IN THE SUPREME COURT OF NEVADA

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

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ, DISTRICT JUDGE, DEPT. 11,

Respondents,

and

DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, AND MICHAEL WROTNIAK,

Real Parties in Interest.

CASE NO: 75053

Consolidated for purposes of disposition with Cases: 76981, 77648, and 77733

Related to Cases: 72261, 72356, 74759

Dist. Court Case No.: A-15-719860-B

COTTER JR.'S SUPPLEMENTAL APPENDIX

VOLUME I (CSA1-CSA48)

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PETITIONER'S SUPPLEMENTAL APPENDIX

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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 deposited with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first class postage prepaid, on the date and to the addressee(s) shown below I hereby certify that a true and correct copy of the foregoing **COTTER'S SUPPLEMENTAL APPENDIX, VOLUME I (CSA1-CSA48)** was served by the following method(s):

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Courtesy Copy Hand Delivered

To:

Judge Elizabeth Gonzalez
Eighth Judicial District Court of Clark County, Nevada
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DATED this 24th day of May, 2019.

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

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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 JOINDER TO THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 3 RE THE PURPORTED UNSOLICITED OFFER

Date Of Hearing: October 25, 2016
Time: 8:30 a.m.

READING INTERNATIONAL, INC. hereby submits its *Joinder to the Individual Defendants' Motion for Partial Summary Judgment No. 3 Re Plaintiff's Claims Related to Purported Unsolicited Offer*. Reading International, Inc., ("RDI") 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 filed by Plaintiff James J. Cotter, Jr. ("Plaintiff" and/or "Cotter, Jr.") to the extent that such claims relate to RDI's response to the purported unsolicited offer. In addition to joining the arguments advanced on behalf of the Individual Defendants in their Motion, 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 of this Motion.

DATED: October 3, 2016.

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MEMORANDUM OF POINTS AND AUTHORITIES

This Court should grant judgment in favor of RDI on the Cotter, Jr.'s First, Second, Third, and Fourth Causes of Action to the extent that such claims challenge the following actions relate to RDI's response to the non-binding, unsolicited offer. At the heart of his claims is Cotter, Jr.'s apparent insistence that any indication of interest in a purchase of the company's outstanding shares *requires* the Board of Directors to engage an independent investment consultant before responding. There is no support for such a claim.

Here, the purported offer was, in fact, nothing more than an expression of interest, and proposed a share price that amounted to barely half the value of RDI's assets. Declining to enter into discussions with respect to such a casual expression of interest cannot constitute a breach of fiduciary duty. Because Cotter, Jr. is unable to present sufficient evidence to satisfy the elements of his claims for breach of fiduciary duty with respect to this issue, the Motion for Partial Summary Judgment should be granted.

LEGAL ARGUMENT

This Court should grant RDI summary judgment as to Cotter, Jr.'s First, Second, Third and Fourth causes of action in the SAC to the extent such claims rely on allegations that the Board of Director's decision to decline to pursue an expression of interest for the purchase of RDI's shares was breached their fiduciary duties. Cotter, Jr. is unable to present evidence sufficient to show the Directors were not sufficiently informed in making their decision, and is unable to show that any damages have resulted from the decision.

Summary judgment should be granted if the pleadings, admissions, and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). In that event, the non-moving party is then obligated to present admissible evidence to show that there are material

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issues of fact preventing summary judgment, or summary judgment must be granted. *Id.* Because a plaintiff is required to prove each element of his cause of action, is 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).

Here, Cotter, Jr. bears the burden of proof on his breach of fiduciary duty claims, which requires he establish that the Independent Directors breached their duties of loyalty and care, and that RDI and its shareholders suffered damages as a result of that breach. 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 shareholders. *Foster v. Dingwall*, 126 Nev. 56, 69, 227 P.3d 1042, 1051 (2010), citing *Stalk v. Mushkin*, 125 Nev. 21, 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."). Additionally, in order to satisfy the breach element of his claims, Cotter, Jr. must present evidence sufficient to rebut NRS 78.138(3)'s statutory presumption that directors have acted in the best interests of the corporation. NRS 47. 180(1). Finally, in order to satisfy the damages element of his claims, Cotter, Jr. must present evidence to show that an actual injury occurred as a result.

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I. SUMMARY JUDGMENT SHOULD BE GRANTED COTTER JR.'S CLAIMS RELATED TO THE PURPORTED UNSOLICITED OFFER

Plaintiff's claims that the Independent Directors failed to become properly informed is apparently based on his assumption that a director can be sufficiently familiar with the value of a company only if advised as to its value by outside consultants. The evidence presented by the Individual Defendants in the Motion belies this claim.

As detailed in the Independent Director's Motion for Summary Judgment No. 3, after the unsolicited expression of interest was received, RDI's Board of Directors discussed it at two board meetings. At the first meeting, the Board resolved that management should compile its available relevant information to facilitate further discussion by the Board at a subsequent meeting. The Board considered engagement of an outside consultant, but determined that

outside financial advisors would not be cost effective at that time. At a subsequent board meeting, the Board heard RDI's management's views that the proposed $17 per share price reflected a valuation that was well below what the company's assets were worth, based on existing valuation documents, which documents represented conservative figures. The Board was also presented with information regarding the data that formed the basis of Management's assessment, the value of RDI's assets, and a valuation figure of $590-725 million. Due to the disparity between the valuation and the proposed price, which amounts to about $400.7 million, RDI's management did not support spending additional assets in further evaluation. ***See* Motion, 5-6.**

Armed with the above information, as well as their own knowledge of RDI, the Board discussed the expression of interest. That discussion included 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; its 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. With all of the above in mind the majority of the members of the Board of Directors resolved that the best interests of the shareholders and RDI were best served by continued independence of the company. Cotter, Jr. did not oppose the resolution, but instead, abstained. ***See* Motion, pp. 5-7.**

As shown, there is no dispute that the Board of Directors was informed as to the particulars of the expression of interests itself, and as to the *minimum* value of the company's real property and cinema assets, which together was much higher than the offer. The Board members were entitled to rely on Management's report of the value of RDI. NRS 78.138(2). Cotter, Jr. bears the burden of presenting direct evidence showing that Board of Directors was not properly informed in making this decision. See NRS 78.138(3); NRS 47.180. He cannot do so.

Cotter, Jr. also has bears the burden of showing that RDI and its shareholders were damaged by this purported breach of fiduciary duty. However, Cotter, Jr. cannot show any

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potential damage to RDI, as the expression of interests referenced a purchase of shares. RDI would not have received any benefit in such a transaction. Nor can Cotter, Jr. show any damage to the shareholders, as Cotter, Jr. cannot show that any transaction would ever have resulted.

As Cotter, Jr. cannot present evidence sufficient to satisfy the elements of his claims, summary judgment must be granted.

CONCLUSION

Cotter, Jr. is unable to present evidence sufficient to rebut the statutory presumption that decisions of the Board of Directors are made in good faith, or that either RDI or its shareholders were damages by the Board of Directors' decision to decline to pursue the expression of interest. Accordingly, RDI is entitled to judgment as a matter of law.

DATED: October 3, 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 Joinder to the Individual Defendants' Motion for Partial Summary Judgment No. 3 Re the Purported Unsolicited Offer*** 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 3rd 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 JOINDER TO THE INDIVIDUAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT NO. 5 RE PLAINTIFF'S CLAIMS RELATED TO THE APPOINTMENT OF ELLEN COTTER AS CEO** **Date of Hearing: October 25, 2016** **Time: 8:30 a.m.**

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READING INTERNATIONAL, INC. ("RDI" or "Company"), hereby submits its *Joinder to the Individual Defendants' Motion for Summary Judgment No. 5 Re Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO (the "Motion")*. RDI joins with the Individual Defendants[1] in seeking summary judgment to the extent that Plaintiff James J. Cotter, Jr. ("Cotter, Jr.") asserts claims and damages related to the appointment of Ellen Cotter as CEO in the Second Amended Complaint. RDI joins in the arguments advanced on behalf of the Individual Defendants in their Motion and requests judgment in its favor.

This Joinder 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 3rd day of October, 2016.

GREENBERG TRAURIG, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

This Court should grant judgment in favor of RDI on the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint ("SAC") filed by Plaintiff James J. Cotter, Jr., to the extent that such claims relate to the appointment of Ellen Cotter to the position of CEO of RDI. This is a personal issue for Plaintiff who holds a grudge against the Company and its Board of Directors because he was removed as the President and CEO of RDI in June of 2015. As set forth in the Motion, there is no factual or legal basis for Plaintiff to proceed on any claim

[1] The Motion was brought on behalf of Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding and Michael Wrotniak collectively hereinafter "Individual Defendants."

relating to Ellen Cotter's appointment as CEO. Indeed, summary judgment is appropriate in RDI's favor.

In an effort to aid the Court and be efficient, RDI provides the following limited additional supplemental arguments in support of the Motion.

LEGAL ARGUMENT

I. Summary Judgment is Warranted.

Summary judgment should be granted if the pleadings, admissions, and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). In that event, the non-moving party is then obligated to present admissible evidence to show that there are material issues of fact preventing summary judgment, or summary judgment must be granted. *Id.* Because a plaintiff is required to prove each element of his cause of action, is 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).

A. The Actions of RDI's Directors Are Protected by Nevada's Business Judgment Rule.

The key issue for the Court's consideration of the Motion is the applicability of the business judgment rule as codified in NRS 78.138(3). The statute clearly 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). The decision to appoint Ellen Cotter as permanent CEO of RDI falls squarely within the confines of the statute and the inquiry should end. Moreover, the undisputed facts of this matter clearly show that each of the directors involved in the decision

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making process drew upon a number of resources, including their own experiences with Ellen Cotter, to make the important decision of who should be running the Company.

B. Ellen Cotter has the Experience and Qualities of CEO.

Ellen Cotter had a long standing track record at RDI prior to her appointment as the permanent CEO of the Company. Indeed, she had been employed by the Company for more than seventeen years and for more than thirteen years had served as an executive of the Company overseeing RDI's domestic cinema operations. In this role, her responsibilities included cinema operations, development, marketing, operations and acquisitions. Additionally, Ms. Cotter has proven herself as an executive of the Company and stepped up and agreed to act as interim CEO after Cotter, Jr. was removed from that position. After interviewing key candidates identified by Korn Ferry the CEO Search Committee unanimously decided that Ellen Cotter was the best candidate for the job. Having a CEO with working knowledge of the Company, a proven track record of performance and a demonstrated ability to get along with others was and is a huge asset to RDI.

From the Company's perspective, Ellen Cotter was an obvious choice and in her short tenure in the position has more than proven she is capable of the title bestowed upon her. It is ironic that Plaintiff is challenging the process and circumstances in which Ellen Cotter was appointed as CEO when the process was much more substantial than the process and procedure utilized when Cotter, Jr. was appointed to the same position.

C. Common Sense Supports Defendants' Position.

Cotter, Jr.'s challenge to Ellen Cotter's appointment would create havoc for companies incorporated in Nevada and attempts to impose burdens and obligations that do not exist. Plaintiff cannot point to any legal requirements that were not followed. Allowing, such a claim to proceed would open up the flood gates for candidates not chosen for a position to challenge the same. In the context of a derivative action such as this, shareholders could be incentivized to file suit just because they are unhappy with a candidate that was selected in hopes of strong-arming the Company into making a leadership change. Nevada law clearly gives the discretion to appoint officers to a company's Board of Directors. There is no basis for the Court to

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interfere with the Board's decision. Moreover, here RDI utilized a well-known company to aid in its CEO search, interviewed multiple candidates including a number of external candidates and ultimately concluded that the best person for the position was someone with nearly two decades of experience with the Company and a track record of getting along well with others.

In regard to allegations regarding public filings made by RDI relating to the CEO search and Ellen Cotter's appointment to the CEO position, there is no evidence to support Plaintiff's contention that the statements were misleading and no basis to impose liability on RDI for the same. The fact that Plaintiff may not like the verbiage is of no consequence. The filings clearly reflect what occurred and are supported by the undisputed facts in the Motion.

II. Conclusion.

Plaintiff has no legal basis to challenge the appointment of Ellen Cotter as RDI's President and CEO. In fact, the efforts taken by RDI's board prior to Ellen Cotter's appointment far exceeded the consideration given when Cotter, Jr. was appointed to the same position years ago. After a professional search for a new Company executive, Ellen Cotter was selected for the position based on her wealth of experience and expertise. The process and procedures utilized by RDI's Board were more than adequate and Cotter, Jr.'s wounded pride does not provide a basis for any such claims to proceed to trial.

WHEREFORE, RDI respectfully requests that summary judgment be entered in its favor to the extent that any claims in the SAC relate to the appointment of Ellen Cotter as CEO of RDI.

DATED: this 3rd 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 ***Reading International, Inc.'s Joinder to the Individual Defendants' Motion for Summary Judgment No. 5 Re Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO*** 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 3rd 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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READING INTERNATIONAL, INC., a Nevada Corporation,

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Dept. XI

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

READING INTERNATIONAL, INC.'S JOINDER TO THE INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT NO. 6, RE PLAINTIFF'S CLAIMS RELATED TO THE ESTATE'S OPTION EXERCISE, THE APPOINTMENT OF MARGARET COTTER, THE COMPENSATION PACKAGES OF ELLEN COTTER AND MARGARET COTTER, AND THE ADDITIONAL COMPENSATION TO MARGARET COTTER AND GUY ADAMS

Date of Hearing: October 25, 2016
Time: 8:30 a.m.

READING INTERNATIONAL, INC. hereby submits its *Joinder to the Individual Defendants' Motion for Partial Summary Judgment No. 6 Re Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the additional Compensation to Margaret Cotter and Guy Adams.* Reading International, Inc., ("RDI") 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 filed by Plaintiff James J. Cotter, Jr. ("Plaintiff" and/or "Cotter, Jr.") to the extent that such claims challenge the above actions. In addition to joining the arguments advanced on behalf of the Individual Defendants in their Motion, 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 of this Motion.

DATED: this 3rd day of October, 2016.

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/s/ Mark E. Ferrario
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MEMORANDUM OF POINTS AND AUTHORITIES

This Court should grant judgment in favor of RDI on the First, Second, Third, and Fourth Causes of Action in the Second Amended Complaint ("SAC") to the extent that such claims challenge the following actions by the Individual Defendants in their capacity as members of the RDI Board of Directors or committees thereof:

- the Approval of Cotter, Sr.'s Estate's Option Exercise;
- the Appointment of Margaret Cotter to an 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.

Cotter, Jr. is unable to present evidence sufficient to overcome the statutory presumption that any of the above decisions was not based on good faith and in furtherance of the best interests of the corporations. Significantly, a statutory presumption of good faith exists as to the approval of compensation to these directors, *regardless* of personal interest in such compensation.

In short, Cotter, Jr.'s attack on the Executive Committee is not actually based on any *realistic* belief or theory ---let alone, any ***evidence***---that the committee's existence or actions have actually caused any harm to RDI or its shareholders. Instead, this attack is simply another example of Cotter, Jr.'s condemnation of virtually *every* action taken by the Board of Directors since his termination. Even if Cotter, Jr. is sufficiently deluded so as to be personally so convinced of his own superiority that he honestly believes that any decision not personally blessed by him must necessarily be harmful to RDI, such irrational thought patterns do not, and should not, suffice to perpetuate litigation against RDI. Cotter, Jr.'s continuation of this litigation is, itself, harmful to RDI, and must be brought to a halt.

Cotter, Jr. is unable to show that the Executive Committee's existence is a breach of any defendant's fiduciary duty to the RDI shareholders. He is also unable to show that RDI's shareholders have suffered any damage as a result of the challenged decisions of the Executive Committee. Accordingly, summary judgment in favor of RDI and the Individual Defendants should be granted.

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LEGAL ARGUMENT

This Court should grant RDI summary judgment as to Cotter, Jr.'s First, Second, Third and Fourth causes of action in the SAC to the extent such claims exist. Cotter, Jr. is unable to present evidence sufficient to show that a material issue of fact exists as to RDI's entitlement to judgment as to this issue.

Summary judgment should be granted if the pleadings, admissions, and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . pointing out ... that there is an absence of evidence to support the nonmoving party's case." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007). In that event, the non-moving party is then obligated to present admissible evidence to show that there are material issues of fact preventing summary judgment, or summary judgment must be granted. *Id.* Because a plaintiff is required to prove each element of his cause of action, is 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).

Here, Plaintiff Cotter, Jr. bears the burden of proof on his breach of fiduciary duty claims. Accordingly, he can survive this motion for summary judgment only if he affirmatively presents admissible evidence sufficient to persuade a reasonable jury that any of these decisions constituted a breach of fiduciary duty. To do this, he must present direct evidence sufficient to overcome the statutory presumption that a director's decision was made in good faith. NRS 78.138(3). Because Cotter, Jr. is unable to present evidence sufficient to overcome this presumption, RDI is entitled to judgment as a matter of law.

I. COTTER, JR. CANNOT PRESENT EVIDENCE TO OVERCOME THE PRESUMPTION THAT APPROVAL OF THE ESTATE'S EXERCISE OF ITS STOCK OPTION WAS IN GOOD FAITH, OR THAT THE TRANSACTION WAS UNFAIR.

RDI is entitled to judgment in its favor with respect to claims relating to the approval of

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the exercise of its stock option by the Cotter, Sr. Estate. Cotter, Jr. contends that the exercise of the option was improper because the Estate was permitted to exchange its Class A shares of stock for Class B shares, instead of being required to pay with cash. However, the Stock Option plan expressly authorized numerous methods of payment, including payment through exchange of Class A shares. That provision provides:

> 6.1.6 Payment. Except as provided below, payment in full, in cash, shall be made for all stock purchased at the time written notice of exercise of an Option is given to the Company, and proceeds of any payment shall constitute general funds of the Company. The Administrator, in the exercise of its absolute discretion after considering any tax, accounting and financial consequences, may authorize any one or more of the following additional methods of payment:
>
> * * *
>
> Subject to the discretion of the Administrator and the terms of the stock option agreement granting the Option, delivery by the optionee of shares of Common Stock already owned by the optionee for all or part of the Option price, provided the fair market value (determined as set forth in Section 6.1 .9)[1] of such shares of Common Stock is equal on the date of exercise to the Option price, or such portion thereof as the optionee is authorized to pay by delivery of such stock.

See Ex. 3, to Motion, § 6.1.6.(b). As relevant here, § 6.1.9. provided that the fair market value of common stock was to be determined by the closing price of the stock on the exchange in which it is traded. ***Id.* at § 6.1.9.** Thus, the plan expressly authorizes that exercise of an option to purchase Class B stock by presenting Class A stock with the same fair market value. Accordingly, Cotter, Jr. is challenging an action that consisted of RDI selling property of a specific fair market value, and receiving, in return, ***property with the exact same fair market value.***

The Independent Directors have appropriately briefed and argued Nevada law on this issue, pointing out that any challenge to the option exercise decision must overcome the statutory presumption that the decision was made in good faith. NRS 78.138. However, even if such presumption did not exist, the fairness to RDI of this transaction, which consisted of a one to one exchange based on fair market value is obvious.

[1] As relevant here, § 6.1.9. provided that the fair market value of common stock was to be determined by the closing price of the stock on the exchange in which it is traded.

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II. COTTER, JR. CANNOT PRESENT EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE APPOINTMENT OF MARGARET COTTER TO A POSITION WITHIN RDI WAS IN GOOD FAITH.

Cotter, Jr. contends that the appointment of Margaret Cotter as an Executive Vice President constituted a breach of fiduciary duty, because, he claims, that Ms. Cotter is unqualified for the position, because, he claims, she lacked real estate development experience. However, the RDI Board and committee minutes reflect consideration of 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. Given satisfaction with her service, and the expressed intention of having her continue with the same sorts of services, but as an employee, her experience is apparently precisely what is required. **See Motion, pp. 4-5.** Accordingly, Cotter, Jr.'s personal objection to this business decision is insufficient to overcome the presumption of good faith.

III. UNDER NEVADA LAW, DIRECTOR DECISIONS REGARDING THEIR OWN COMPENSATION ARE PRESUMED TO BE IN GOOD FAITH, REGARDLESS OF THEIR PERSONAL INTEREST IN SUCH COMPENSATION.

This Court should grant summary judgment in favor of RDI with respect to Cotter, Jr.'s challenges to the compensation approved for the Cotter sisters and Director Adams. The Nevada legislature has determined that any decisions made by directors of a corporation with respect to their own compensation are presumed to be fair to the corporation, regardless of such director's personal interest in the issue. Specifically, Nevada law provides:

> Unless otherwise provided in the articles of incorporation or the bylaws, the board of directors, ***without regard to personal interest***, may establish the compensation of directors for services ***in any capacity. If the board of directors establishes the compensation of directors pursuant to this subsection, such compensation is presumed to be fair to the corporation unless proven unfair by a preponderance of the evidence***

NRS § 78.140(5). RDI's Bylaws permit the Board to award compensation to directors. RDI Bylaws, Art. II, § 12. Accordingly, to prevail on his claims of a breach of fiduciary duty, Cotter, Jr. must present direct evidence showing that the approval of compensation for the Cotter sisters and for Guy Adams was unfair to RDI. *See* NRS 47. 180(1). He is unable to do so.

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Under the presumption created in NRS 78.140(5), a member of the board of directors would be permitted to vote in favor of his own compensation, and such compensation would still be presumed fair. However, here, neither the Cotter sisters nor Director Adams actually participated in the vote awarding them compensation. Instead, Cotter, Jr. contends that their votes were made by directors who were beholden to the Cotter sisters. As shown in the briefing of the Independent Defendants' Motion for Partial Summary Judgment re Director Independence, and RDI's Joinder thereto, Cotter, Jr. cannot support this claim. However, even if his allegations of non-independence were true, the presumption that the compensation was fair to the corporation would still apply. As can be seen, the statute notes that the authorization for determining compensation applies "without regard to personal interest." NRS 78.140(5).

The Independent Director's Motion demonstrates that the compensation paid to the Cotter sisters is well within the range of comparable sized companies for positions of similar responsibility, and moreover, that the Directors voting in on the compensation issue had been so informed at the time the decision was made. In these circumstances, Cotter, Jr. cannot demonstrate unfairness to the RDI.

With respect to the one-time payment to Margaret Cotter, the evidence presented by the Individual Defendants shows that Ms. Cotter had given up the rights to certain future compensation. **See Motion, pp. 9-10.** In such circumstances a one-time payment, which payment is apparently less than that which would otherwise have been owed by the company, is obviously not unfair.

Finally, with respect to the payment of special compensation to Director Adams, Cotter, Jr. cannot show that the payment was not made in consideration of the lengthy list of additional services that Mr. Adams, an outside director, has provided to RDI in 2015, including offering advice to Ellen Cotter in the transition to her position as CEO, offering advice on investor relations, and extensive services related to two board committees. **See Motion, p. 10.** RDI's Bylaws expressly permit approval of compensation to board members for additional services. Cotter, Jr. cannot present evidence showing that this compensation was unfair to RDI.

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CONCLUSION

Cotter, Jr. is unable to present evidence sufficient to rebut the statutory presumption that decisions of the Board of Directors are made in good faith, or the presumption that decisions regarding director compensation, in any capacity, are fair to the corporation. Accordingly, RDI is entitled to judgment as a matter of law.

DATED: this 3rd 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 Joinder to the Individual Defendants' Motion for Partial Summary Judgment No. 6, Re Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams*** 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 3rd day of October, 2016.

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

v.

MARGARET COTTER, et al,

Defendants.

In the Matter of the Estate of

JAMES J. COTTER,

Deceased.

JAMES J. COTTER, JR.,

Plaintiff,

v.

READING INTERNATIONAL, INC., a Nevada corporation; DOES 1-100, and ROE ENTITIES, 1-100, inclusive,

Defendants.

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

MOTION TO DISMISS FOR FAILURE TO SHOW DEMAND FUTILITY

Hearing Date: 1/8/18
Hearing Time: 8:30a.m.

Nominal Defendant Reading International, Inc. ("RDI"), a Nevada corporation, by and through its undersigned counsel of record, hereby moves this Court to dismiss this action due to the inability of Plaintiff James J. Cotter, Jr. ("Cotter, Jr.") to prove his allegations of demand futility. This motion is based upon the files and records in this matter, the attached memorandum of authorities, and any argument allowed at the time of hearing.

DATED this 3rd day of January, 2018.

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DECLARATION OF TAMI D. COWDEN, ESQ.

I, Tami D. Cowden, state and declare as follows:

1. I am licensed to practice law in the State of Nevada. I am an attorney with the law firm of Greenberg Traurig, LLP, counsel for Reading International, Inc. in this proceeding. I make this declaration based upon personal, firsthand knowledge. If called upon to testify as to the contents of this declaration, I am legally competent to testify to its contents.

2. On December 28, 2017, this Court executed an order that determined, as a matter of law, that RDI Directors Judy Codding, William Gould, Edward Kane, Douglas McEachern, and Michael Wrotniak were independent.

3. In so ruling, this Court found that Cotter, Jr. could not prove the allegations he had made as to the purported interestedness of these directors. As a result, this Court has also determined that Cotter, Jr. cannot prove the allegations of demand futility that he had included in the various iterations of his complaint.

4. This Court had previously determined that Cotter, Jr.'s allegations of interestedness and demand futility had been sufficient to survive a motion to dismiss.

5. Pursuant to Nevada law, the Court's determination as to the adequacy of the pleading required the Court to subsequently determine, as a matter of law, whether the allegations of interestedness were proven.

6. This Court's December 28, 2017 Order establishes that the allegations of interestedness could not be proven.

7. Accordingly, as Cotter, Jr.'s allegations of demand futility cannot be proven, he does not have standing to maintain a derivative action, and it should therefore be dismissed as a matter of law.

8. Good cause exists to hear this motion on shortened time. Presenting this motion in the ordinary course would prevent the Court from ruling on the motion to dismiss prior to the scheduled trial date. Accordingly, grant of an order shortening time is appropriate.

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

Executed on this 3rd day of January, 2018, at Las Vegas, Nevada.

Tami D. Cowden, Esq.

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ORDER SHORTENING TIME

GOOD CAUSE APPEARING, it is hereby ordered that the foregoing ***Reading International, Inc.'s Motion to Dismiss for Failure to Show Demand Futility*** shall be heard on shortened time on the 8th day of January, 2018, at the hour of 8:30 A.m.in Department XI.

DATED this 3rd day of January, 2018.

CR

DISTRICT COURT JUDGE

CR

Respectfully submitted by:

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Kara B. Hendricks, Esq. (NBN 7743)
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MEMORANDUM OF POINTS AND AUTHORITIES

This Court's recent determination that, as a matter of law, Directors Judy Codding, William Gould, Edward Kane, Douglas McEachern, and Michael Wrotniak establishes that the making of a demand to file an action against the remaining defendants would not have been futile. Accordingly, this action must be dismissed for lack of standing by Cotter, Jr. to maintain a derivative action on behalf of RDI.

FACTS RELEVANT TO THIS MOTION TO DISMISS

Cotter, Jr. first filed his complaint in this action on June 12, 2015. The original complaint combined both individual claims and claims brought derivatively on behalf of RDI. The Defendants for the derivative claims included RDI Directors Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, and Timothy Storey, with RDI as a Nominal Defendant. As relevant here, the individual directors moved to dismiss the derivative claims for a failure to make demand; RDI joined that motion. At a hearing on September 10, 2015, this Court determined that Cotter, Jr. had "adequately alleged demand futility and interestedness," but partially granted the motion to dismiss due to a failure to adequately plead damages. *See* Transcript, Sept. 10, 2015, 15:24-16:3.

Cotter, Jr. thereafter filed his First Amended Complaint, to which Defendants Judy Codding and Michael Wrotniak were added. On November 12, 2015, the Individual Director Defendants again filed motions to dismiss, including a failure to allege demand futility among the grounds.[1] RDI moved to dismiss on additional grounds. This Court denied those motions in an order filed March 1, 2016, noting that the denial was without prejudice for the Defendants' rights to file motions for summary judgment. On May 6, 2016, Cotter, Jr. voluntarily dismissed Defendant Timothy Storey from the action. Cotter, Jr. subsequently sought leave, over the objection of Defendants, to file a Second Amended Complaint, again naming as defendants all of the members of RDI's Board of Directors, other than himself.

///

[1] Defendants William Gould and Timothy Storey filed such motion separately from the other defendants.

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On September 23, 2016, the Individual Directors (except for Director Gould) filed a motion for partial summary judgment on the issue of the independence of each of them (save Gould). RDI joined that motion. Defendant Gould filed a motion for summary judgment, in which the issue of his independence was one of the claimed grounds. This Court denied those motions finding there were material issues of fact regarding the independence of the Directors. Those motions were subsequently renewed, however, and, as noted above, this Court granted them on December 28, 2017.

LEGAL ARGUMENT

THE DETERMINATION THAT A MAJORITY OF RDI'S DIRECTORS WERE INDEPENDENT ESTABLISHES THAT COTTER, JR. CANNOT PROVE HIS DEMAND FUTILITY ALLEGATIONS, REQUIRING DISMISSAL

This Court's determination that Directors Codding, Gould, Kane, McEachern, and Wrotniak are disinterested with respect to the decisions cited in the Second Amended Complaint establishes that such complaint must be dismissed for failure of demand.

Pursuant to NRCP 23.1, a plaintiff must allege efforts made to have the corporation file the action, or to show that the making of a demand to sue is futile. When a court determines that the allegations of purported interest of a majority of members of the board of directors are sufficient to withstand a motion to dismiss for failure to make demand, the court must "later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue." *In re Amerco Derivative Litig.*, 127 Nev. 196, 222, 252 P.3d 681, 700 (2011), quoting *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006). In fact, in *In Re Amerco*, the remand to the district court instructed the court to determine "whether demand was, in fact, futile." 127 Nev. at 222, 252 P.3d at 700.

Here, this Court's ruling on summary judgment has taken the place of such evidentiary hearing; Cotter, Jr. was unable to show that demand was futile. Accordingly, the matter should be dismissed. This is true regardless of which of the three iterations of the complaint the Court considers. the Court considers the time the initial complaint was filed, wherein the majority of

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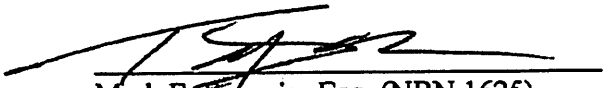
the RDI Directors included William Gould, Edward Kane, Douglas McEachern, and Timothy Storey, or if the Court considers the time of the filings of the First or Second Amended Complaints, wherein the majority of RDI's Board was comprised of Judy Codding, William Gould, Edward Kane, Douglas McEachern and Michael Wrotniak. Accordingly, a majority of RDI's Directors were independent as of the filing of each version of Cotter, Jr.'s complaint, and demand would not have been futile.

CONCLUSION

This Court has determined that a majority of RDI's Directors were independent with respect to the decisions challenged by Cotter, Jr. Therefore, none of these Directors faced liability based on Cotter, Jr.'s claims. Cotter, Jr. cannot prove his allegations that demand on the Board to file his claims was futile. Accordingly, Cotter, Jr. has no standing to serve as a plaintiff in this derivative action.

DATED this 3rd day of January, 2018.

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 ***Motion to Dismiss for Failure to Show Demand Futility*** to be filed and served via the Court's Odyssey eFileNV Electronic Service 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 3rd day of January, 2018.

An employee of GREENBERG TRAURIG, LLP

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR CONTINUANCE

MONDAY, JANUARY 8, 2018

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. STEVE L. MORRIS, ESQ.
FOR THE DEFENDANTS:	KEVIN JOHNSON, ESQ. MARSHALL M. SEARCY, ESQ. CHRISTOPHER TAYBACK, ESQ. MARK E. FERRARIO, ESQ. TAMI COWDEN, ESQ.

LAS VEGAS, NEVADA, MONDAY, JANUARY 8, 2018, 10:07 A.M.

(Proceedings 8:28 a.m. to 8:42 a.m. and 10:00 a.m. to 10:07 filed under seal. Hearing continued in open court as follows)

THE COURT: I have 10 minutes for your arguments.

MR. KRUM: So I'll talk with counsel about this matter after we do what we need to in the arguments so that we can take care of that and get out of the courtroom. Thank you.

THE COURT: Okay. I have a motion to dismiss for failure to show demand futility, and I have a motion for judgment as a matter of law --

Let everybody in now.

-- both which appear to be summary judgment motions, because they are asking me to look outside of the pleadings. Can someone explain why these motions were not filed in the time required for summary judgment motions under my scheduling order?

MR. FERRARIO: Who do you want to go first?

THE COURT: It doesn't matter. They both have the same procedural issue.

MR. FERRARIO: Well, Your Honor, I addressed this briefly the other day. And I don't think there's any dispute as to this. Your ruling on the motions for summary judgment relating to the five now disinterested directors had what I would call a ripple effect. And so I don't think that we

would have been in a position to file the motion we filed, nor do I think that director defendants would have been in the position to file the motions they filed without the benefit of your order. So your order -- and I can see you're smiling, but we filed the motions, we filed motions before, and you said the record wasn't complete, go out and complete the -- we did all that. Then by the time they got decided, okay, we're now in December. So Your Honor appropriately considered the motions that were in front of you, and I'm not going to go through the numbers of them now, because, quite frankly, I don't remember them all, and concluded that five directors were now disinterested.

THE COURT: I determined there were no genuine issues of material fact --

MR. FERRARIO: Exactly.

THE COURT: -- without the interestedness of those directors. Different.

MR. FERRARIO: Right. And you gave -- and I want to make on the -- you gave Mr. Krum every opportunity at that hearing to convince you otherwise, and he had a full and fair opportunity to present to you in the record any facts that would controvert Your Honor's ruling. He didn't do that. Which that, from our perspective, is the equivalent -- it's equivalent to an evidentiary hearing. So having now the benefit of Your Honor's ruling, we went back and we looked at

certain things. One of the things we looked at under the statute in Nevada is the concept of ratification. And that's addressed more extensively in the directors' motion. We brought that to your attention last week.

The other thing that we looked at, and it's what the company filed based on, is the demand futility concept. Your Honor at the outset of the case determined that from the allegations of the complaint that sufficient information had been pled to excuse demand on the board. That was based on what was in the complaint.

We then go through discovery, and it was robust discovery, I must say. There were numerous depositions taken, thousands of pages of documents produced, and based upon a full and complete record Your Honor makes the determination that the five board members are not interested. That then raises the issue of whether or not demand should have been excused in the first place. Obviously, given your ruling, demand should not have been excused, okay. And if you look at whether you want to call them, as Ms. Cowden says, the Shane case, because she likes to pronounce it like Germans do, I call it Shoen, or you call it Amerco --

THE COURT: Because we know the family, Lynn's family.

MR. FERRARIO: Exactly. Whatever -- if you look at those cases, one thing they made clear is the review of demand

or demand futility doesn't stop at the beginning, it's a continual look. And that's quoted in both -- in Shoen and in Amerco. And so what we've had in effect is the evidentiary hearing on whether the directors were interested or could act independently. And that hearing didn't go in favor of the plaintiff. So at this stage demand should not have been excused. And plaintiff consequently lacks standing as a derivative plaintiff to bring this case. He would have presented this and still should present the demand to the board, which is comprised primarily now of independent, disinterested directors. That's what the law provides, that's what the Shoen and Amerco cases provide, and that's why we brought this motion, because we're relying on Your Honor's ruling, which we didn't have until a couple weeks ago. That's it.

THE COURT: So you believe waiting for the Court to decide some motions that had a required filing deadline is sufficient showing of good cause for the late filing of these two motions?

MR. FERRARIO: Well, I wouldn't phrase it that way. I would phrase it that as we are standing here in front of you today dealing with an odd set of circumstances things evolve, okay. The case evolved. We didn't have the benefit of your ruling. We now have your ruling. And this is a follow-on motion related to that ruling. And you can say it's a motion

for summary judgment. I don't think that's an appropriate characterization. It's a motion to dismiss for demand futility. And so I think that the predicate for that motion was your order, and I don't think we're running afoul of the summary judgment deadline that you had, because it arose because of your order. And under Amerco and Shoen it says a motion can be filed any time. And so that's how I would characterize it. So we're not intentionally trying to go around your deadline for filing summary judgment motions in any way, shape --

THE COURT: Thank you.

Did someone want to respond on the procedural issue related to your motion for judgment as a matter of law?

MR. SEARCY: Yes, Your Honor. With respect to the procedural issue on several of the claims we actually did file a motion for summary judgment. So with respect to the appointment of Ellen Cotter as CEO, the appointment of Margaret Cotter to the position of executive vice president of real estate, we did file motions on those. And the byproduct of Your Honor's ruling on those is -- should necessarily be that because there were five disinterested directors who approved of those transactions, those transactions should be valid as a matter of law, Your Honor. So we did file in a timely fashion on those.

With respect to two other transactions, specifically

those are the termination of Jim Cotter, Jr., and with respect to the exercise of 100,000 shares, in those instances, Your Honor, based upon the ripple effect that Mr. Ferrario just described the board of directors got together, as they were allowed to do under Nevada Revised Statute 78.140(2)(a), which applies to interested director transactions, and they ratified those two transactions, using a majority of disinterested directors, specifically Mr. Kane, Mr. Gould, Mr. McEachern, Judy Codding, and Michael Wrotniak. Those five directors approved of the two transactions that the Court has singled out as being a potential issue for this case and ratified them as they're allowed to under the law.

With respect to the timing issue, Your Honor, the Court has held -- and this is with respect to a Rule 50 motion, which would apply to a bench trial, as opposed to a jury trial --

THE COURT: This isn't a bench trial, Counsel. We're picking a jury starting at 1:00 o'clock unless I grant these motions.

MR. SEARCY: Understood, Your Honor. But my point -- to distinguish that case, but to also explain the importance of it here, in the Charles Brown case the court held, if the plaintiff's not going to be able to prove their case, if there's going to be a failure, as there is here, because of the ratification under the applicable statute, then

that should be the end of the analysis. Here they're not going to be able to prove their case, because the transactions have been ratified by the disinterested directors, the five who this Court has held as a matter of law are disinterested. You found that there's no issue of fact on that, Your Honor, and they've ratified those two transactions.

And I would ask that to the extent that Mr. Cotter is allowed to receive some sort of continuance, then I'd ask for leave of the Court, if the Court really does think that this is an issue of a motion for summary judgment, then I'd ask for leave of the Court to be able to bring that motion, because this is now ripe for adjudication, there are no issues of fact here, this is a ratification that was done by a board of directors regarding transactions that you've examined and you've examined the relationship of those directors to those transactions. So there shouldn't be an issue of fact here.

So to the extent that the Court does not -- is not ready to consider this a motion for judgment as a matter of law, then I'd ask for leave to file a motion for summary judgment. Thank you.

THE COURT: Thank you, Mr. Searcy.

Mr. Krum, Mr. Morris, do you want to address the procedural issue?

MR. KRUM: Thank you, Your Honor. You're absolutely correct. These are not only untimely summary judgment

motions, but one of them is predicated upon evidence created on December 29th with respect to which not only is there an issue of fact, there should be discovery. So agree with Your Honor's assessment that they are untimely.

And the demand motion, Your Honor, they've made it, and they've made it in the only -- it's -- nothing has changed as they suggest it has, I don't think, Your Honor.

And you said just the procedural, so I won't go to the law.

THE COURT: Thank you. Now, Mr. Krum, in a minute I'm going to ask you a question. So can you pull up the opposition you emailed, because Cassandra didn't pull it in the pile. I read it, but I don't remember the footnote number I may refer to.

MR. KRUM: Which one, Your Honor?

THE COURT: The opposition you sent over the weekend to probably the motion for judgment as a matter of law. Mr. Morris did one, and you did one, I think.

MR. KRUM: I have it, Your Honor.

THE COURT: All right. Don't answer any questions yet.

So the motions both are denied without prejudice to renew if you should obtain leave of Court if there is not a proceeding today, because waiting for the Court to decide other motions is insufficient showing of good cause for late

filing of these two motions. If you thought you had a valid basis for the filing of the motions as they are currently presented, that should have been done prior to the date of the summary judgment motion.

With respect to Footnote -- is it 2 or 3 that talks about the admissibility of evidence?

MR. KRUM: Footnote 3, Your Honor.

THE COURT: So with respect to the issue raised in Footnote 3 of Mr. Krum's opposition I am not ruling on that at this time. I do have serious concerns about the appropriate disclosure of the factual evidence on which these motions are based.

MR. FERRARIO: Well, Your Honor, as to the company's motion it's --

THE COURT: That's the demand futility motion.

MR. FERRARIO: -- based entirely on your order.

THE COURT: I'm aware of that, Mr. Ferrario.

MR. FERRARIO: And the only thing is would -- just so the record's clear and it is under Shoen and Amerco --

THE COURT: It isn't Shane, it's Shoen.

MR. FERRARIO: Shoen. Okay.

THE COURT: And it's not Amerco, it's Shoen II. I know the Supreme Court wants to give it a new name, but it's --

MR. FERRARIO: Okay. So what do you want to call

it, Shoen and Shoen II?

THE COURT: It's Shoen.

MR. FERRARIO: All right. Well, then there. You got that Tami? It's Shoen from now on.

THE COURT: They're Shoen. They're Shoen. Both Shoen. Ask Mr. Peek. They were his case.

MR. FERRARIO: She keeps correcting me, and then --

THE COURT: Yeah, she's wrong.

MR. FERRARIO: All right.

THE COURT: Lynn Shoen. His name was Lynn Shoen.

MR. FERRARIO: Right.

THE COURT: And her family is the family that was fighting.

MR. FERRARIO: That's right. Where is she now?

THE COURT: I believe there's some bar proceedings.

MR. FERRARIO: Okay. What we're filing is what the statute provides. It's a motion to dismiss for failure to meet the requirements of Rule 23.

THE COURT: Mr. Ferrario, I absolutely understand what you're filing.

MR. FERRARIO: And I think the Shoen cases provide for that, Your Honor. And I don't know that it's fair --

THE COURT: You think the Shoen case provides for you after the hearing of the summary judgment motions to go to the board, get a change or belief as to whether a futility

then exists or other action should occur, and then after all of the pretrial disclosure deadlines are due then to make a decision right before trial?

MR. FERRARIO: Let me --

THE COURT: You think that's what Shoen says?

MR. FERRARIO: I don't think that --

THE COURT: No. I'm just trying to figure out. Do you think --

MR. FERRARIO: No, I don't think -- I don't think --

THE COURT: -- that's what Shoen 1 or Shoen 2 says?

MR. FERRARIO: I don't think Shoen says that.

THE COURT: Okay.

MR. FERRARIO: I think what Shoen says is -- and this is what we're doing. Shoen requires first of all demand futility. You look at it like you did at the beginning as pled. We made a motion to dismiss on that. You made conclusions based on what was pled.

THE COURT: At the time.

MR. FERRARIO: At the time. Those conclusions then changed with your order, okay. So with those changed conclusions we now know as a matter of law that demand should not have been excused. If --

THE COURT: That is not true, Mr. Ferrario. What you know now is based on the facts elicited in discovery --

MR. FERRARIO: Right.

THE COURT: -- and a briefing in this case I have made certain decisions as to whether there was a genuine issue of material fact related to interestedness. That's what you know. You don't know other stuff. That's what you know.

MR. FERRARIO: I understand. But the predicate for your ruling to excuse demand was that they were interested and not independent.

THE COURT: But there was an allegation that they were interested --

MR. FERRARIO: Exactly.

THE COURT: -- that was well founded.

MR. FERRARIO: And what Shoen does articulate, Your Honor, is that you can raise that issue during the course of the proceedings. And as we've articulated, in effect your ruling on summary judgment is -- supplanted the evidentiary hearing that was mentioned in Shoen.

THE COURT: That can be had in Shoen.

MR. FERRARIO: Exactly. And that's what we're --

THE COURT: You didn't request that in this case.

MR. FERRARIO: We didn't have to once you did -- once you made your ruling.

THE COURT: You never requested it for the four years or so we've been in litigation. Wait. We've only been in litigation three years. You didn't request it after the motion to dismiss was denied because it appeared the

allegations at that time were well founded. You never again requested or renewed that motion with a request for an evidentiary hearing.

MR. FERRARIO: You are correct, Your Honor. But what we did do, and as Your Honor recalls, at the beginning of this case there was a flurry of activity. The plaintiffs wanted injunctions, we were on an expedited schedule.

THE COURT: Absolutely.

MR. FERRARIO: The parties called time out and we pulled that injunction off, and then we set out to do discovery, which would have dealt with all of this, okay. I guess we could have had a separate track. But we dealt with this through the course of discovery. And I don't think that the fact that the issue materializes and the facts are crystallized and you have a decision right before trial that supports our argument regarding demand -- that that's somehow been waived. This is a predicate for a plaintiff to make, okay. You have to make demand or it has to be excused. Here it should not have been excused. That's what your ruling says, and that's why it runs afoul of Rule 23. It's a standing issue.

THE COURT: I understand.

MR. FERRARIO: And he lacks standing. And I just wanted to make that clear.

THE COURT: Sure. I appreciate you --

MR. FERRARIO: And my understanding of your comments were that if for some reason the case gets continued, if they get an affidavit that's sufficient, we can revisit these issues, correct, with a more complete record? Did I understand that correctly?

THE COURT: Then I would anticipate that you or Mr. Searcy would file a motion for leave to file a new motion for summary judgment and attach the draft motion. I would then make a decision as to whether I wanted to hear it.

MR. FERRARIO: Thank you.

THE COURT: And it depends on a lot of timing issues, because I'd probably have to reopen discovery if I entertain these motions.

MR. FERRARIO: Understand. Thank you.

THE COURT: Anything else? All right. So I'll see you guys at 1:00 o'clock. We are in Courtroom 3D at 1:00 o'clock.

Mr. Krum, your opposition didn't hit Odyssey, which is why nobody could find it but me, which is why I had to ask you for the footnote number. So you may want to check to see if it got sent. Mr. Morris's did hit Odyssey.

MR. KRUM: Thank you, Your Honor. We will.

THE COURT: 1:00 o'clock, 3D.

THE PROCEEDINGS CONCLUDED AT 10:24 A.M.

* * * * *

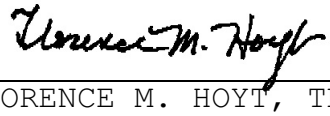
CERTIFICATION

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

AFFIRMATION

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

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

1/9/18

DATE

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

v.

DOUGLAS MCEACHERN, EDWARD KANE, JUDY CODDING, WILLIAM GOULD, MICHAEL WROTNIAK, and nominal defendant READING INTERNATIONAL, INC., A NEVADA CORPORATION

Respondents.

CASE NO: 75053

Consolidated for purposes of disposition with Cases: 76981, 77648, and 77755

Related to Cases: 72261, 72356, 74759

Dist. Court Case No.: A-15-719860-B

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

APPELLANT'S REPLY BRIEF (RDI)

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RULE 26.1 DISCLOSURE

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

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

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I. SUMMARY OF ARGUMENT

The Court should reject the rogue answering brief filed by Reading International Inc. ("RDI") and the arguments made therein. RDI is a nominal defendant. Cotter Jr. brought his derivative claims *on behalf* of RDI—not against it. The order from which Cotter Jr. appealed does not pertain to RDI: the order grants summary judgment in favor of five individual directors on the grounds that there are no genuine issues of material fact as to their disinterestedness or independence. As a nominal defendant on whose behalf Cotter Jr.'s derivative suit was brought, RDI lacks standing to choose sides and lend the individual directors a helping hand in solidifying their win in the district court.

Even assuming RDI could inject itself into this appeal, RDI's answering brief is nothing more than a belated and inappropriate effort to "fix" on appeal the "procedural blunders" RDI made below. *See Coray v. Hom*, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). RDI seeks affirmance of the district court's dismissal order on the alternative ground that Cotter Jr. failed to adequately plead or prove demand futility. But RDI never sought dismissal of the Second Amended Complaint based on Cotter Jr.'s alleged failure to plead demand futility and *never* once asked the district court for

an evidentiary hearing on demand futility as contemplated in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006). RDI waited until the eve of trial and long after the deadline to file a dispositive motion for Cotter Jr.'s alleged failure to show demand futility. The district court was correct in rejecting RDI's motion as untimely.

RDI could not first raise this issue on appeal, as it attempts to do here: the demand futility requirements of Rule 23.1 are not jurisdictional in that they can be raised at "any time," as RDI argues; it is a heightened pleading requirement. *See* NRCP 23.1; *Shoen*, 122 Nev. at 633, 137 P.3d at 1179. "[Q]uestions of demand futility are more appropriately resolved by the district court in the first instance." *Shoen*, 122 Nev. at 642, 137 P.3d at 1186.

Even assuming the Court could or were inclined to consider on appeal what RDI omitted to timely raise below, RDI's arguments fail on the merits as well. As discussed below, the Second Amended Complaint was sufficiently pleaded, and there was ample evidence identified by Cotter Jr. to meet either of the two *Aronson* prongs to establish demand futility.

II. THE RELEVANT FACTS THAT RDI'S BRIEF OMITS.

A. The numerous demand futility allegations of the First Amended Complaint.

The demand futility allegations of the First Amended Complaint ("FAC") were not limited to paragraphs 166-169, as RDI represented in its statement of facts. RDI Answering Brief ("AB") at 10. Although paragraphs 166-169 of the FAC are listed under the heading that says "Demand is Excused," the detailed allegations of fact to support the futility of demand—*why* the directors lack independence and disinterestedness and how they acted in bad faith, contrary to the best interest of RDI—are found in the preceding 165 allegations that RDI largely ignores. *See*, *e.g.,* I JA50, JA74-76, JA81-82 (¶¶ 12, 122, 148-150) (specific allegations pertaining to the appointment of director Codding); I JA48 (¶¶ 5-6) (allegations pertaining to Kane's quasi-familial relationship), I JA49 (¶ 9) (detailing specific conduct by five directors), JA50-51 (¶¶ 13-15) (detailing specific conduct by the Cotter sisters and Kane).

The FAC also alleges facts that describe each defendant and the conduct of those defendants that supports interestedness and/or lack of independence and other alleged misconduct, as prescribed in *Shoen*, 137 P.3d at 1182. *See* I JA52-53 (¶¶ 17-20), JA57-58 (¶¶ 35-40) (Kane and Cotter

sisters); *see also* JA53-54, JA65-67 (¶¶ 21, 77-85) (alleging detailed factual basis for Adams' lack of independence).

For example, Cotter Jr. alleged that Kane, Adams and McEachern chose sides in family disputes between the Cotter sisters and Cotter Jr. by making the settlement of independent trust and estate litigation commenced by the Cotter sisters a condition under which Cotter Jr. could remain president and CEO—a condition which had nothing to do with the business interests of RDI and showed these directors' divided loyalties. I JA48, 54, 69 (¶¶ 4, 22, 95-98); Cotter Jr. also alleged how several board committees were created in an effort to exclude him, Gould, and Storey—the directors who voted against his termination—from having a voice on crucial business matters, such as the appointment of a new CEO and the exercise of a 100,000 share option that would guarantee control of RDI by the Cotter sisters. I JA49-51 (¶¶ 9-10, 13-15). In addition, Cotter Jr. alleged that directors Kane and Adams, to serve the personal interests of the Cotter sisters, authorized the sisters' request to use Class A non-voting RDI stock to exercise a 100,000-share option the sisters claimed belonged to the Estate of Cotter Sr. that did not benefit RDI because it was not paid for in cash. I JA49-50, JA76-78 (¶¶ 10, 127-132). Cotter Jr. also made detailed

allegations of "board stacking" by the Cotter sisters recommending appointment of unqualified family friends to the board, which the defendant directors thereafter approved. I JA50-51 (¶¶ 12-14), JA80-83 (¶¶ 146-151, 155-158).

Based on these allegations, the district court correctly found that Cotter Jr. had adequately alleged demand futility and denied defendants' motion to dismiss. I RDI-SA0186-201. Shortly thereafter, RDI filed an answer to the FAC. I JA122-JA143.

B. The Second Amended Complaint adds new specific allegations to confirm demand futility.

The Second Amended Complaint ("SAC") contains 168 paragraphs that provide highly detailed factual allegations relative to the acts, omissions, interestedness, and lack of independence of the individual director defendants. I JA168-JA213. In addition to the facts alleged in the FAC, Cotter Jr. described the events leading to his termination, including the vague agenda item circulated shortly before the board meeting that led to his termination. I JA188 (¶ 72); he described in detail that director Guy Adams was financially dependent on income from family businesses controlled by the Cotter sisters, explaining that 80% of his income was derived from those businesses, I JA170-71, 176, 187-188 (¶¶ 5, 21, 64-71).

He also detailed the lack of independence and the disabling interestedness of the Cotter sisters who had initiated trust and estate litigation and probate litigation against him months before seeking his termination in an effort to procure control of RDI Class B stock sufficient to elect RDI's directors, I JA175, 199 (¶¶ 18, 110). He alleged that Ellen Cotter had asked Cotter Jr. to resign from the board after he was terminated as CEO, knowing there was no basis for this, I JA170 (¶ 4), and how Margaret Cotter and Ellen Cotter did not want to report to him when he was CEO. I JA182 (¶ 41). He also alleged how his sisters prevailed on the other directors to add two friends to the board, Codding and Wrotniak, who would support their personal interests, pointing out that Codding is a longtime family friend of Ellen Cotter's mother with whom Ellen Cotter lives, I JA172, 202 (¶¶ 11, 124), and that Wrotniak is the husband of Margaret Cotter's close friend from college. I JA172 (¶ 12).

Neither Codding nor Wrotniak had experience serving on the board of a public company. I JA171, 202, 203 (¶¶ 7, 124, 132). Neither had experience with cinema operations or real estate development that RDI was involved in. I JA177-178 (¶¶ 24-25). Cotter Jr. also alleged how each of the Cotter sisters got the executive positions of control they wanted with RDI

after terminating Cotter Jr., despite the fact that neither of them had the necessary and desired experience or other qualifications for the positions. I JA180, 208-209 (¶¶ 34, 144, 149). He pleaded facts to show that the Cotter sisters created an executive committee of directors loyal to them in an effort to defeat the votes of directors Storey and Cotter Jr. I JA171 (¶ 8).

Cotter Jr. pleaded facts showing the longstanding, quasi-familial relationship of director Ed Kane coupled with his consistent support for every decision proposed by the Cotter sisters—from their wish to terminate Cotter Jr., their proposal to leave him on as CEO if he agreed to their settlement terms, their desire to create board committees to exclude the vote of directors Cotter Jr., Storey, and Gould, to their decision to use the 100,000 share option in an effort to solidify their control of RDI, *e.g.*, I JA176, 194, 198 (¶¶ 20, 99, 107), and the threat by Kane, McEachern, and Adams to terminate Cotter Jr. and support decisions by the Cotter sisters for their personal interests rather than RDI's interests. I JA177, 181 (¶¶ 22, 36). He also described the lack of process and due diligence in approving Codding and Wrotniak, unqualified friends of the sisters, as board members. I JA201-203 (¶¶ 121-125, 132-133). And he described the circumstances under which a "friendly" CEO search committee was set up

by Ellen Cotter that included herself, her sister, Gould, and McEachern to search for a qualified, experienced CEO, which turned out to be Ellen who was neither. I JA207-208 (¶¶ 137-144).

These and other allegations in the SAC also described bad faith conduct by the directors. I JA168-JA224. Thus, like the FAC, the SAC was not limited to just four "conclusory" paragraphs to support on demand futility, as RDI contends. AB at 11-12. The district court correctly granted Cotter Jr. leave to file this SAC finding that "demand would be futile on the board under the circumstances." RDI-SA0461.

C. None of the defendants seeks dismissal of the SAC based on demand futility.

Neither RDI nor the individual directors moved to dismiss the SAC under Rule 23.1 for Cotter Jr.'s failure to adequately plead demand futility when the SAC was filed on September 2, 2016. Instead, on September 23, 2016, all directors except for Gould filed six separate motions for partial summary judgment ("Partial MSJs") on specific issues and Gould filed a Motion for Summary Judgment on all claims. I JA225-XIV3275. RDI joined in all six Partial MSJs and in Gould's Motion for Summary Judgment. XV JA3725-XVI JA3810; *see also* Cotter Jr.'s Supplemental Appendix ("CSA") CSA1-22.

D. RDI and the individual defendants answer the SAC and admit many demand futility allegations.

Even though not a single claim was made against it, RDI filed an answer to Cotter Jr.'s SAC on December 20, 2016. XX JA4905-JA4930.[1] RDI admitted many of Cotter Jr.'s factual allegations in its answer and deferred to the answer of the other defendants for many other allegations. *Id.*; XX JA4906-08, 4913, 4919, 4921 (¶¶ 10, 14, 15, 20, 72, 124, 149).

A year after Cotter Jr. filed the SAC on behalf of RDI, the individual director defendants filed their answer, admitting many factual allegations that support demand futility. XXI JA5021-JA5050. For example, they admitted that neither Codding nor Wrotniak had experience serving on the board of a publicly traded company; that neither had experience with cinema operations or real estate development; that each was proposed by the Cotter sisters; that Codding is a longtime family friend of Ellen's mother with whom she lives; and that Wrotniak is the husband of Ellen Cotter's best friend from college. XXI JA5022-5027 (¶¶ 6, 11, 12, 24 & 25).

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[1] The SAC clearly distinguished between "Defendants" and "Nominal Defendant" RDI in the caption, I JA168, and each of the four causes of action alleged breaches of fiduciary duty "**to** RDI" by the "**individual** defendants" or the Cotter sisters. I JA215 (¶174); I JA216 (¶181); I JA218 (¶¶188, 194). RDI is not an individual defendant. Cotter Jr. sought damages on behalf of RDI. I JA 221 (¶ 5).

The director defendants also admitted that director Guy Adams receives a substantial amount of his income from businesses controlled by the Cotter sisters. XXI JA5030 (¶ 66). They also admitted to the creation and use of several board committees, such as the executive committee, which excluded Cotter Jr. and directors who had voted against his termination. XXI JA5023-5024 (¶¶ 8, 12, 15).

They admitted to director Kane's relationships with Cotter Sr. and the Cotter sisters. XXI JA5022, 5026, 5028 (¶¶ 5, 20, 38). They admitted that Adams and Kane approved the Cotter sisters' request to invoke a 100,000 share option using RDI Class-A stock that would guarantee them control of RDI to the exclusion of Cotter Jr. XXI 5034-35 (¶ 107). They admitted that McEachern, Gould, and Margaret Cotter abandoned the search for a CEO with real estate development experience and appointed Ellen Cotter (who was a member of the search committee and had no such experience) despite Ellen's lack of experience that the search committee had previously determined to be essential for the position. XXI JA5024 (¶ 14).

E. The district court enters its order dismissing the five directors.

All Partial MSJs were supplemented on November 9, 2017 and heard on December 11, 2017. XX JA4946-XXI JA5000; XXIV JA5823-5897.

The district court dismissed Cotter Jr.'s claims against five of the directors, finding they were disinterested. XXIV JA5866-5867, 5894-95. But the district court denied Partial MSJ No. 2 on "Independence" as to three defendants, *i.e.*, the two Cotter Sisters and Guy Adams. XXVI JA6173. The Court also denied Partial MSJ Nos. 1, 5, and 6 against them. XXVI JA6173-6174. The order on the Partial MSJs and Gould's MSJ was entered on December 28, 2017. XXVI JA6170-6176.

F. RDI finally moves to dismiss the SAC based on demand futility.

On January 3, 2018—five days after the dismissal order, more than a year after the SAC was filed, and a mere five days before trial was to start—RDI filed a "Motion to Dismiss for Failure to Show Demand Futility." CSA23-31.

RDI's Motion did not address any allegations of the SAC. Rather, this nominal defendant summarily argued that the recent dismissal of the five directors based on their disinterestedness and independence "t[ook] the place [] of an evidentiary hearing" and "establishes that such complaint must be dismissed for failure of demand." *Id*. at 7; *see also id*. at 3 (Cowden Decl. ¶ 7) (arguing that "as Cotter Jr.'s allegations of demand

cannot be proven, he does not have standing to maintain a derivative action, and it should therefore be dismissed as a matter of law").

The district court denied RDI's Motion without prejudice, finding it was untimely filed, because the deadline to file dispositive motions had long passed. CSA41-42 (at 10:22-11:4; XX JA 4942-43). The district court questioned why RDI had never requested an evidentiary hearing on demand futility:

> You never requested [an evidentiary hearing] for the [three] years or so we've been in litigation. . . You didn't request it after the motion to dismiss was denied because it appeared the allegations at that time were well founded. You never again requested or renewed that motion with a request for an evidentiary hearing.

CSA 45-46 (at 14:22-15:3).

III. ARGUMENT

A. RDI lacks standing to oppose Cotter Jr.'s appeal from the order dismissing the five directors.

"The complaint in a derivative action is filed on the corporation's behalf; not against it." *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005-09, 84 Cal.Rptr.3d 642, 652 (2008). The corporation is only a nominal defendant. *Id*. As a nominal defendant, the corporation is functionally aligned with the plaintiff: It is the "real party in interest" on whose behalf the derivative case is brought. *Ross v. Bernhard*, 396 U.S.

531, 538-39 (1970). As the SAC demonstrates, Cotter Jr. sought both damages and injunctive relief *on behalf of* RDI. I JA215-220 (¶¶ 178-179, 186-187, 191-192, 199-200, 201-202).

As a nominal defendant, the corporation " 'is required to take and maintain a wholly ***neutral*** position taking sides neither with the complainant nor with the defending director.' " *Swenson v. Thibaut*, 250 S.E. 2d 279, 293-94 (N.C. App. 1978) (quoting *Solimine v. Hollander*, 129 N.J.Eq. 264, 19 A.2d 344 (1941)) (emphasis added). "[T]he corporation has no ground to challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit." *Patrick,* 167 Cal. App. 4th at 1005, 84 Cal. Rptr. 3d at 653.

Here, the appeal does not involve RDI or an order pertaining to RDI: Cotter Jr.'s appeal is from the district court's order dismissing five individual directors on the grounds that there were no genuine issues of material fact as to their disinterestedness or independence. XXVI JA6326-JA6327. Thus, RDI should have stayed neutral because it 'does not have a dog in this fight.'

Nevertheless, RDI has injected itself into this appeal by filing a separate answering brief to improperly support the dismissal of the five

individual directors, and—by extension—to take a partisan position in support of the Cotter sisters in their efforts to defeat Cotter Jr.'s appeal. RDI even incorporated into its answering brief the statement of facts and *all* legal arguments asserted by the five individual respondents in their answering brief. AB at 4, fn. 5; *id*. at 18 fn. 10. RDI asks this Court to affirm the MSJ order on grounds advanced by the five directors. AB at 21. This is an entirely improper course of conduct for a nominal neutral defendant; it underscores the extent to which RDI and its board of directors have been and are being influenced and controlled by the Cotter sisters.

B. RDI's demand futility claim is barred by waiver, laches, and inexcusable delay.

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Moreover a claim is also barred by laches if, as here, (1) a party inexcusably delays bringing the claim; (2) the party's inexcusable delay constitutes a knowing acquiescence to the alleged deficiency the party is raising; and (3) the inexcusable delay is prejudicial to the appellant. *E.g.*, *Bldg. & Const. Trades Council of N. Nev. v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992). Delay is

inexcusable "when the time to act has expired" and the party seeking to assert a right had no "reasonable basis" for not complying and caused "prejudice to the nonmoving party." *Moseley v. Eighth Judicial Dist. Ct.*, 124 Nev. 654, 665, 188 P. 3d 1136, 1144 (Nev. 2008) (discussing excusable neglect under NRCP (6).

As set out below, there is no legal or equitable reason to excuse RDI waiting more than a year before seeking dismissal of the SAC based on Cotter Jr.'s alleged failure to plead or prove demand futility, or for its failure to ask the district court for an evidentiary hearing on demand futility. Its deficient motion was filed on the eve of trial, well after the deadline to file dispositive motions had expired. The Court should not consider RDI's challenge to the SAC for the first time on appeal.

1. The heightened pleading requirements of Rule 23.1 are not jurisdictional.

Rule 23.1 provides, in relevant part:

> In a derivative action . . . the complaint must be verified and must allege that the plaintiff was a shareholder . . . at the time of the transaction of which the plaintiff complains . . . . **The complaint must also allege with particularity** the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and **the reasons** for the plaintiff's failure to obtain the action or for not making the effort. **The derivative action may not be maintained** if it appears that the plaintiff **does not fairly and adequately represent the interests of the shareholders** . . . .

Nev. R. Civ. P. 23.1 (emphasis added).

Rule 23.1 thus makes a distinction between the "demand futility" requirement and the "adequate representation" requirement. The former is a heightened pleading standard; the latter is a requirement for standing that, if not met, prevents a plaintiff from maintaining suit altogether. *Accord, Quinn v. Anvil Corp.*, 620 F.3d 1005, 1012 (9th Cir. 2010) (discussing the "pleading requirements" of FRCP 23.1 and the "continuous ownership requirement," of the Rule, which "foreclose[d] Quinn's derivative action").

In this respect, Nev. R. Civ. P. 23.1 materially differs from California Corporations Code § 800, which treats compliance with demand futility pleading requirements as jurisdictional: It provides that "[n]o action may be instituted or maintained in right of any domestic . . . corporation . . .unless. . . . [t]he plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort . . . ." Cal. Corp. Code § 800(b)(2). Thus, RDI's reliance on *Nelson v. Anderson*, 72 Cal. App. 4th 111, 84 Cal.Rptr.2d 753 (1999) is misplaced, because the court expressly based its decision to reverse the jury verdict on plaintiff's failure to comply

with the demand futility pleading requirements of Cal. Corp. Code § 800(b)(2), as this excerpt from *Nelson* shows:

> [California] law demands certain prerequisites to bringing a derivative action which have not been alleged or proven in this case, such as alleging 'in the complaint with particularity, [the] plaintiffs [sic] efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort' . . . .'No action may be instituted or maintained" unless there has been compliance with the statute.'

Nelson, 72 Cal. App.4th at 127, 84 Cal.Rptr.2d at 763 (quoting Cal. Corp. Code § 800(b)(2)).

2. *Shoen* refutes RDI's argument that the demand futility pleading requirements of NCP 23.1 are jurisdictional.

Shoen confirms that the heightened pleading requirements under Rule 23.1 are not a matter of subject matter jurisdiction. As this Court held, "NRCP 23.1 imposes heightened pleading imperatives in shareholder derivative suits" in that "a derivative complaint must state, with particularity . . . [the] reasons for not making a demand." *Shoen*, 122 Nev. at 633-34, 137 P.3d at 1179. Although a failure to meet these pleading requirements "deprives the shareholder of standing," *id.*, it does not justify a dismissal for lack of subject matter jurisdiction, as RDI suggests on pages 31 and 32 of its answering brief, but "justifies dismissal of the complaint for failure to state a claim upon which relief may be granted." *Shoen*, 122 Nev.

at 634, 137 P.3d at 1180. This is a distinction between Nevada and California law that makes a difference and which renders RDI's reliance on *Nelson v. Anderson* invalid.

In other words, a failure to comply with Rule 23.1 does not result in a dismissal under NRCP 12(b)(1) but in a dismissal under NRCP 12(b)(5); as a result, a party cannot first raise a failure to comply with Rule 23.1 for the first time on appeal. In fact, this Court in *Shoen* noted twice that "questions of demand futility are more appropriately resolved by the district court in the first instance." *Shoen*, 137 P.3d at 1186; *id*. at 1185 ("the district court . . . is a more appropriate forum in which to resolve shareholder demand disputes in the first instance").

3. The Rule 23.1 pleading requirements have nothing to do with standing to sue.

The remaining cases cited by RDI on pages 31 and 32 of its brief—none of which is a derivative shareholder case—were all general standing cases. They all pertained to "the issue of whether the plaintiff had the "legal right to set judicial machinery in motion" in the first place. *Secretary of State (Heller) v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (internal quotation marks and citation omitted). For example, the issue in *Smaellie v. City of Mesquite*, 393 P.3d 660 (Nev. 2017)

(unpublished order) was whether the plaintiff had standing to sue as a beneficiary under the contract, which he had not pleaded. In *Oaktree Capital Mgmt., LP v. KPMG*, 963 F.Supp.2d 1064, 1077 (D. Nev. 2013), the defendants argued that plaintiffs lacked Article III standing because they "failed to meet the injury-in-fact requirement." In *Applera Corp. v. MP Biomedicals, LLC*, 93 Cal.Rptr.3d 178, 173 Cal. App. 4th 769 (2009), the issue was whether the plaintiff had standing to sue for damages under a license agreement.

In other words, all cases cited by RDI involved the question whether the plaintiff "ha[d] a sufficient interest in the litigation" to bring suit—*i.e.*, a legal interest, personal right, or "personal injury and not merely a general interest that is common to all members of the public." *Schwartz v. Lopez*, 382 P.3d 886, 894 (Nev. 2016). If a plaintiff lacks such interest, a court lacks "subject matter jurisdiction over the suit" and it must be dismissed under Rule 12(b)(1)." *Cetacean Cmty v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)).

Here, by contrast, there is no question as to whether Cotter Jr. has or had a sufficient interest in the litigation. Defendants admit that

Cotter Jr. is a shareholder who at all relevant times owned a substantial amount of stock in RDI. XX JA4907 (¶ 17); XXI JA5025 (¶ 17). Thus RDI's arguments that the Rule 23.1 pleading requirements are jurisdictional can be raised at any time and warrant dismissal under NRCP 12(b)(1) or NRCP 12(h)(3) are altogether misplaced.

4. RDI's jurisdictional argument does not yield the result it seeks.

Even assuming the demand futility pleading requirements under Nev. R. Civ. P. 23.1 were a "jurisdictional mandate," the principal (unpublished) case on which RDI relies for its jurisdictional argument teaches that " 'a dismissal for lack of standing should be *without prejudice* because it is not an adjudication on the merits.' " *Smaellie v. City of Mesquite*, 393 P.3d 660 (Nev. 2017) (unpublished order) (quoting *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006)) (emphasis added). Thus, even if RDI is right that the SAC should have been dismissed for Cotter Jr.'s lack of standing, this would not result in a final order dismissing the case but would result in an order remanding the case to allow Cotter Jr. to amend his SAC.[2]

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[2] Such amendment would not be futile. As Cotter Jr.'s opening brief in Appeal No. 76981 will show, the events that occurred right after the district

5. RDI untimely and improperly moved for a dispositive ruling on demand futility.

A failure to meet the pleading requirements of Rule 23.1 "justifies dismissal of the complaint for failure to state a claim upon which relief may be granted." *Shoen*, 122 Nev. at 634, 137 P.3d at 1180. But if a district court finds that the complaint provides "sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue." *Id.* at 645, 137 P.3d at 1187.

Here, RDI never moved to dismiss the SAC for failure to satisfy the heightened demand futility pleading requirements. Although RDI filed an answer to Cotter Jr.'s SAC, which did not make a single claim against it, and asserted a defense for failure to make a demand, RDI did not assert a defense that Cotter Jr. failed to adequately plead demand futility. XX JA4926. And RDI "never requested" the district court for "an evidentiary hearing" contemplated by *Shoen*. CSA45-46 (at 14:22-15:3).

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court dismissed the five directors only further support Cotter Jr.'s claims that *all* directors, including the five directors who were found disinterested, were controlled by the Cotter sisters. They admittedly ratified the challenged board decisions on the eve of trial for the purpose of assisting the Cotter sisters in avoiding trial on the merits.

It wasn't until after the district court entered its order granting summary judgment in favor of five directors, and on the eve of trial, that RDI filed a "Motion to Dismiss for Failure to Show Demand Futility." CSA23-CSA31. But despite calling it a Motion to Dismiss, RDI did not seek a dismissal based on the insufficiency of the pleadings; RDI sought dismissal of the case for Cotter Jr.'s alleged failure to "***prove*** his allegations of demand futility." CSA24 (emphasis added).[3]

RDI in part based its "Motion to Dismiss" on the "files and records" of the case and an incorporated declaration of RDI attorney Tami Cowden. CSA25-26. The declaration did not contain "only factual, evidentiary matter," as EDCR 2.21 requires, or any other evidence for that matter; instead, it characterized and drew a number of conclusions from the district court's rulings. For example, Ms. Cowden argued that the district court: (1) determined "as a matter of law" that the five dismissed directors were independent; (2) "found that Cotter Jr. could not prove the

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[3] Nothing in NRCP 12(h)(2) supports RDI's suggestion on page 33 of its answering brief that it can first raise Cotter's alleged failure to adequately plead demand futility on appeal. Although *Clark County Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 168 P.3d 87 (2007) held that a defense for failure to state a claim may be asserted "at any time," NRCP 12(h)(2) makes clear that the outer limit is "**at** the time of trial"; not after "the trial on the merits." (emphasis added).

allegations" as to the "interestedness of the directors"; and that, "*[a]s a result*" (3) *has also determined* that Cotter Jr. cannot prove the allegations of demand futility . . . . ." CSA25 (emphasis added); *see also id*. (¶¶ 2-3, 5-7).

The remainder of the Motion—less than three pages—did not cite, let alone discuss, a single demand futility allegation of Cotter Jr.'s SAC that RDI claimed he had not proven. RDI's Motion only referenced *prior* complaints and *prior* motions to dismiss for failure to allege demand futility that the defendants had filed, before concluding that the district court's order granting summary judgment "has taken the place of the evidentiary hearing" required in *Shoen* to determine "whether demand, in fact, was futile." CSA28-29 (quoting *In Re Amerco Deriv. Litig.*, 127 Nev. 196, 222, 252 P.3d 681, 700 (2011)).

The district court properly treated the Motion to Dismiss as an untimely motion for summary judgment, CSA41-42, because it was based on the district court's summary judgment order, and thus "presented matter [] outside the pleadings." NRCP 12(c). It was well within the district court's discretion to reject the Motion as untimely. It was filed almost two months after the deadline to file dispositive motions and just five days

before trial. CSA23, 37, 39, 41-44; *see also* NRCP 12(c) (requiring motions for judgment on the pleadings to be filed "within such time as to not delay the trial . . . "). XX JA4942-43.

There was no reason or excuse for RDI to delay until the eve of trial to file its Motion, as the district court observed: RDI "never," in all the years since the lawsuit was filed, asked the district court for an evidentiary hearing to determine if demand futility was in fact properly pleaded and excused. CSA45-46. It thereby inexcusably delayed and waived its right to do so. *See Bldg. & Const. Trades Council of N. Nevada*, 108 Nev. at 611, 836 P.2d at 637 (petition was barred by the doctrines of laches and implied waiver where the petitioner "knew of its legal rights but chose not to exercise them" and "inexcusably delayed in seeking the petition"). RDI cannot fix its "procedural blunders" on appeal. *Coray v. Hom*, 80 Nev. 39, 40, 389 P.2d 76, 77 (Nev. 1964) ("The case is loaded with procedural blunders. . . . Having failed to plead the statute of frauds as an affirmative defense as required by NRCP 8(c), the[] [buyers] sought to introduce it by way of a motion for summary judgment at the close of the sellers' case-in-chief. Of course, their failure to plead it affirmatively constituted a waiver").

C. There is no basis to affirm the order dismissing the five directors on the alternative ground RDI proposes.

1. The district court correctly held that Cotter Jr. satisfied the heightened pleading requirements of Rule 23.1.

As this Court made clear, a shareholder "is not required to plead evidence," and the pleadings may be "simple, concise, and direct" under NRCP 8(e), as long as the allegations are not merely "conclusory . . . ." *Shoen*, 122 Nev. at 634, 137 P.3d at 1179-80. Because the majority of board members had not changed at the time Cotter Jr. filed his SAC, the test established in *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) applied to the challenged business decisions. *Shoen*, 122 Nev. at 636-639, 137 P.3d at 1182-83 (distinguishing between the *Aronson* and *Rales* tests). Under *Aronson*, "a two-pronged demand futility analysis applies . . . : 'In determining demand futility, the trial court . . . must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment'." *Shoen*, 122 Nev. at 637, 137 P.3d at 1182 (quoting *Aronson*, 473 A.2d at 812) (some internal alterations omitted).

Here, the district court properly found, in granting Cotter Jr.'s motion to amend his FAC, "that demand would be futile under the circumstances," II RDI-SA0461, because the SAC contained particularized allegations showing that the majority of directors who participated in the main challenged decisions—*i.e.*, Cotter Jr.'s termination, the 100,000 share option, the executive committee, Ellen Cotter's appointment as CEO, the aborted search for a qualified CEO —were either interested (the Cotter sisters), not independent (*i.e.*, controlled generally and specifically in their decision-making by interested directors) (the Cotter sisters, Adams, Kane, McEachern), or failed to exercise due care or act in good faith when adopting the challenged decisions (Adams, Kane, McEachern, and Gould as to some).

2. The FAC and the SAC both allege facts that a trier of fact could reasonably conclude establish director interestedness, lack of independence in favor of the Cotter sisters, and disregard of RDI's best interests.

Cotter Jr.'s demand futility allegations in his FAC and SAC were not limited to four paragraphs, as RDI suggests on pages 10 through 12 of its answering brief. The FAC contained 165 other paragraphs with particularized allegations to support that demand was futile. I JA46-95. The SAC pleads 168 detailed factual allegations showing interested

relationships of the directors with the Cotter sisters and that demand on them for corrective action would have been futile. I JA168-JA224.[4]

As to the SAC, among the 168 factual allegations summarized under the Relevant Facts Section II.B, above, Cotter Jr. detailed: (1) the events and circumstances of his termination, including the vague agenda item titled "Status of President and CEO," circulated shortly before the board meeting on May 21, 2015, and the lack of process that was followed thereafter, I JA188 (¶ 72); (2) the lack of independence of director Guy Adams by showing that 80% of his income came from family businesses controlled by the Cotter sisters, I JA 170-71, 176, 187-88 (¶¶ 5, 21, 64-71); and (3) the lack of independence and interestedness of the Cotter sisters. *E.g.*, I JA 172, 175, 199, 182.

a) The SAC details the Cotter sisters' successful efforts to oust Cotter Jr. and place themselves in executive positions for which they were not qualified.

The sisters' efforts to overthrow and throw out Cotter Jr. included: (a) employing trust and estate litigation and probate litigation

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[4] RDI's answering brief ignores most of Cotter Jr.'s many detailed factual allegations of his SAC. RDI merely cited a few of many relevant other allegations and obscured them in footnotes. *See* AB at 8 fn. 7; *id*. at 13 fn. 8; *see also* AB at 23.

they had initiated against Cotter Jr. prior to seeking his termination as CEO in an effort to procure control of RDI Class B stock so that they could elect whomever they wished as RDI directors. I JA175, 199 (¶¶ 18, 110); (b) the Cotter sisters' refusal to report to Cotter Jr. when he was CEO. I JA182 (¶41); (c) Ellen Cotter's issuance of an incorrect SEC Form 8-K asserting that Cotter Jr. was required to resign from the board, knowing there was no basis for it, and the directors' failure to correct it. I JA170 (¶4); (d) the Cotter sisters' board-stacking: their quickly-accepted proposal to add two board members, Codding and Wrotniak—one of whom is a longtime family friend of Ellen Cotter's mother with whom she lives, I JA172, 202 (¶¶ 11, 124); the other the husband of Margaret Cotter's best friend from college, I JA172 (¶12)—neither of whom had experience serving on the board of a public company or experience with cinema operations or real estate development. I JA171, 177-78, 202-03 (¶¶ 7, 24-25, 124, 132); (e) the Cotter sisters' promotions to executive positions after terminating Cotter Jr., despite the fact that neither of them had the necessary and desired qualifications for the positions. I JA180, 208-09 (¶¶ 34, 144, 149); and (f) the Cotter sisters' creation of biased board committees, such as the executive

committee and CEO search committee in an effort to bypass the votes of directors Storey and Cotter Jr. I JA171, 207-08 (¶¶ 8, 137-144).

b) The SAC details other directors' lack of independence and lack of care.

The SAC further alleged: (1) the lack of independence of director Edward Kane based on his longstanding, quasi-familial relationship with the Cotter family, coupled with his consistent unqualified support for every decision proposed by the Cotter sisters—from their wish to terminate Cotter Jr., their settlement proposal and conditions under which Cotter Jr. could retain a title, but no authority, at RDI, their desire to create board committees that excluded directors Cotter Jr., Storey, and Gould (and thereby their votes)—to the Cotter sisters' request to exercise the 100,000 share option to solidify their control over RDI by using class A stock to pay for it. I JA171-72, 176, 181-82, 186-89, 190-94, 198, 202-03 (¶¶ 8, 10-12, 20, 36, 38, 40, 62-63, 73, 81-94, 99, 107, 125-127, 131-133); (2) the threat by directors Kane, McEachern, and Adams to terminate Cotter Jr. and siding with decisions by the Cotter sisters. I JA177, 181 (¶¶ 22, 36); (3) the lack of process and due diligence by Gould, Kane, McEachern, and Adams in approving new directors Codding and Wrotniak. I JA201-203 (¶¶ 121-125, 132-133); (4) Kane, McEachern and Gould's approval of biased board

committees and acquiescence in RDI making erroneous SEC filings. *E.g.*, I JA173, 194-95, 202-03, 207-08 (¶¶ 13, 99, 101, 127-131, 137-144); and (5) McEachern's active participation in facilitating the Cotter sisters' interests and wishes. JA173, 177, 181 194-95, 202-03, 207-08 (¶¶ 13, 22, 36, 99, 101, 127-131, 137-144).

Thus, the notion that Cotter Jr. did not comply with the demand futility pleading requirements of Rule 23.1 is entirely without basis.[5] Cotter Jr. did not merely plead facts showing that the Cotter sisters controlled the majority of the company stock, as RDI suggests. AB at 24-25 (comparing the SAC to the allegations in *Aronson*). He pleaded facts showing how they acquired control and exercised it to benefit themselves with the help of their friends on the board, all at the expense of RDI.

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[5] Even assuming the *Rales* test applied, Cotter Jr.'s SAC was adequately pleaded. The *Rales* test applies in three situations not present here: "(1) where the majority of the directors who made the challenged business decision have been replaced, (2) where the complaint's subject matter is not a business decision of the board, and (3) where the challenged decision was made by a different company." *Shoen*, 137 P.3d at 1183 n.49 (citing *Rales v. Blasband*, 634 A.2d 927, 933-34 (Del. 1993) and *Aronson*, 473 A.2d at 813). As detailed above, the majority of directors who would be addressing demand at the time the SAC was filed were either interested or controlled by the Cotter sisters, including Codding and Wrotniak, who were family friends hand-picked by the Cotter sisters. I JA170-208.

3. The defendants admitted many demand futility allegations.

RDI's claim that Cotter Jr. did not prove any of his demand futility allegations is belied in the first place by the answers filed by the defendants. Both RDI and the individual directors admitted many demand futility allegations. For example, RDI admitted that the Cotter sisters were allowed to exercise on behalf of the Estate an option to acquire 100,000 shares of RDI Class B Voting Stock. XX JA4906 (¶ 10). RDI admitted that Ellen Cotter was appointed CEO following Cotter Jr.'s termination, and that she was appointed CEO *after* the independent CEO search was aborted. XX JA4907 (¶14). RDI admitted that Margaret Cotter was appointed executive Vice President of RDI and given responsibilities for real estate development in New York. *Id*. (¶15). RDI admitted that Edward Kane was a close family friend of James Cotter, Sr. XX JA4908 (¶20). RDI admitted that the agenda with "Status of President and CEO" was distributed only two days before the May 21, 2015, board meeting. XX JA4914 (¶ 72).

The individual director defendants also admitted key demand futility allegations of Cotter Jr.'s SAC. XXI JA21-50. For example, they admitted that Margaret Cotter and Ellen Cotter were both engaged in

litigation against appellant Cotter Jr. and that they refused to report to Cotter Jr. when he was CEO. XXI JA5025-26, 5028 (¶¶ 18-19, 41). They admitted director Guy Adams' interests in businesses controlled by the Cotter sisters. XXI JA5030 (¶ 66). They admitted to Kane's relationships to Cotter Sr. and the Cotter sisters. XXI JA5022, 5026, 5028 (¶¶ 5, 20, 38). They admitted that Codding was a longtime family friend of Ellen Cotter's mother with whom Ellen lives, and that Wrotniak is the husband of Margaret Cotter's best friend from college, that neither had experience serving on the board of a public company, and that Wrotniak lacked experience with cinema operations or real estate development. XXI JA5022-5027, 5037 (¶¶6, 11, 12, 24-25, 132).

They also admitted that Kane Adams, McEachern, and Gould failed to perform a background check on Codding. XXI 5037 (¶ 126). They admitted to the creation and use of several board committees, such as the executive committee, which excluded Cotter Jr. and directors who had voted against Cotter Jr.'s termination. XXI JA5023-5024 (¶¶ 8, 12, 15). They admitted that two of the three "Compensation Committee" members, Adams and Kane, approved the Cotter sisters' request to invoke a share option using RDI Class A stock that provided no benefit to RDI. XXI

JA5034-35 (¶ 107). They admitted that Ellen Cotter was the chair of the CEO search committee, and that McEachern, Gould, and Margaret Cotter abandoned the search for a CEO with real estate development experience and appointed Ellen Cotter (who was a member of the search committee), XXI JA5024, 5038 (¶ 14, 137), XXI JA5119, 5153, 5164, 5202.

4. Other evidence supported the demand futility allegations.

In addition to the defendants' admissions, Cotter Jr. provided evidence on the directors' lack of independence, bad faith, and lack of process. *See generally*, XXI JA5081-5091, JA5108-5228; XXII JA5238-5487, XXIII 5488-5612; Opening Brief at 36-42.[6] The district court held that there were genuine issues of material fact as to the disinterestedness and independence of directors Adams and the two Cotter sisters, and denied Partial MSJs Nos. 1, 2, and 6 as to them. XXVI JA6173-74. The district court also denied Partial MSJ No. 5 pertaining to the appointment of Ellen Cotter as CEO in its entirety. XXVI JA 6174.

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[6] Cotter Jr. discusses the record evidence again in his Reply to the Answering Brief filed by the five individual directors. Cotter Jr. incorporates all arguments made in his Reply and the evidence that support them as if fully set forth herein.

5. The district court only considered the first *Aronson* prong.

Demand is excused if *either* the first or the second *Aronson* prong is met. *See Shoen*, 137 P.3d at 1182 n.43. As this Court explained, "the two-pronged *Aronson* analysis was originally articulated in the conjunctive" but the "Delaware Supreme Court, in quoting this analysis in a 1993 case, replaced that conjunctive with the disjunctive 'or.' " *Shoen*, 137 P.3d at 1182 n.43 (citing *Rales v. Blasband*, 634 A.2d 927, 933 (Del.1993)).

First, the dismissal order that is the subject of this appeal was not an order based on demand futility. XXVI JA6173-74. Second, the district court did not address or decide under the second *Aronson* prong whether "the challenged transaction was *otherwise* the product of a valid exercise of business judgment." *Shoen*, 137 P.3d at 1182 (emphasis added). As explained in Cotter Jr.'s opening brief, the district court during the December 11, 2017 hearing on the Partial MSJs focused solely on the "interestedness" component of the first prong of the *Aronson* test, asking for evidence of interestedness with respect to each of the five dismissed directors. XXIV JA5855, 5858. The district court granted summary judgment in favor of the five defendants on the sole basis that there were "no genuine issues of material fact related to the disinterestedness and/or

independence" of defendants Kane, McEachern, Codding, Wrotniak, and Gould, and that "judgment in favor of [these five defendants] is GRANTED on all claims asserted by Plaintiff." XXVI JA6173-6174, JA6219-6220.

Thus, RDI's argument throughout its answering brief that Cotter Jr. failed to provide sufficient evidence to show demand futility cannot be based on the district court order that is the subject of this appeal. That order cannot serve "in lieu of the required evidentiary hearing to determine whether demand was, in fact, futile" as RDI contends. AB at 19-20 (citing *In re Amerco Deriv. Litig.*, 127 Nev. 222, 252 P.3d at 700 (Nev. 2011)). There simply has been no finding that Cotter Jr. "presented no evidence" on the second *Aronson* prong. RDI's repeated arguments suggesting otherwise are wholly unsupported. AB at 21, *id.* at 17-19, and should be disregarded.

6. This Court should not make findings on the second *Aronson* prong that the district court did not make.

The Court should decline RDI's invitation to make findings on the second *Aronson* prong that the district court did not make and that RDI did not ask the district court to make. *See* AB at 27-28. As this Court held in *Shoen*, "questions of demand futility are more appropriately resolved by the district court in the first instance," *Shoen*, 137 P.3d at 1186, especially

where, as here "[i]t is not clear that the district court considered whether demand on [RDI's] board was excused on this basis." *Id*. Deciding this issue for the first time on appeal and affirming the order dismissing the five directors on this alternative ground would be especially prejudicial to Cotter Jr. because it would deprive him of the opportunity to seek leave to amend his SAC.

But assuming the Court should evaluate the SAC in the first instance, that evaluation would be done "with all fair inferences made in favor of appellant []" Cotter Jr., *In re Amerco Deriv. Litig.*, 127 Nev. at 221, 252 P.3d at 699, after considering all of the allegations in the complaint that have been cataloged in this appeal. That undertaking would confirm what this reply brief illustrates in detail: that Cotter Jr. *did* plead particularized allegations demonstrating a reasonable doubt as to the directors' good faith in their decision-making process, such as: (1) the last-minute board agendas that were circulated right before his termination and the refusal by Kane to first have a meeting with and among disinterested directors; (2) the conditions he was asked to agree to as a condition to remain CEO; (3) the use of a one-time special committee by Kane, McEachern, and Adams to not re-nominate director Storey as a director at the request of the Cotter

sisters so as to eliminate any dissenting vote on their agenda; (4) Kane and Adams' failure to first consider whether the Cotter Estate was entitled to exercise the 100,000 share option *before* approving the Cotter sisters' request to exercise it; (5) the board's lack of process and due diligence when appointing Codding and Wrotniak to the board, which the directors acknowledged; and (6) the board's approval of erroneous SEC filings that Cotter Jr. should resign from the board, without there being a basis for doing so. I JA169-173, 176, 181-82, 186-89, 190-95, 198, 201-03.[7]

Against this accumulation of pleaded, particularized facts, the only allegation RDI points to as "evidence" of Cotter Jr.'s failure to have adequately pleaded demand futility, AB at 28, is ¶ 169 of the SAC. That paragraph, however, merely summarizes the conclusion to be drawn from the particular facts pleaded in the 168 preceding paragraphs—*i.e.*, that the directors did not act in good faith and in the best interest of RDI. I JA213.

IV. CONCLUSION

RDI's answering brief is too little too late. Assuming *arguendo* RDI has standing as a nominal defendant to take sides in a derivative case

[7] These allegations, many of which were admitted, are also supported by evidence. *See, e.g.*, XIV JA3324-JA3329, JA3399; XV JA3611; XVI JA3871-3872; XVII JA4148, JA4229; XVIII JA4344; XXI JA 5222-5223 (¶35), JA5235.

brought on its behalf, the company had every opportunity between June 2015 and November 2017 to request an evidentiary hearing on demand futility. It failed to use that opportunity. This appeal from the district court's order granting summary judgment in favor of five directors is not the time, place, or vehicle for a supposedly neutral nominal defendant to take a partisan position especially when that positon is thoroughly undermined by 168 paragraphs of allegations of fact which confirm that Cotter Jr. adequately pleaded demand futility.

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CERTIFICATE OF COMPLIANCE

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

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 8293 words.

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

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I certify that on the 24th day of May, 2019, I served a copy of **APPELLANT'S REPLY BRIEF (RDI)** upon all counsel of record:

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