduled and taken?

MR. FERRARIO: My proposal would be this. We already blocked out the 14th for trial, I think. We use that time period --

THE COURT: Well, but you've got witnesses who haven't been as easy to get along with in life as you'd like.

MR. FERRARIO: No, that --

THE COURT: You don't just get to tell them to come. There was the one guy in San Diego who didn't want to go a half hour away from his house. I don't even remember which guy it was.

MR. FERRARIO: He's Ed Kane. He's 80-some years old.

THE COURT: Right.

MR. FERRARIO: That was when he was -- look, I hope I have as much energy as he does when he's 80 years old.

THE COURT: Me, too.

MR. FERRARIO: But the fact is, sitting there a whole day, it's draining. So they control -- I'm not going to speak. They can talk about that. I don't think scheduling Mr. Kane, scheduling Mr. McEachern, scheduling Mr. Adams is going to be an issue. We already have a date --

THE COURT: And we've got Cotting, Tompkins, and the remainder of the 30(b)(6).

MR. FERRARIO: Won't be an issue. Mr. Tompkins is right here.

THE COURT: Good morning, sir. Or good afternoon, sir. How are you?

MR. FERRARIO: These are not going to be issues. I'm just saying.

THE COURT: So how -- I -- you and I have done --

MR. FERRARIO: Mr. -- let me --

MR. SEARCY: Your Honor, we blocked --

THE COURT: Wait. Wait, Mr. Searcy.

You and I have done enough litigation over the years that it never works that we set aside a deposition schedule

where we have a week worth of witnesses that the witnesses all come when they're supposed to.

MR. FERRARIO: I -- I think we have the 14th blocked out. We don't even have to wait till the -- we have the 14th blocked out, okay.

THE COURT: Sure. So you think --

MR. FERRARIO: That gives us let's say 10 days. We should be able to knock out --

And I don't know if you can make your clients available.

MR. SEARCY: They've set aside that time period around the 14th, Your Honor, so they're available.

THE COURT: Really.

MR. SEARCY: And we should be able to stack these, because they're very short depositions.

MR. FERRARIO: They are short. And I know Ellen Cotter -- we've talked to her about -- because she's the 30(b)(6), and that's a two-hour depo, and she's, you know, as flexible as she can be running the company and all. And then we do have to accommodate her when she's in the trust litigation. But Mr. Krum's client has that same issue. So there's a couple days, I think the 14th, 15th, 16th they may be in trial down there. We can make all that happen.

THE COURT: Okay. So you get those depositions done say by -- you're done with that by Thanksgiving.

MR. FERRARIO: Yes.
THE COURT: Best of all possible worlds.
MR. FERRARIO: Best of all worlds.
THE COURT: And then you've got the experts. How long is that going to take? Because the experts are harder to schedule.
MR. FERRARIO: How many are left to be set? I know my schedule had somebody in Palo Alto next week; right?
MR. TAYBACK: He hasn't accepted those dates.
MR. FERRARIO: Oh.
MR. TAYBACK: So we've offered dates for ours. We were waiting for dates from his. I think two weeks. Same time period.
MR. FERRARIO: I think we can do it.
THE COURT: You can't do them at the same time. So then how much longer is it going to take to finish up those five depos, five expert depos?
MR. FERRARIO: Well, we did five in like a week, so --
THE COURT: I heard the schedule that Mr. Krum just recited. And, yes, that was a tough schedule, but I'm glad you guys did it.
MR. FERRARIO: Right. I don't see why we can't have them done -- when's Thanksgiving, the 24th, 25th?
THE COURT: So that means you in the best of all

possible worlds would be done the week after Thanksgiving, maybe by the 9th of December.

MR. FERRARIO: Yes.

THE COURT: I don't call in juries over the Christmas holiday, so there's no way given when you'd be finished I could try you on this stack even if I wasn't in my capital murder case.

MR. FERRARIO: Oh. What if we -- what if we were done by the beginning of December? I know you don't want to -- I agree, none of us want to be here having the jury glare at us over Christmas.

THE COURT: You're not going to be ready. You can't do it. I mean, you just can't physically do it.

MR. FERRARIO: Well, you know, when I said that to you in CityCenter when you told me to look at 3 million documents, I think you said, just do it.

THE COURT: I set five tracks of depositions in that case --

MR. FERRARIO: That's true, you did.

THE COURT: -- and I haven't done that in this case.

MR. FERRARIO: You haven't. If we got done -- but it is possible to get it done by the beginning of December. I mean, I'm not being facetious, because the depos haven't been as long as we thought. And if they've got control over -- well, they do have control over all the witnesses. So does

Mr. Krum. We can finish Mr. Cotter, Jr., in a half day.

THE COURT: So let me go to another issue. So you know you took a writ; right? Or no. Mr. Krum took a writ, and there's a stay related to some documents that he has. Are you worried about those documents being available prior to you starting trial?

MR. FERRARIO: We've talked amongst ourselves, and if we can get the trial date, we're prepared to proceed with that writ pending and the stay in place.

THE COURT: Okay. So you're not really worried about those documents anymore.

MR. FERRARIO: No. I mean, we're worried about them, but it's not worth forgoing the trial and having this linger.

THE COURT: Okay. Mr. Krum --

Mr. Ferrario, was there anything else you wanted to say before I hear from Mr. Krum again?

MR. FERRARIO: No. I know Mr. Searcy had some things he wanted to say, Your Honor.

THE COURT: I've been grilling him when he's been sitting there the whole time.

What else, Mr. Searcy?

MR. FERRARIO: Have you got anything else, Marshall?

MR. SEARCY: I don't have much to add, Your Honor. You know, there was an issue that came up that Mr. Krum

brought up concerning production of documents relating to the unsolicited expression of interest from the individual defendants. We don't have any documents. Mr. Krum has told me that his plaintiff doesn't have any documents from the meeting that's at issue. So it shouldn't be a surprise that there are no documents.

MR. FERRARIO: And we gave -- we gave minutes --

THE COURT: But you really hope that Mr. Ferrario and his people will turn over the documents; right?

MR. FERRARIO: Your Honor, I -- Ms. Hendricks -- Kara's here. We did on the --

THE COURT: Wait.

MR. FERRARIO: -- first expression of interest. He has them all. What he's talking about is Ms. Cotter gave a presentation. The presentation related to information that was already in his client's possession. That's the point I'm making.

THE COURT: I understand what you're saying.

MR. FERRARIO: Okay.

THE COURT: I know the issue when people remain on the board and they're still fighting among themselves they get the board information. It's amazing how that actually happens.

MR. FERRARIO: It does. You know, Your Honor, the only -- the only hiccup I see, and I don't think -- I don't

think it's insurmountable, there's no reason we can't complete all of the let's call them fact witnesses that we mentioned here well before Thanksgiving. That's just not an issue. The experts are the only scheduling hiccup that I see. And I don't know how --

THE COURT: Have you taken all the plaintiff's experts, we're just waiting on the defense experts now?

MR. TAYBACK: They've gone back and forth.

THE COURT: So you've got some of each left.

MR. FERRARIO: Yeah. Jumping around.

MR. SEARCY: But I believe they're all in California, all the experts.

THE COURT: All the remaining experts?

MR. SEARCY: That's right.

THE COURT: Mr. Krum.

MR. KRUM: Thank you, Your Honor. Two or three points where I need to correct some misstatements. In fact, with respect to the news article -- not the news article, with respect to the subject matter of the news article that is a renewed revised offer or whatever it supposedly is. Mr. Ferrario and I spoke about that, and he initially suggested to me that he thought hypothetically for purposes of this public discussion today if that had occurred it might moot the discovery you'd ordered them to provide. And he hasn't understood on that position.

Second, if there are any documents with respect to this supposed new offer, the offer described in the news article, they've not been provided to my client. Ellen Cotter has not provided him documents about that. So I don't know whether she -- if there are any documents, whether she's provided them to other directors, but my client has not received any such documents from her.

The other correction is if they produce a single memo in response to your modified order regarding advice of counsel, we will have to meet and confer, and we will be back. As our motion made clear, we cited to I think it was dozens of privilege log entries where the subject matter was identified as advice of counsel with respect to exercise of option, or words to that effect. Those are documents between Mr. Tompkins and Messrs. Adams and Kane that have been ordered produced by Your Honor, among others. So it's not one memo, okay. And I understand the process through which Mr. Ferrario and Ms. Hendricks have to go to confer with a client, and I'm sure they'll do it as diligently as they can, but it's not going to be that next week they produce one memo.

Finally, Your Honor, on the depositions, after a couple false starts we actually did pretty well scheduling percipient witness depositions. I was able to spend week after week in Southern California taking some of those depositions, and hopefully we'll be able to do that again with

the percipient witnesses.

The experts are a different issue. The subject isn't -- the issue isn't how long the depositions go, it's travel to the cities in which no one except Angelinos live and then to the next city and so forth that turns what might be a three-hour deposition into not less than a two-day exercise.

And the other half of that, of course, is, as I mentioned earlier, these folks seem to be tremendously successful and terribly busy, because as to most of them they came up with one or two or three days or half days in a period of a month. But, you know, counsel will do what they can subject to the preexisting obligations of those experts. But to assume we're going to get those by done by December 1st or 9th or whatever is I think in all likelihood wishful thinking. Thank you.

THE COURT: So when do you really think it's going to be done, Mr. Krum?

MR. KRUM: Given the intervening Thanksgiving holiday, I think our goal should be before the year-end holidays. I can see some reasons that might not happen. When we actually suggested the end of January there were reasons for that. And the reasons were the kind of considerations we've discussed today, the intervening holidays, the schedules of all the people, the uncertainties that I've addressed. So if you want a date by which I'm reasonably confident it will

be done, it would be approximately the end of January. The best-case scenario I think is the Christmas-New Year holiday.

THE COURT: Okay. Anything else?

Are there more documents than this one memo you've talked about?

MR. FERRARIO: There are documents on the directors privilege log I think is to what you're speaking; correct?

MR. KRUM: Correct.

MR. FERRARIO: And I thought that his motion was aimed at the memo that was prepared and I think given to Kane and Adams.

THE COURT: It was.

MR. FERRARIO: That's what I thought. I mean --

THE COURT: And I granted it.

MR. FERRARIO: As I'm sitting here, Your Honor, I don't know what's on the directors privilege log in terms of what may have gone back and forth. I know the memo of which he speaks. I actually think our office did it, quite frankly. That was what I was speaking to. I'm not conversant with these other --

MR. KRUM: The document to which Mr. Ferrario just referred is the document to which they referred in their proposed order. Your order obviously is different than their proposed order. Our motion was different than their proposed order. And, you know, the documents in the privilege log are

either responsive or they're not. They're either covered by the order or they're not. Candidly, as I understand the facts, including the GET memo to which Mr. Ferrario refers, that's not it, as I understand.

THE COURT: My ruling only relates to the legal opinion that Mr. Kane and Mr. Adams got from GET.

MR. KRUM: No, Your Honor. If you look, you referred --

THE COURT: Mr. Krum, don't correct me.

MR. KRUM: I'm sorry.

THE COURT: And to the extent there are other communications related to that issue they're not necessarily precluded from production because I did not specifically address those. So what I'm trying to say is the work papers the Greenberg Traurig folks did are not part of what I've ordered produced, unless, of course, they were provided to Mr. Kane and Adams. You're now on a separate subject, which is the email communications by Mr. Tompkins; right?

MR. KRUM: Correct.

THE COURT: That's a different issue.

MR. KRUM: Well, that's not how we read your order. so perhaps we'll have to look back at that.

THE COURT: Well, it's a different -- it is a very different issue.

MR. KRUM: And I repeat nor is that how the motion

was framed.

THE COURT: I understand how you framed the motions, Mr. Krum.

MR. KRUM: Okay.

THE COURT: So I'm not saying that Mr. Tompkins's memo may not have to be produced, but --

MR. KRUM: Right.

THE COURT: I haven't granted that relief to anybody at this point related to that memo. I haven't ruled one way or the other. You guys need to have that discussion, because that was not part of the advice of counsel issue that I ruled on.

MR. KRUM: We did not understand that, Your Honor. So we'll have to have another conversation.

MR. FERRARIO: We will.

MR. KRUM: And the discussions we just had about the timetable are now going to be more optimistic, I suspect. In other words, we're likely back before you on those issues.

THE COURT: Maybe not. Maybe they'll produce them.

MR. FERRARIO: Judging from what you're telling us and who knows how long your capital case goes --

THE COURT: It's only got three more days.

MR. FERRARIO: Oh, that's all?

THE COURT: And then they decide whether I go to a penalty phase. So it's only a week or week and a half more.

But the problem is I have to do this evidentiary hearing for a week before I can resume the trial, and then it may or may not include death, but I still have to have a penalty phase if they find him guilty of first degree murder.

MR. FERRARIO: So how long does all that take? Because I'm not --

THE COURT: Well, I'm doing the week of -- I have it written down in this handy chart here. The week of November 28th is when I'm doing the evidentiary hearing on intellectual capacity. And then the week of the 25th [sic] I resume the trial, and we anticipate being done with that and to the jury on the guilt phase by December 9th.

MR. FERRARIO: Okay. So --

THE COURT: And then if there's a penalty phase, it's like punitive damages.

MR. FERRARIO: Right.

THE COURT: You take a break, you start again, you do some more evidence.

MR. FERRARIO: So we're not -- well, it doesn't sound to me like you've got any time on the November stack anyhow given --

THE COURT: Well, if that case goes away, I do. But I don't know if that case will go away or not. And I won't know if that case goes away until close to December 1st.

MR. FERRARIO: Well, I think we will do -- I can say

on this side of the table we'll do everything we can to get everything wrapped up by December 1st. So in the event you do have a slot open, that's fine. But I guess what we're afraid of is kind of getting caught in, you know, the regular flow of your cases and getting pushed way down the road. And again, I've said this, I sound like a broken record, we need to get this case resolved.

THE COURT: We all know that.

MR. FERRARIO: It's a significant matter to the company, it's significant to the individuals, it's significant to Mr. Krum's client. We've worked hard to achieve this trial date. There's very little left to be done, quite frankly. Again, the depos haven't been going as long as we thought, and even the expert depos, Your Honor, I mean, they were -- Mr. Searcy took Mr. Steele's depo. It was less than three and a half hours, I think. You know. So everybody's being efficient, everybody's going after it. What's the next date you could give us where we could have a block of three weeks?

THE COURT: I can't tell you that right now. I can tell you that I will see you for a status check on December 1st, and you may appear by phone if you are out and about taking depositions. We can do a telephonic appearance to find out where you are on the deposition trail, where you on finishing, and what it looks like both from my side and from your side about that issue. But I can't tell you right now

what I'm going to be able to do for you. I'll be able to tell you on December 1st.

MR. FERRARIO: All right. We understand. I mean --

THE COURT: So, I mean, if you -- I can't call a jury in over the holidays.

MR. FERRARIO: We understand that.

THE COURT: And I'm not going to have a jury start two weeks before Christmas and then take a break for two weeks before we finish. I'm not going to do that, either.

MR. FERRARIO: I don't think anybody here would want that.

THE COURT: And you're not going to be done until the first week of December, it sounds like, even on the best-case scenario.

MR. FERRARIO: Well, I think that depends on what you do with the next batch of motions.

THE COURT: Well, I'm ready to go to those in a minute. Are you ready?

MR. FERRARIO: I think we are.

THE COURT: Okay. So, Mr. Krum, your motion is granted to the extent you have sought a motion to compel and received relief or not related to that, to the extent it relates to the Tompkins information that is currently on the directors privilege log, and to the extent you need to complete the depositions of Kane, Cotting, Adams, McEachern,

Tompkins, the 30(b)(6), and the five experts.

MR. KRUM: I think I understand, Your Honor.

THE COURT: And the goal is to get them done ASAP. I am hopeful you have them done by December 2nd, but I'm not issuing that order, because I don't have enough information about the schedules of the folks, and I don't want to force people who have availability problems to be available that quick. Okay. So we're going to have a status check on resetting your date for December 1st at 8:30.

So that means I can go on to motion Number 3 on my list, which is the claims related to the purported unsolicited offer. And you guys can tell me when you're ready for a break, since we don't have a jury and we have a lot of flexibility. You just tell me, and I'll take a break.

MR. TAYBACK: We will, Your Honor. On our side we will.

Our motion for partial summary judgment on the unsolicited offer I think is pretty straightforward on the briefing, which is to say -- and this is -- this is one of the curiosities of this case which Mr. Ferrario referred to. It's a case that's moving and being litigated in real time. So we are seeing actions and events that --

THE COURT: Every M&A case I have with offers is like this. Now, this is a little different, but, you know, it happens all the time. We deal with it.

MR. TAYBACK: It's a little different --
THE COURT: I know.
MR. TAYBACK: -- but it's also not really a true M&A case.
THE COURT: I know.
MR. TAYBACK: This is a letter that was received unsolicited that is not even in and of itself an offer. And as -- that is to say, it couldn't be accepted. It was an invitation to negotiate, to do due diligence, and to meet. But it's not the valid -- it's not a valid legal basis for a claim. And you don't I think need to look any further than the argument that was just made by Mr. Krum about the other things that he wants, referring to the public article and the idea that there's an additional letter and he has not -- his client has not received it. The fact is that if there is a dialogue, even if it's a subsequent letter following on the heels of what is clearly not an offer that could have been accepted, there's no way to stake out a claim that it's a breach of fiduciary duty by any director to have done something different, to have not done something more.

We'll start with the fact that there's certainly no obligation to have purported to accept something that couldn't be legally accepted. And the letter isn't terribly long or terribly complicated, but it isn't an offer. It's an invitation to have a discussion about an offer that they hoped

they might be able to make at some point in time. That in and of itself can't be a basis for a breach of fiduciary duty claim, period, hard stop.

The other kind of what I'll call the collateral allegations for breach of fiduciary duty that he has surrounding that unsolicited letter are things like, gee, you know, the board didn't go out and hire an investment banker to do an analysis or study. There's no case cited by anybody, especially plaintiff, that stands for the proposition that a company has to do that, has an obligation to do that. The board knows what it knows about the value of the company. And it makes the decisions it makes about that. And when you have -- to add another layer to this, when you have a controlled company, that is to say a company where the majority, in this case a significant majority of the shares reside in -- with a controlled group, the fact is there is nothing that you can do that could require the sale of a company.

So that begs the question what is it that would be the damages, what would be the component of the wrong even if it was a breach, even if you could articulate that it was a breach of some fiduciary duty to have done something more with this offer -- this alleged offer. What's the harm to the company? Well, you can't say that there's harm to the company, because there's no obligation to have done anything. So there is no harm to the company. And if you were to say,

well, damages per se aren't a requirement, because I know he's made that argument and he's talked about the right to seek equitable relief for breaches of fiduciary duty. If you get to the point where you say this is a breach of fiduciary duty, even though I believe there's no basis for it to be so, and you get to the point where you say damages are not required and it's a question of equity, what is that you would be compelling the board to do, to negotiate, to have a further conversation? That's not the role, really, of the Court. And, not surprisingly, you don't see cases where that takes place. You don't see courts compelling boards to hire investment bankers, to consider a letter, to respond in some particular manner. That essentially divests the whole responsibility of the board with respect to dealing with any kind of an inquiry like this to courts. And there's not a single case that does that. And that's for good reason, because that's the domain of the board. When and if something happens down the road when this runs its course, however that may be, and it has not, whatever that may be, if and then there's an issue, that would be perhaps arguably ripe for something then. But that's not here now. And, as a result, this claim is, A, premature and baseless under the law.

THE COURT: So would it be fair to say that your group of motions the have been filed that are all set today are attacking individual aspects of the alleged breaches of

fiduciary duties?

MR. TAYBACK: Yes.

THE COURT: So you're picking every potential alleged breach they could have made and you want me to separate them out and decide which ones the jury will hear about and which ones they won't, as opposed to letting the jury hear and make a decision as to which rise to the level of the breach of fiduciary duty?

MR. TAYBACK: That's not exactly what I would say I'm asking Your Honor to do. What I'm saying --

THE COURT: Yeah, it is. That's exactly what you're asking me to do.

MR. TAYBACK: No, no. What I would say is -- I would certainly characterize it differently. I would say -- I'm not saying take it out, I'm saying it's not a breach. And if it's not a breach, then it's not a basis for a breach of fiduciary duty claim. It's different to say, we're going to litigate everything the company has done over the span of several years and we'll let the jury pick and choose what might or might not be a breach. He has articulated what he alleges are breaches, and we have filed motions for partial summary judgment saying that they are not. And we have attacked every single thing that he says is a breach on different grounds. But --

THE COURT: And so you don't think they're evidence

of a breach whether they are in and of themselves a breach. See, there's a different concept that I'm trying to deal with as a trial judge than I think you're dealing with in your motions, which it's your job.

MR. TAYBACK: There's two issues. One is could it be a breach as a matter of law. And my answer to that question is no. The second question is is there evidence that it's a breach. And the answer to that is no, as well.

THE COURT: That's not what I said, Counsel. Is this activity taken with other activities evidence of a breach of fiduciary duty?

MR. TAYBACK: I understand his argument, plaintiff's argument.

THE COURT: That's not his argument. That's what trial judges think about.

MR. TAYBACK: The question -- it begs the question, though, is what is the breach. There has to be a specific thing that occurred that is a breach --

THE COURT: Uh-huh.

MR. TAYBACK: -- as opposed to saying, this is a course of conduct. And that's the way plaintiff has characterized it. And the course of conduct can be relevant to a breach --

THE COURT: Yes.

MR. TAYBACK: -- but it begs the question what is

the breach, what is the breach. This is not the breach. This is not a breach. It's not a valid basis for a breach claim. And to say it might be relevant evidence of something else, some other breach, that's a decision you could make.

THE COURT: You're not asking me to exclude evidence of this, only to not instruct it or include it on a special interrogatory that it could be found an independent breach --

MR. TAYBACK: That's correct.

THE COURT: -- as opposed to evidence of breaches that have occurred.

MR. TAYBACK: That's absolutely correct.

THE COURT: I just needed you to say that, because that's not what your motion says.

MR. TAYBACK: I believe it's not -- I believe ultimately it wouldn't be relevant perhaps. But that's a different question. That's a different question. And that's not our motion. Our motion is to summarily adjudicate the basis of this unsolicited offer as being a breach.

THE COURT: There is no -- there is no allegation of the unsolicited offer as the breach of fiduciary duty claim. It is one of many things that are alleged as evidence of breach of fiduciary duty.

MR. TAYBACK: If I'm --

THE COURT: I pulled the complaint to read it again, because --

MR. TAYBACK: I did, too.

THE COURT: Okay.

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

THE COURT: Okay. Anything else?

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

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

them.

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

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

MR. KRUM: Yes.

THE COURT: What are you going to ask them?

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

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

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

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

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

THE COURT: I know.

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

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

Okay. What else?

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: What's that?

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

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

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

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

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

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

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

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

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

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

May I just grab my other binder?

THE COURT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. TAYBACK: Anything else? No other questions?

THE COURT: Those are all my questions for you.

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

THE COURT: You want to say something, Mark?

MR. FERRARIO: Just very briefly.

MR. KRUM: Your Honor --

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

MR. KRUM: They're a nominal defendant.

THE COURT: Mr. Krum.

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

MR. FERRARIO: I can tell you that --

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

MR. FERRARIO: I'm not.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: He's part of the family.

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

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

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

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