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

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

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Docket 75053 Document 2019-22875

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

In an effort to suggest that this derivative action is merely an employment case in which Cotter Jr. is trying to get his job back, the directors in their answering brief[1] focus almost entirely on the decision to terminate Cotter Jr. as CEO and President; the remaining decisions that Cotter Jr. challenges are mentioned only in passing, stripped of any mention of their instigators and beneficiaries so as to present the decisions in the false light of neutral business decisions. The actions and decisions of the directors were all aimed at consolidating the Cotter sisters' control over the company.

The Court should not be misled by this effort. Cotter Jr.'s termination is just one decision that evidences the directors' breach of their fiduciary duties. Cotter Jr.'s verified second amended complaint ("SAC") also sets out a number of *post*-termination acts and omissions by the directors—many of which are undisputed—all of which evidence a pattern of the directors doing not what is in the best interest of this public company but what is desired by and in the interest only of the Cotter sisters.

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[1] Nominal defendant/respondent Reading International, Inc. ("RDI") also filed an answering brief, to which Cotter Jr. is responding in a separate Reply Brief. Cotter Jr. incorporates the arguments he made in that Reply here as if fully set forth herein.

The Court should also not be misled by the four directors' attempt to re-characterize their *partial* summary judgment motion on the *issue* of independence as one for summary judgment on *all claims*. The "issue of independence" is not a claim, and none of the six partial summary judgment motions sought dismissal on all claims in favor of all four directors. Only director Gould moved for summary judgment on all claims, and the district court based its ruling solely on the five directors' disinterestedness and/or independence.

Even assuming all five directors moved for summary judgment on all claims on the basis of their independence when only Gould did, Cotter Jr. was deprived of the opportunity to show that in making the challenged decisions the directors: (a) were controlled or influenced in their duties by interested directors; (b) acted in bad faith; and/or (c) failed to take the requisite due care. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, 399 P.3d 334, 341 (2017); *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006). The directors do not cite a single case to support their argument that "operational decisions," such as Cotter Jr.'s termination, are not subject to further challenge because there is no such case.

For these reasons, the ones stated in the principal brief, and those stated below, the Court should reverse the order granting summary judgment in favor of the five directors and allow Cotter Jr. to proceed to trial on the merits of his claims against all directors.

II. ARGUMENT

A. There is no special legal framework for "operational decisions."

The directors' leading argument is that the decisions challenged by Cotter Jr. are mere "operational decisions" that are not subject to challenge by derivative plaintiffs making breach of fiduciary duty claims. Respondents' Answering Brief ("RAB") at 28-36. Using a broad, self-serving definition of the term, the directors argue that "operational decisions" are "always" protected by the business judgment rule and insulated from judicial review, and that Cotter Jr. is seeking to attack these decisions on their substantive merits. RAB at 28, 31, 34. The directors are mistaken on all counts.

1. The law does not distinguish between "operational decisions" and other decisions.

Neither NRS Chapter 78 nor this Court's case law distinguishes between "operational decisions" and "transactional decisions" for purposes of analyzing whether a decision is protected by the business judgment rule.

The business judgment rule is rebuttable—not just under NRS 78.139 and NRS 78.140, as the directors contend, RAB at 29, but also under NRS 78.138, which provides that "a director or officer is not individually liable . . . *unless* [] the trier of fact determines that the presumption established by subsection 3 ***has been rebutted*** . . . ." NRS 78.138(7)(a) (emphasis added). As this Court held, the business judgment rule is "a *presumption* [not a conclusive rule of immunity] that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the Company." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178–79 (2006) (internal quotation marks and citation omitted) (emphasis added). A plaintiff can rebut the presumption by showing, inter alia, "that the director failed to exercise due care in reaching the decision." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. __, 399 P.3d 334, 341 (2017) ("*Wynn*") (internal quotation marks and citation omitted).

The directors fail to cite a single case holding that operational decisions are "always" protected by the business judgment rule, RAB at 30 (first paragraph). That's because there are none. Courts apply the same due care analysis to operational decisions as they do to any other types of director decisions. For example, in *In re Walt Disney Co. Deriv. Litig.*, 906

A.2d 27 (Del. 2006), Disney shareholders challenged several so-called "operational" decisions, including the hiring and termination of Michael Ovitz. *Id.* at 73. But the Delaware Supreme Court (and the Chancery court below) applied the same analysis in determining whether the decisions were protected by the business judgment rule, reiterating that the rule's "presumptions can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith." *Id.* at 52. Although the Delaware Supreme Court affirmed the decision of the Chancery Court that the decisions were protected by the business judgment rule, this was not the result of applying a blanket rule for operational decisions which the directors advocate here; it was because the court concluded that the directors acted with due care and did not act in bad faith. *Id.* at 52, 62, 67, 73.

Similarly, in *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006)—a case on which the directors rely, RAB at 32—the court neither foreclosed a derivative claim based on the decision to remove an officer, nor did it hold that the business judgment rule insulates such decisions as a matter of law. The court simply concluded that "Plaintiffs have failed to rebut the presumptions of the business judgment rule" that the removal of the officer

was an honest attempt to promote the welfare of the corporation. *Carlson*, 925 A.2d at 540.

The remaining cases cited on pages 32 and 33 of the directors' answering brief to support their argument that the termination of an officer cannot give rise to a claim for breach of fiduciary duty, are simply not on point. For example, in *Riblet Products Corp. v. Nagy*, 683 A.2d 37 (Del. 1996), the dispute was "solely" related to the employment contract, and the terminated CEO made only *direct* (not derivative) claims for breach of fiduciary duty against the majority shareholders. *Id*. at 37. Notably, the Delaware Supreme Court observed: "this is ***not*** an attempt to bring a ***derivative*** suit by Nagy as a stockholder on behalf of the corporation for actionable injury to it arising out of the termination of the employment agreement," *id*. at 40 (emphasis added), as in Cotter Jr.'s case.[2]

2. The SAC is not limited to "operational decisions."

Cotter Jr. is not merely challenging routine business decisions, as the directors incorrectly contend. RAB 31-33. What all the challenged decisions have in common—and what the directors are trying to obscure

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[2] *Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429 (4th Cir. 2000) was also not a derivative case and involved a direct claim. *Mannix v. Butte Water Co.*, 854 P.2d 834 (Mont. 1993) did not even involve a fiduciary duty claim.

on pages 2 and 31 of their answering brief—is that the decisions in issue were aimed at fulfilling the wishes of the Cotter sisters to bring about a total change of control over RDI soon after their father died and they (indirectly) became majority shareholders. The board did not just hire any "successor" to replace Cotter Jr. as CEO, RAB at 2, 31; they hired his sister Ellen Cotter who did not match the profile they had established for candidates for CEO to replace him. XXI JA5039, JA5118-5119, JA5122; XXIII JA5688. The "employment of a senior executive," RAB at 2, refers to Cotter Jr.'s other sister, Margaret Cotter, who lobbied for and became the senior executive responsible for the development of RDI's valuable New York City properties, despite lacking any real estate development experience. XXI JA5040 (¶¶ 149-151); XXI JA5118-5119. The directors' "authorization . . . of the use of non-cash consideration to exercise a long-outstanding . . . stock option," RAB at 2, refers to their uninformed decision to allow the Cotter sisters to exercise a 100,000 Class B share option and pay for these shares with non-voting Class A shares instead of cash. XXI JA5023, 5034-5035 (¶¶10, 104, 107); XXI JA5222-5223 (¶35).

Cotter Jr. is also challenging other decisions that are not "operational" in nature. For example, stacking the board with loyal family friends is not an operational decision. I JA172, 202 (¶¶ 11-12, 124). Neither

is creating and using sub-committees to prevent certain directors from participating in board matters. I JA171, 194-195, 202-03 (¶¶ 8, 13, 99, 127-131). Even the termination of Cotter Jr. was not a mere business decision. It came about after his sisters refused to report to him and his refusal to accede to their conditions for him to remain as titular CEO, which included requiring him to get approval for certain key decisions from an executive committee comprised of—surprise—the Cotter sisters and Adams. VII JA 1690-93. The directors' attempt at presenting this series of decisions to serve the sisters' personal interests as "business as usual" should therefore be rejected outright.

3. Cotter Jr. is not challenging the substance of the decisions.

Cotter Jr. is not arguing that derivative plaintiffs have the right, let alone "*always* have 'the right' to challenge the substantive merits of any board decision." RAB at 34 (emphasis added). He is not attacking the decisions on their substantive merits.[3] He is attacking the directors' lack of

[3] Ironically, the directors themselves went to great lengths to defend the termination decision on its substantive merits in their brief, RAB at 7-16, even though none of the reasons that supposedly justify their decision was considered by the district court in granting summary judgment in favor of the five directors. XXVI 6170-6176. Directors Codding and Wrotniak were not even directors at the time Cotter Jr. was terminated and director Gould voted against his termination. XXI JA5033 (¶ 94). To "support" their argument that Cotter Jr. lacked experience, they rely solely on the self-

care and process in making the decisions to disenfranchise him, their failure to act in good faith, and their submission to the influence of the sisters. Opening Brief ("OB") at 30-42. It is the pretense of setting up a board meeting to discuss the "Status of president and CEO" when the "die is cast" beforehand. OB at 41. It is the hypocrisy of creating an executive search committee to engage a highly qualified executive search firm to find a new CEO with specific qualifications only to promptly abandon that goal and firm to appoint Ellen Cotter, who admittedly lacked the real estate experience the directors earlier told Korn Ferry was crucial. XXI JA5118-5119, JA5122; XXIII JA5688; *see also* XXI JA 5153, JA5164.

The directors feign fear that Nevada will become the most hostile state to corporations if a derivative plaintiff such as Cotter Jr. is permitted to rebut the business judgment rule. But this feigned expression of fear overlooks the fact that the Court has already clarified that in determining whether the directors acted in good faith, the substance of the decisions cannot not be challenged. *See Wynn*, 399 P.3d at 343.

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serving opinion of McEachern, RAB at 9, ignoring Cotter Jr.'s twelve years of experience on the RDI board and his professional experience prior to being appointed CEO. V JA1237, 1240, 1242. Moreover, these after-the-fact reasons stand in sharp contrast to what Kane told Cotter Jr. a week before he was terminated: "**there is no one more qualified to be the CEO of this company than you**." XVII JA 4148 (emphasis added).

B. Cotter Jr.'s evidence was sufficient to raise a genuine issue of material fact as to the directors' independence.

1. Cotter Jr. presented sufficient evidence that the five directors were not independent.

The directors primarily rely on Cotter Jr.'s own deposition testimony that he viewed Gould and McEachern independent and Codding "technically independent." RAB at 42-45. But "[i]ndependence is a **fact-specific** determination made in the context of a particular case." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) (emphasis added). "Directors must not only *be* independent, but must *act* independently." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 264 (Del. 2003) (emphasis added). Cotter Jr.'s opinion is, therefore, far from being determinative, if even relevant: the *court* decides independence based on the facts of the case—not the opinions of the plaintiff.

Moreover, Cotter Jr. was not asked about the directors' independence with respect to *any* specific decision, which informs the inquiry: "Independence means that a director's *decision* is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del.

2000) ("*Aronson*") (emphasis added). He was merely asked, generally, without reference to specific acts, whether he thought any of these directors was independent. *E.g.*, VIII JA 1998-2000.

Far more relevant is Kane's opinion that he did not deem Gould independent. Kane voiced this opinion right before and in connection with the decision to terminate Cotter at the May 21, 2015 board meeting. XV JA3611-12. When Gould proposed that the independent directors meet first to discuss the matter, Kane told Gould: ". . . [i]n my opinion you are certainly not independent." XV JA3611. Kane based his opinion on the fact that years earlier Gould successfully talked Cotter Sr. out of removing him from the Board for being too old by throwing a more senior director under the bus. *Id*. In other words, Kane believed Gould would be guided by extraneous influences—*i.e.*, his self-interest—rather than looking at the corporate merits of the decision.[4] While Gould's interest and expectation in obtaining legal work from RDI, alone, may be insufficient to support lack

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[4] The directors dismiss Kane's opinion of Gould in May of 2015 as a mere "lay opinion," RAB at 44, but that argument cuts both ways: Cotter Jr. is also no expert on the matter. Moreover, while asking the Court to ignore a directly relevant opinion expressed by Kane at the time a challenged decision was made, the directors are asking the Court to accept as "proof" the opinion by the T2 Plaintiffs (who are also lay persons) that the directors did no wrong. RAB 21.

of independence, that interest coupled with his self-interest to continue serving on the board of a public company (and his decisions to accommodate the Cotter sisters' wishes) may be evidence of being under the control of controlling directors and officers who can make that happen, such as the Cotter sisters.

As to McEachern, his independence is not established because he has no business dealings with the Cotter sisters. "It is the care, attention and sense of individual responsibility to the performance of one's duties . . . that generally touches on independence." *Aronson*, 473 A.2d at 816. If McEachern truly acted independently in his decision to terminate Cotter Jr. because he believed it was in the best interest of the corporation, then why did he reconsider when the Cotter sisters indicated they might, conditioned on Cotter Jr. settling unrelated trust and estate litigation with his sisters to their satisfaction? XXI JA5031-33, 5071. These conditions had nothing to do with the interest of the corporation and everything to do with the personal interests of the sisters.

Similarly, as to director Kane, Cotter Jr. did not rely only on Kane's quasi-familial relationship, or the fact that he was appointed by Cotter Sr. Unlike in *Beam Ex Rel. M. Stewart Living v. Stewart*, 845 A.2d 1040 (Del. 2004) for example, where the plaintiff did not allege anything

more than personal friendships between certain directors and Stewart, *id*. at 1051, here, Kane's voting history supports that the relationship is "bias-producing": Kane, like McEachern, changed his decisions according to the wishes of the Cotter sisters: (1) he voted to terminate Cotter Jr. because the Cotter sisters did not want to report to Cotter Jr.; (2) he then changed his mind and agreed with the sisters that Cotter Jr. could stay if he settled the trust and estate litigation *and* work with his sisters "as an executive committee"; (3) he authorized the Cotter sisters to acquire 100,000 shares of RDI Class B voting stock and pay for the shares with non-voting Class A shares instead of cash. XIV JA3416; XVII JA4148, JA4229; XVIII JA4344, JA4353; XXI JA 5222-5223 (¶ 35), JA5235; *see also* RAB at 15-16 (admitting that settling the trust and estate litigation was one of the conditions). Kane's quasi-familial relationship coupled with a pattern of voting consistent with the controlling shareholders may raise a reasonable doubt as to his independence. *Beam ex rel. M. Stewart Living v. Stewart*, 833 A. 2d 961, 981 (Del. Ch. 2003).

Finally, as to Codding and Wrotniak, Cotter Jr. did not merely make vague references to the relationships between these two directors and the Cotter sisters. It is undisputed that: (1) Judy Codding is a long-time family friend of Ellen Cotter's mother, Mary Cotter; (2) Ellen Cotter

lives with her mother; (3) Ellen Cotter proposed to add Codding to the board; and (4) Codding had never served on the board of a public corporation. XVIII JA4406-4407; XXI JA5023, 5026-27. Similarly, Cotter Jr. showed that: (1) Michael Wrotniak is the husband of Margaret Cotter's close friend from college; (2) Margaret Cotter proposed to add Wrotniak to the board; and (3) Wrotniak also lacked experience serving on a board for a public corporation and relevant industry or real estate development experience. I JA172, 177-178 (¶¶ 11-12, 24-25); XVIII JA4379-4380, XXI JA5023, 5026-5027 (¶¶ 11-12, 24-25); XXIII JA5543. Notably, the Cotter sisters proposed to (and did) add these two directors in October 2015 when only one director seat was vacated when Storey was asked to retire. XXI JA5026-27, 5023.

While a director who "is nominated and elected by a large or controlling stockholder . . . [may not be] necessarily beholden to his initial sponsor," *Frank v. Elgamal*, 2014 WL 957550, at * 22 (Del. Ch. Mar. 10, 2014); and mere friendships, without more, may not establish a lack of independence, *Stewart*, 833 A.2d at 980-82; here, we have a combination of factors, which supports a reasonable inference that these two directors, who were hand-picked by the Cotter sisters, will vote according to their wishes as controlling shareholders—especially when they were not

selected based on their qualifications or experience serving as board members of a public company. *Compare Stewart*, 833 A.2d at 980 (while director Martinez was a friend of the director who sponsored him, he had been "an executive and director for major corporations since at least 1990").

2. The belated ratification vote further supports the five directors' lack of independence.

The directors are correct that the ratification of the two main decisions by the five dismissed directors on the eve of trial is the subject of Cotter's Appeal No. 76981. But that does not make review of the ratification "premature" in this appeal, as the directors contend, RAB at 57, because the ratification is directly relevant to the independence of the five directors in this appeal. The ratification occurred more than a month before this appeal was filed, formed the basis of the directors' Motion for Judgment as a Matter of Law, which they filed on the same day the order denying Cotter Jr.'s motion for reconsideration was entered, and is thus part of the record on this appeal. XXVI JA6260-6277, 6300-6303.[5]

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[5] The same cannot be said of a number of papers included in the directors' appendix, such as the June 19, 2018 Motion for Evidentiary Hearing. *See* IV RA 680-928. This Motion was never heard or decided (let alone before February 1, 2018, when this appeal was filed), yet the directors try to "argue" it in this appeal in an effort to vilify Cotter Jr. *See* AB at 58. The directors also included in their appendix a March 22, 2018 judgment in the California trust and estate case. *See* III RA572-574; *see also* IV RA929-032 (11-13-2018 RDI Form 8K).

No matter how the directors try to distract the Court with other "facts," AB at 58, the ratification smacks of influence by the Cotter sisters. First, the directors ratified two main decisions challenged by Cotter Jr. in which Adams and the Cotter sisters participated, as to which summary judgment was denied. XXVI JA6268-6272. Second, although both decisions were made in 2015, ratification was not proposed until mid-December 2017—a week after the district court decided the Partial MSJs and Gould's MSJ in the five directors' favor. XXVI JA6211. Third, just three days after the ratification, and less than five days before trial, the Cotter sisters and Adams filed a motion asking for judgment in their favor, based on the ratification of the challenged decisions. XXVI JA6260-6292. At the very minimum, the timing of the ratification—combined with all other facts discussed above—raised genuine issues of material fact as to whether the five directors were unduly influenced and made the ratification request "to comport with the wishes or interests of the [Cotter sisters] doing the controlling." *Shoen*, 122 Nev. at 639, 137 P.3d at 1183. The district court erred by not considering the ratification request as new evidence of their lack of independence. XXVI JA6258. [6]

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[6] If disinterestedness and independence is both the beginning and the end of the analysis, as the directors now claim, it is telling that four of the five

C. A finding of disinterestedness and independence does not foreclose overcoming the business judgment rule.

The directors' argument that a finding of disinterestedness and independence "concludes the analysis as to whether the business judgment rule applies" and "absolves the director of liability," AB at 52, ignores this Court's case law directly on point that holds otherwise, as *Shoen* confirms:

> a plaintiff challenging a business decision . . . must sufficiently show that ***either*** [1] the board is incapable of invoking the business judgment rule's protections (e.g., because the directors are financially or otherwise interested in the challenged transaction) **or**, [2] if the board is capable of invoking the business judgment rule's protections, ***that that rule is not likely to in fact protect the decision*** (i.e., ***because there exists a possibility of overcoming the business judgment rule's presumptions*** that the requisite due care was taken when the business decision was made).

Shoen, 122 Nev. at 637, 137 P.3d at 1181 (emphasis added).

Thus, even if the directors are capable of invoking the business judgment rule because they are independent and disinterested, the plaintiff can still overcome the rule's presumptions by showing that the directors did not in fact act with due care, or in good faith. *See also id*. at 637, 137 P.3d at 1182 (holding same for determining demand futility: the pleadings

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directors did not move for summary judgment on all Cotter's claims on that basis. No matter how the directors try to re-characterize their piece-meal motion practice below, the fact remains that they moved for "*partial*"—not total—summary judgment on "the issue of independence." VIII JA1863-1895; XXJA4961-64; RAB at 25.

may raise a reasonable doubt that " '(1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment' ") (quoting *Aronson*, 473 A.2d at 812); *accord Wynn*, 399 P.3d at 342 (holding same, quoting *Shoen*, 137 P.3d at 1181). "With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers." *Shoen*, 137 P.3d at 1184.

Moreover, the Delaware law on which the directors rely contradicts their argument. In *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A. 2d 150 (Del. Ch. 2005) ("*Benihana*"), Benihana of Tokyo ("BOT") alleged, among other things, that the directors of BOT breached their fiduciary duties of loyalty and care in approving a stock transaction between Benihana and BFC in which one of the directors had an interest. *Id*. at 154-55, 173. The court first looked at whether the defendants satisfied Del. Code § 144(a)(1)—Delaware's counterpart to NRS 78.140. *Benihana*, 891 A.2d at 174. The court noted that even if the requirements of Del. Code § 144(a)(1) were met, "that section *merely protects against invalidation* of a transaction '*solely*' because it is an interested one." *Benihana*, 891 A.2d at 174 (emphasis added). "Because BOT also contend[ed] that the Director Defendants breached their fiduciary duties of loyalty and care," the court's

analysis "d[id] not end with the "safe harbor" provisions of § 144(a)." *Benihana*, 891 A.2d at 185. The *Benihana* court also elsewhere made clear that the disinterestedness and independence does not conclude the analysis as to whether the business judgment rule applies, noting that "the Delaware Supreme Court identified *several circumstances* in which the business judgment rule would not apply:

> Thus, directors' decisions will be respected by courts *unless* the directors are interested or lack independence relative to the decision, ***do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available***.

Benihana, 891 A.2d at 174 (quoting *Brehm v. Eisner*, 746 A.2d 244, 264 n. 66 (Del. 2000)) (emphasis added).

The directors also rely on *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002), but the holding they attribute to that case was made with respect to a breach of *loyalty* claim. *Id*. at 22. The duty of loyalty requires directors "to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *Shoen*, 122 Nev. at 632, 137 P.3d at 1178. As a result, to rebut the "presumption that a board acted loyally," the plaintiff must show that "the board was either *interested* in the outcome of the transaction or lacked the *independence to consider objectively whether the transaction was in the best interest of its company* . . . ." *Orman*, 794

A.2d at 22 (emphasis added). Here, by contrast, Cotter Jr. also made claims for breaches of the duty of *care*. I JA 214-216; XXIV 5795-96. Plaintiffs can rebut the business judgment rule's presumption by showing "that the director failed to exercise due care in reaching the decision." *Wynn*, 399 P.3d at 343.

Finally, the directors are taking this Court's holding in *Wynn* out of context when arguing that an inquiry into bad faith would provide a "back door" to a "substantive" challenge to a board decision. RAB at 53. The *Wynn* Court held the exact opposite: courts may inquire "into the *procedural* indicia of whether the directors resorted in *good faith* to an informed decision making process." *Wynn,* 399 P.3d at 343 (internal quotation marks and citation omitted) (emphasis added).

1. The directors' good faith cannot be decided as a matter of law for the first time on appeal.

The directors' remaining argument is a futile attempt to discredit and mischaracterize plaintiff's evidence of bad faith and lack of care and process, because the district court did not consider this evidence in dismissing Cotter Jr.'s claims against the five directors. The decision was based solely on the directors' disinterestedness and independence. XXVI JA6170-76. Thus, it would be improper to weigh and draw conclusions

from the evidence for the first time on appeal, as the directors propose. *See Perez v. Las Vegas Medical Center*, 107 Nev. 1, 7, 805 P. 2d 589, 593 (1991) (declining to consider an issue that "was not fully explored below and not the basis for the district court's decision.").

This is *not* a case in which the material evidence is undisputed so that the Court could decide whether the directors acted in good faith and in good faith resorted to an informed decision-making process "as a matter of law." *Cf. LaForge v. State, University System*, 116 Nev. 415, 422, 997 P. 2d 130, 134-35 (2000) (holding as an alternative basis for summary judgment that, "as a matter of law, respondents did not breach the contract" because the material facts were undisputed). The district court denied the directors' Partial MSJ No. 4 "on Plaintiff's Claims related to the Executive Committee" to the extent the directors argued that the "utilization" of the executive committee was protected by the business judgment rule. XX JA4933. The district court also denied Partial MSJs Nos. 5 and 6, which were related to many challenged decisions, including the appointment of Ellen Cotter as CEO (No. 5), the 100,000 Share Option exercise, and the appointment of Margaret Cotter (No. 6). XXVI 6174.

Moreover, in debating the evidence, the directors missed key points and rely on inapposite cases.[7] It is not simply Kane's refusal to meet with Gould or Storey before the board meeting where Cotter Jr.'s "Status of President and CEO" was to be discussed; the agenda was sent out with just two days' notice and director Kane's mind was closed *before* the meeting, as evidenced by his email saying: the "die is cast." XV JA3611. Good faith is not determined by looking at the decisions themselves or the board minutes, as the directors contend. RAB at 55. "[R]esort to the process must *itself* be undertaken in good faith, which means that "at some level . . . there will be an inquiry into the director's *subjective* good faith." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994) (relied on and adopted in *Wynn*, 399 P.3d at 343) (emphasis added).

Similarly, with respect to the decision by Kane and Adams to allow the Cotter sisters to exercise the 100,000 Class B share option, the evidence is disputed and raises a reasonable doubt as to their good faith and due care. The directors only relied on the advice of counsel in

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[7] At issue is not whether a board of directors can fire an officer or whether the removal of an officer is subject to the directors' equitable defenses, as in *Klaassen v. Allegro Dev't Corp.*, 2013 WL 5967028 (Del. Ch. Nov. 7, 2013). Throughout their answering brief the directors rely on many other unpublished Delaware cases, after faulting Cotter Jr. below for relying on Delaware law. *E.g.*, XVII JA4021; XIX JA4631; III RA485-553.

approving the Share Option, without verifying whether the Estate even owned the Option. XXI JA5222-5223 (¶ 35), JA5229, 5034-35 (¶ 107). The only "benefit" of exercising the Option accrued personally to the Cotter sisters by giving them control of RDI at the expense of their brother. XXI JA 5222-5223 (¶ 35), JA5235. *Id.* The fact that it turned out the Cotter sisters did not need the additional shares at the annual shareholders meeting in 2015, RAB at 56-57, does not transform the contested personal decision into a routine business decision. Moreover, Adams, the other director who approved the decision together with Kane, cannot invoke the business judgment rule in the first place, because the district court held there are genuine issues of material fact as to his disinterestedness and independence. XXVI JA6170-6176.

2. The directors' decisions cannot be considered in isolation.

The directors failed to refute Cotter Jr.'s argument that the series of decisions outlined in the SAC must be viewed in context as a whole. The directors did not address or discuss *In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402 (Del. Ch. Jan. 15, 2016) (rejecting the director defendants' contention that bylaw amendments should be viewed individually rather than collectively); *Carmody v. Toll Brothers, Inc.,* 723 A.2d 1180, 1189 (Del. Ch. 1998) (holding that particularized allegations that

directors acted for entrenchment purposes are sufficient to excuse demand); *Chrysogelos v. London*, 1992 WL 58516, at *8 (Del. Ch. March 25, 1992) ("None of these circumstances, if considered individually and in isolation from the rest, would be sufficient to create a reasonable doubt as to the propriety of the director's motives. However, *when viewed as a whole*, they *do* create such a reasonable doubt . . .") (emphasis added); or *Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343 at *29–30 (Del. Ch. Dec. 18, 2002) (concluding that allegations which individually would be insufficient to show a lack of disinterestedness or independence when taken together, were sufficient to do so).

As described above and in Cotter Jr.'s Opening Brief, when viewed in context and as a whole, the decisions challenged in the SAC raise a genuine issue of material fact as to the directors' independence, good faith, and due care.

D. The district court did not abuse its discretion in concluding that Cotter Jr. had derivative standing.

A district court's determination as to whether a derivative plaintiff adequately represents the interests of the shareholders under Rule 23.1 is reviewed for an abuse of discretion. *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 580, 112

L.Ed.2d 585 (1990). "An adequate representative must have the capacity to vigorously and conscientiously prosecute a derivative suit and be free from economic interests that are antagonistic to the interests of the class." *Id.* at 1367. In the Ninth Circuit, courts look at the following factors to determine whether a plaintiff can adequately represent the interests of the shareholders:

> (1) indications that the plaintiff is not the true party in interest; (2) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (3) the degree of control exercised by the attorneys over the litigation; (4) the degree of support received by the plaintiff from other shareholders; (5) the lack of any personal commitment to the action on the part of the representative plaintiff; (6) the remedy sought by plaintiff in the derivative action; (7) the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action; and (8) plaintiff's vindictiveness towards the defendants.

Larson, 900 F.2d at 1367.

Here, the vast majority of factors weigh in favor of Cotter Jr.'s derivative standing. The directors admit that Cotter Jr. is a major shareholder XXI JA5025 (¶ 17), who is intimately familiar with the case and personally committed to it (factors 1, 2, and 5). Cotter Jr. also received substantial support from his derivative case from the intervening "T2 Plaintiffs" (factor 4). I RA80-97, 178-216. Although the T2 Plaintiffs ultimately settled their claims, RA243-257, in doing so they did not conclude there was "no merit" to Cotter Jr.'s lawsuit, as Respondents

suggest, RAB at 20, and the T2 Plaintiffs settled *before* Cotter Jr. filed his SAC, on September 2, 2016, which set out *new* factual allegations and challenges a number of *additional* decisions. I JA168-224. But support from other shareholders is not a prerequisite: "a single shareholder may bring a derivative suit." *Larson*, 900 F.2d at 1368.

Further, Cotter Jr. specifically asked for damages and injunctive relief *on behalf* of RDI—not against it (factor 6)—and not merely for relief that would personally benefit him (factor 7). I JA219 (¶ 201), JA221 (¶ 5). Unlike the CEO in *Energytec, Inc. v. Proctor*, 2008 WL 4131257 (N.D. Tex. Aug. 29, 2008), who was first sued by the corporation and who counterclaimed with a derivative suit, *id*. at *1, Cotter Jr. filed an original derivative lawsuit against the directors. I JA1-29. That *RDI* thereafter initiated a baseless employment arbitration against Cotter, I RA58-79, does not make his derivative suit a mere "personal" matter, as the district court correctly recognized. XXI JA5009 (at 9:16-19) ("that's not the whole allegations that he's made as part of his derivative claim. You understand that").

Cotter Jr. can also not be compared to the general counsel in *Khanna v. McMinn,* 2006 WL 1388744 (Del. Ch. May 9, 2006)—another unpublished case on which Respondents rely. "In concluding that Khanna

must be disqualified as a representative plaintiff, the [c]ourt relie[d] ***primarily*** on Khanna's position as Covad's former General Counsel and the ethical quagmire that follows." *Id*. at *44 (emphasis added). The *Khanna* court also acknowledged that "mere selfish motives do not necessarily disqualify an individual from serving as a derivative plaintiff." *Id*. Thus, the mere fact that the RDI directors made decisions that personally affected Cotter Jr. more than other shareholders does not disqualify him. *All* shareholders benefit from the proper corporate governance sought in the SAC. It is sophistry to suggest that Cotter Jr. would spend millions of dollars to merely get his job back: he is a major RDI shareholder seeking to protect his assets and those of his children, as well as all other shareholders, by protecting the Company against the predation of his sisters.

Factor 8—"plaintiff's vindictiveness towards the defendants"—also does not apply. Cotter Jr.'s SAC is altogether incomparable to the papers in *Smith v. Ayers*, 977 F.2d 946 (5th Cir. 1992), where the plaintiff used terms like "satanic" and "evil" to describe the defendant, *id*. at 949, or the complaint in *Love v. Wilson,* 2007 WL 4928035 (C.D. Cal. Nov. 15, 2007), where the plaintiff made degrading statements about the defendant's past drug use that had nothing to do with the merits of the case. *Id*. at *7.

The directors do not cite to a single allegation of Cotter Jr.'s SAC in which he used "vituperative epithets, pugilistic metaphors, and [extreme] descriptions" against any of the directors, as in *Ayres*, 977 F.2d at 949, or used "gratuitous language," as in *Love*, 2007 WL 4928035, at *7. Instead, they cite to a single page of *their* brief, in which they purport to summarize Cotter Jr.'s allegations, while wrenching them out of context. *See* RAB at 39 fn. 115 (citing V JA1085).[8] When the examples cited by the directors are read in context—(or individually)—they hardly demonstrate a disqualifying animus. Moreover, all examples are related to the claims made in the SAC. *Compare* I JA180 (¶ 33) ("[Cotter Jr.] alienated his sisters because he acted to protect and further the interests of RDI and all of its shareholders. . . ."), *with, Love*, 2007 WL 4928035, at *7 ("Wilson has pursued a path to . . . injure The Beach Boys trademark . . . drugs began to destroy Brian Wilson . . . Brian was surrounded by drug addicts, drug dealer, parasites, and plagiarizers . . .").

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[8] For example, Cotter Jr. did not accuse Kane of "***threatening*** Corleone ('Godfather') style family justice," V JA1085, he alleged that "***Kane*** has sided with EC and MC in their family disputes with Plaintiff . . . ***lecturing*** JJC about how ***he*** (Kane) is implementing Corleone ("Godfather") style family justice ***in dealing with JJC***." I JA176 (emphasis added).

The directors also invoke another factor that courts outside the Ninth Circuit apply—*i.e.*, the presence of other litigation. RAB at 38-39 (citing out-of-state cases). Even assuming this factor applied, it does not help Respondents. The **Cotter sisters**—*not* Cotter Jr.—initiated the California trust and estate litigation months before this derivative suit was filed. XXI JA5025-26 (¶¶18-19). Moreover, **RDI**—*not* Cotter Jr.—filed a demand for arbitration *after* Cotter Jr.'s derivative suit. RA61 (line 23-24). Thus, *the Cotter sisters* attempted to seek control of RDI through the California lawsuit and *RDI* used the employment arbitration as leverage in an effort to have Cotter Jr. abandon this derivative lawsuit—not the other way around. The district court did not fall for this tactic and denied RDI's motion to compel arbitration. RA98-107.

In sum, when considering all the factors under *Larson*, the district court did not abuse its discretion in denying Respondents' serial motions to dismiss for lack of standing, and correctly found—when deciding the directors' last Motion for Evidentiary Hearing Regarding Plaintiff's Adequacy as a Derivative Plaintiff, in which RDI and Gould joined—that there was nothing "new" in the directors' argument that Plaintiff was "using this derivative case to pursue solely personal

remedies." XXI JA5006, 5010. The Court should therefore reject the directors' request to affirm the order on this alternative ground.

III. CONCLUSION

For the reasons set out in the Opening Brief and those above, appellant Cotter Jr. respectfully requests that the Order granting summary judgment in favor of directors Kane, Gould, Wrotniak, Codding, and McEachern, and dismissing all Cotter Jr.'s claims against them be reversed, and that Cotter Jr. be allowed to proceed to trial on his four claims against all eight individual directors.

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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 6881 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 (Directors)** upon all counsel of record:

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