IN THE SUPREME COURT OF NEVADA

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

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

APPELLANT'S OPENING BRIEF IN CASE NO. 77648

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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. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(8), which allows an appeal to be taken from a "special order entered after final judgment . . . ." On August 14, 2018, the district court entered final judgment against the last three director defendants. XXXIV JA8401-8411.[1] On November 6, 2018, the district court entered an order granting, in part, Cotter Jr.'s Motion to Retax Costs, and judgment for costs ("Cost Judgment"), which is the subject of this appeal. LIII JA13163-13174. Cotter Jr. appealed from the Cost Judgment on December 6, 2018. LIII JA13220-13222.

II. ROUTING STATEMENT

The Nevada Supreme Court has jurisdiction over this appeal under NRAP 17(a)(9) because the case originated in business court. I. JA 1.

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[1] The district court previously dismissed the other five directors and certified the portion of its December 28, 2017 order granting summary judgment in their favor as final under NRCP 54(b). XXV JA6065-6071, JA6081-6091, JA6179-6181. The December 28, 2017 order is the subject of Appeal Case No. 75053. "JA" refers to the Joint Appendix filed in support of this Opening Brief and the Opening Brief filed in Case No. 76981, which, together with this case (Case No. 77648), is consolidated under Case No. 75053. *See* Order dated April 18, 2019.

III. ISSUES PRESENTED

1. Did the district court abuse its discretion by awarding the directors $852,000 in expert witness fees when: (a) the experts did not testify in court; (b) none of the directors' dispositive motions relied on the experts' testimony; (c) all experts' invoices showed pervasive duplication of work and excessive staffing; and (d) the amount awarded per expert is more than 100 times the statutory $1,500 maximum?

2. Did the district court err by treating Reading International Inc. ("RDI") as a "prevailing party" entitled to costs under NRS 18.020, where RDI: (a) was a mere nominal defendant; (b) did not prevail on any of its motions to defeat Cotter Jr.'s lawsuit; and (c) did not obtain a judgment in its favor?

3. If nominal defendant RDI is entitled to costs, did the district court abuse its discretion by awarding RDI $581,718.69 in costs when most of its costs were unnecessary, excessive, and not supported by substantial evidence?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

This is a shareholder derivative action brought by Cotter Jr. on behalf of Reading International, Inc. ("RDI"), against eight directors for

breaches of their fiduciary duties owed to nominal defendant RDI and its shareholders. III JA519-575. Appellant Cotter Jr. is a substantial shareholder and a former director, President, and CEO of RDI. I JA78-79. Respondents Ellen Cotter and Margaret Cotter (collectively, the "Cotter sisters") are members of the RDI board of directors (the "Board") and at all times relevant hereto the controlling shareholder(s) of RDI. *Id*. The remaining individual respondents are or were members of the Board, as well as members of certain Board committees. I JA79-80; XX JA5053-5054 (¶¶ 20-25).[2]

B. Course of the proceedings and disposition below.

Cotter Jr. filed his derivative complaint on June 12, 2015. I JA1. After discovery and two rounds of (partial) motions for partial summary judgment, the district court on December 28, 2017, granted summary judgment in favor of five of the eight director defendants on the grounds that Cotter Jr. had failed to raise genuine issues of material fact as to their disinterestedness or independence. XXV JA6065-6071. The December 28, 2017 order dismissing the five directors, which was certified as final under

[2] Director William Gould passed away on August 6, 2018. LII JA12894-95.

NRCP 54(b) on January 4, 2018, XXV JA6182-88, is the subject of Appeal No. 75053.

On August 14, 2018, the district court granted summary judgment in favor of the remaining three director defendants on the grounds that an independent majority of directors had ratified the decisions that formed the basis of Cotter Jr.'s derivative claims against them, and that the ratification decisions were protected by the business judgment rule. XXXIV JA8401-8410. The district court entered its findings of fact and conclusions of law and judgment on August 14, 2018. Notice of entry of the judgment was given on August 16, 2019. XXXIV JA8412. The August 14, 2018 judgment is the subject of Appeal No. 76981.

After entry of the August 14, 2018 judgment, RDI filed a Memorandum of Costs for $2.9 million on its behalf and on behalf of all director defendants. XXXIV JA8426-8906. Cotter Jr. filed a Motion to Retax Costs. X XXVI JA8915-9018. On November 6, 2018, the district court entered an order granting in part and denying in part Cotter Jr.'s Motion to Retax Costs and entered a cost judgment for $1,554,319.73 (the "Cost Judgment"). LIII JA13163-13167. The Cost Judgment is the subject of this appeal.

On September 9, 2018, RDI filed a Motion for Attorneys' Fees on its behalf and on behalf of all director defendants. XXXVI JA9019-9101. On September 12, 2018, RDI filed a Motion for Judgment in its Favor. XXXVII JA9102-9107. On November 16, 2018, the district court entered an order denying RDI's Motion for Attorneys' Fees, and an order denying RDI's Motion for Judgment in its Favor. LIII JA13175-13198. These two orders are the subject of Appeal No. 77733.

On November 26, 2018, Cotter Jr. moved for reconsideration and amendment of the Cost Judgment on an expedited basis, asking the district court to reduce the Cost Judgment by $581,718.69—the amount of costs awarded to nominal defendant RDI. LIII JA13199-131207. The district court denied Cotter Jr.'s motion for reconsideration by order dated December 6, 2018. LIII JA13216-13219. Cotter Jr. timely appealed from the Cost Judgment that same day. LIII JA13220-13222.

V. STATEMENT OF RELEVANT FACTS

A. The Litigation

1. Cotter Jr.'s derivative complaint.

On June 12, 2015, appellant Cotter Jr. filed a derivative lawsuit against eight directors in the Eighth Judicial District Court, Clark County, Nevada. I JA1-29. He named RDI as a nominal defendant. I JA1. Cotter

Jr.'s lawsuit set out four causes of action for breaches of fiduciary duty and sought injunctive relief, as well as damages, on behalf RDI and himself. I JA28 (¶ 133).

Director William Gould was represented by Los Angeles-based law firm Bird Marella P.C., as well as Washoe County-based law firm Maupin, Cox & LeGoy. III JA576. Directors Ellen Cotter, Margaret Cotter, Guy Adams, Edward Kane, Judy Codding, and Michael Wrotniak (collectively, the "Cotter directors") were represented by the Los Angeles-based law firm of Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel"), and local counsel Cohen, Johnson, Parker, Edwards ("Cohen Johnson"). I JA48. Nominal defendant RDI was represented by the Las Vegas office of Greenberg Traurig ("Greenberg"). I JA105.

2. The T2 Plaintiffs' derivative complaint.

In August 2015, a number of RDI shareholders, including T2 Partners Management, L.P. (collectively, the "T2 Plaintiffs"), were allowed to intervene in the lawsuit and filed their own derivative complaint. I JA109-126.

3. Nominal defendant RDI defends against the derivative complaints filed on its behalf.

Although all Cotter Jr.'s breach of fiduciary duty claims were made against the individual directors on RDI's behalf, nominal defendant RDI, through its outside counsel Greenberg Traurig, actively defended *against* Cotter Jr.'s lawsuit and claims throughout the entire litigation. For example, RDI filed a motion to compel arbitration, arguing (unsuccessfully) that the derivative case Cotter Jr. had filed on its behalf was merely an effort to get his job back. I JA127-148. RDI filed answers to Cotter Jr.'s complaints and asked that the claims filed against the directors be dismissed. II JA397-418; XX JA4891-4916. RDI filed joinders to all six motions for partial summary judgment filed by the Cotter directors and filed a reply in support of Gould's separate motion for summary judgment. XV JA3707-3808; XVI JA3806-3814, JA3921-4014; XIX JA4568-4609. RDI's counsel attended each motion hearing and made arguments on the merits of Cotter Jr.'s fiduciary duty claims in court, over the objection of Cotter Jr.'s counsel. IXX JA4805.

In the process of defending the directors, nominal defendant RDI incurred more than $1,200,000 in costs. XXXIV JA8430-8431.

B. The Discovery.

1. Cotter Jr. and the T2 Plaintiffs seek written discovery.

On August 14, 2015, Cotter served six document requests on the director defendants and RDI seeking documents going back to January 1, 2014. LII JA12809-12818. Three days later, the T2 Plaintiffs served six document requests on the director defendants and RDI, one of which sought documents going back to June 2013. LII JA12966-12975.

When serving responses to the first set of document requests of Cotter Jr. and the T2 Plaintiffs, RDI advised that it had "imaged RDI's server. . ." LII JA12989-13007. Indeed, the September 2015 invoice of its ESI-vendor, Navigant, showed that 1,801 GB of data were uploaded at a cost of $90,000. XLI JA10137. Navigant's total invoice that month was $166,921.99. XLI JA10136-10138.

Navigant not only provided ESI services for Cotter Jr.'s derivative lawsuit and the T2 Plaintiffs' derivative lawsuit but also the employment arbitration RDI had initiated against Cotter Jr. in July 2015, and the trust and estate litigation the Cotter sisters had initiated against Cotter Jr. in February of 2015—both of which were pending in Los Angeles,

California, where Navigant was based. I JA98, I JA130, JA146; XXI JA5061 (¶ 102); XXXIV JA8514-8515.[3]

Navigant had invoiced RDI, Greenberg, and Quinn Emanuel more than $400,000 in ESI costs between August 2015 and February 2016, XXXIV JA8514-8515, but as of February 18, 2016, the directors had collectively produced only 3,300 documents (representing 12,900 pages), while RDI had produced 6,200 documents. II JA358-59, JA366.

2. The parties take out-of-state depositions.

In 2016, the parties' counsel took a number of party and third-party depositions, most of which took place in Los Angeles and New York. XXXIV JA8441; XXXVI JA8831-8838, JA8891-94. RDI's counsel attended all depositions, incurring $23,942.59 for travel costs. XXXVII JA9169-9182. Counsel for Gould and counsel for the Cotter directors each ordered copies of the deposition transcripts. XXXIV JA8430. RDI's counsel, Greenberg, ordered its own copies of all deposition transcripts, incurring $53,344.70 in costs. *Id.* In all, the directors and RDI incurred $164,628.25 for deposition court reporter fees. *Id.*

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[3] RDI was initially represented by Akin Gump in the arbitration, XXXIV JA8514-15; I JA146 but was later replaced by Greenberg. XXXIV JA8515-8516.

3. The directors retain five experts.

Starting in May 2016—two months before the initial expert disclosure deadline, II JA465—the directors retained a number of experts. XXXIV JA8522-8526; XXXV JA8638-8800.

The Cotter directors retained an initial expert on corporate governance, Michael Klausner. XXXIV JA8522; XXXV JA8638-8640. They also retained an initial damages expert, Richard Roll, to address Cotter Jr.'s allegation that RDI's stock suffered in value after Cotter Jr.'s termination. XXXIV JA8522-8523; XXXV JA8678-8680. Director Gould, a corporate attorney and co-author of a treatise on corporate governance,[4] retained an expert on corporate governance, Alfred Osborne. XXXVI JA8860-8862, 8876-8881.

After Cotter Jr. disclosed Myron T. Steele, a former Chief Justice of the Delaware Supreme Court ("Steele") as his initial expert on corporate governance and Mr. Tiago Duarte-Silva as his damages expert, the directors retained two additional (rebuttal) damages experts: (1) Dr. Bruce Strombom, to address the opinions held and the measure of damages

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[4] *See Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334, 343 (Nev. 2017) (citing Joseph F. Troy & William D. Gould, ADVISING & DEFENDING CORPORATE DIRECTORS AND OFFICERS § 3.15 (Cal CEB rev. ed. 2007).

applied by Duarte-Silva; and (2) Jonathan Foster, to address certain opinions by Duarte-Silva concerning damages sustained as a result of the unsolicited offer from a third party, Patton Vision LLC ("Patton Vision offer"). XXXIV JA8522-8524 (¶ 7(a)-(d)).

4. The directors incur $1,400,000 in expert witness costs.

Gould's corporate governance expert, Osborne, charged the highest hourly rate: $1,500 per hour. XXXVI JA8877. The Cotter directors' experts Roll, Foster, Klausner, and Strombom charged $1,200, $990, $950, and $690 per hour, respectively. XXXIV JA8524. But unlike Osborne, each of the four Cotter director experts used a support staff of five or more individuals who charged between $275 and $720 per hour and billed the directors hundreds of hours for their support. *E.g.*, XXXV JA8656, JA8721, JA8739. The total amount of fees charged by the directors' five experts were as follows:

Richard Roll	$425,165.00
Michael Klausner	$447,764.91
Jonathan Foster	$201,814.53
Alfred Osborne	$176,655
Dr. Bruce Strombom	$152,352.50
Total	$1,403,751.94

XXXIV JA8522-8524 (¶ 7(a)-(d)).

C. The Motions for Summary Judgment.

1. The Cotter directors file six motions for partial summary judgment; none relies on expert testimony.

On September 23, 2016, the director defendants other than Gould filed six motions for partial summary judgment ("Partial MSJs") on specific issues, such as Cotter Jr.'s termination (No. 1), the director independence (No. 2), and the Patton Vision offer (No. 3). VI JA1486-XIV JA3336.

But none of the six Partial MSJs relied on, attached, or referenced the testimony or opinions of the four experts they had retained. *See id.*; *e.g.*, VII JA1526-1548; XVIII JA4518-4567, JA4313-4314. The Cotter directors only cited and attached Cotter Jr.'s damages expert's report to one of their Partial MSJs. VII JA1548; IX JA2137-2194.[5] When the Cotter directors filed a Supplement to their Partial MSJs in November 2017—a year after the four experts were disclosed and deposed—they still did not rely on, reference, or attach any of their experts' deposition testimony. XX JA4981-5024. Their counsel also did not quote or rely on their experts'

[5] This exhibit is one of many exhibits included in the Joint Appendix filed in Case No. 75053, which were ordered sealed by the Court's minute order dated April 18, 2019.

deposition testimony during oral argument on the motions in October 2016 and December 2017. XIX JA4736-XX JA4890; XXIII JA5718-5792.

2. Gould's motion for summary judgment also ignores his expert's testimony.

Director Gould filed a separate motion for summary judgment ("MSJ") based on his independence and disinterestedness. III-VI JA576-JA1400. Gould's MSJ was based on fact testimony only. *Id*. While Gould attached excerpts of expert Osborne's *report* to his MSJ and Reply, he mainly relied on the testimony of Cotter Jr. and *Cotter Jr.'s* expert witness—Steele. III JA583-619; V JA1078-1151; XIX JA4610-4677, JA4641-4648; JA4666-4672; XXII JA5559-5685. None of Gould's motion papers relied on or attached Osborne's deposition testimony. *See id*.

3. The district court grants summary judgment in favor of five of the eight directors.

In October 2016, the district court denied most (Partial) MSJs. XX JA4917-4927. But following a second hearing on December 11, 2017, after the parties completed discovery and supplemented their motion papers, the district court granted summary judgment in favor of directors Gould, Codding, Wrotniak, McEachern, and Kane on the grounds that Cotter Jr. had failed to raise genuine issues of material fact as to the independence and disinterestedness of these five directors. XXIII JA5718-

5892; XXV JA6065-6071. The district court denied summary judgment as to the Cotter sisters and Adams. *Id.*

The district court certified as final that portion of its December 28, 2017 order dismissing the five director defendants by order dated January 4, 2018. XXV JA6179-6181. But at no time before his death in August 2018 did dismissed director Gould—the only director who was represented by separate counsel—submit a bill for his costs. XXXIV JA8426-8431.

D. The December 2017 ratification of the 2015 Termination and Share Option Decisions.

The dismissal of Cotter Jr.'s claims against five directors narrowed Cotter Jr.'s derivative claims against the Cotter sisters and Adams to two principal decisions in which they had a determinative say: (1) the June 12, 2015 decision by directors Adams, Kane, McEachern and the Cotter sisters to terminate Cotter Jr. as CEO of RDI ("Termination Decision"); and (2) the September 2015 decision by directors Adams and Kane to allow the Cotter sisters to exercise an option to purchase 100,000 shares of Class B voting stock in RDI held by the Estate of Cotter, Sr. and use Class A Stock to pay for the exercise of the option (the "Share Option Decision"). XXIII JA5691 (B.1. and B.2.). Trial against these directors on

Cotter Jr.'s fiduciary duty claims related to these two Decisions was scheduled on start January 8, 2018. XXV JA6281-6294.

But on December 21, 2017, RDI's counsel—who was concurrently preparing the Cotter sisters for trial, XXXVII JA9206—telephonically met with RDI's "Special Independent Committee ("SIC"), which had only been created a few months earlier, and discussed ratification of the Termination and Share Option Decisions with the SIC. XXVI JA6513B; XXVII JA6746, JA6761-6765; XXXI JA7652, JA7659-7665. Following the SIC meeting, ratification of the Termination and Share Option Decisions was put on the agenda of the December 29, 2017, special board meeting, and the five recently dismissed directors voted to ratify the Decisions. XXV JA6153-6161, JA6224A-F; JA6281; XXX JA7506.

1. The district court allows limited discovery on ratification and the defendants stall to provide it.

Days after the special board meeting, on the eve of trial, the Cotter sisters and Adams filed a Motion for Judgment as a Matter of Law, arguing that the recent ratification vote that Greenberg facilitated entitled them to judgment on all Cotter Jr.'s derivative claims. XXV JA6192-6224. But the district court denied the Motion as untimely filed. XXV JA6273-6274. After continuing the trial for unrelated reasons, the district court

allowed Cotter Jr. 75 days to conduct discovery on the December 29, 2017 ratification. XXV JA6290.

During this brief discovery period, the defendants incurred more than $90,000 in E-discovery costs, XXXIV JA8515-8516, but did not timely produce all ratification documents requested by Cotter Jr. and ordered by the district court—most importantly, those concerning the December 21, 2017 SIC meeting. XXVI JA6432-6561. Cotter filed a number of discovery motions to obtain the documents, all of which the district court granted, in part. XXV-XXVI JA6298-6561, XXIX-XXXI JA7222-7607; XXXIV JA8395-8400, JA8398-8399. The district court also held an evidentiary hearing on the circumstances of the directors' failure to timely produce the minutes of the December 21, 2017 SIC meeting. XXVII JA6727-XXVIII JA6815. Following the evidentiary hearing, the district court compelled the defendants to produce all ratification documents, regardless of time. XXVII JA6805.

But even after being compelled to produce documents—and despite incurring more than $100,000 in ESI costs between January and July 2018, XXXIV JA8515-8516—the directors and RDI did not timely produce or log all responsive documents that the court ordered them to produce.

XXIX JA7222-7568, JA7569-7607. Cotter Jr. therefore filed two additional discovery motions: (1) a Motion for Relief based on the non-compliance with the May 2, 2018 production order, and (2) a Motion to Compel based on documents improperly withheld as privileged. *Id.*

E. The Ratification MSJ and the August 14, 2018 Judgment.

On June 1, 2018, the remaining Cotter directors filed a motion for summary judgment based on the December 29, 2017 ratification ("Ratification MSJ"). XXIX JA7173-7221. Like the Partial MSJs filed earlier, the Ratification MSJ and Reply did not cite or otherwise rely on expert testimony. XXIX JA7173-7221; XXXII JA7841-7874.

On June 19, 2018, the district court held an omnibus hearing on Cotter Jr.'s Motion for Relief and Motion to Compel, the directors' Ratification MSJ, and RDI's renewed Motion to Dismiss based on Cotter Jr.'s alleged failure to make a demand ("Demand Futility Motion"). XXXIV JA8343-8394. The district court granted in part Cotter Jr.'s Motion for Relief, found that the documents were untimely produced, and for purpose of the pretrial motions imposed as an evidentiary sanction "a rebuttable presumption that the doc[ument]s, if timely produced, would support the plaintiff's position that the ratification was a sham or fraudulent exercise."

XXXIV JA8377. But the district court thereafter held that the defendants had overcome the presumption, and that the ratification decision was protected by the business judgment rule. XXXIV JA8389.

On August 14, 2018, the district court entered its findings of fact and conclusions of law and final judgment in favor of the three remaining Cotter directors. XXXIV JA8401-8425. The district court denied RDI's Demand Futility Motion as moot. XXXIV JA8424.

F. RDI's $2.9 million Cost Memorandum.

On August 24, 2018, RDI filed a memorandum of costs ("Cost Memo") on its own behalf and on behalf of the eight individual directors, including Gould, seeking $2,917,257.00 in costs under NRS 18.020. XXXIV JA8426-8906. RDI and the directors requested, *inter alia*, all of their expert witness costs ($1.4 million); e-discovery costs invoiced by Navigant ($902,016.77); deposition travel costs ($68,052.13); deposition reporters' fees ($164,628.25); and travel costs for the out-of-state lawyers to attend court ($98,824.24). XXXIV JA8430-8431. They also sought $65,721.20 for computerized legal research, $47,324 of which was spent by RDI's counsel, Greenberg Traurig. XXXIV JA8430. RDI itself requested more than $175,000 for travel expenses by its counsel for court proceedings and "client

meetings," travel expenses by its directors and officers, temporary office space, and housing for its general counsel during trial. XXXIV JA8431 (Categories 13, 15-17).

1. Cotter Jr. files a Motion to Retax Costs.

Cotter Jr. filed a Motion to Retax Costs, asking the district court to: (1) deny costs to RDI because it was a nominal defendant and not a "prevailing party"; (2) deny costs to Gould because he failed to timely file his Cost Memo; and (3) deny or substantially reduce most cost categories—in particular the expert witness fees, ESI costs, legal research costs, and travel costs—because they were excessive, unsupported by invoices, unreasonable, or all of the above. XXXVI JA8915-9018.

On the eve of the September 17, 2018 hearing on the Motion to Retax Costs, RDI filed an Opposition, which attached thousands of pages of invoices that were not initially attached to its Cost Memorandum. XXXVII-LII JA9111-JA12893. The invoices for court and deposition travel showed pervasive use of luxury travel and dining; the Navigant invoices showed that more than half of the $902,000 ESI discovery costs consisted of paralegal-type consulting services; but Westlaw charges incurred before June 2016 were still not accounted for. *E.g.*, XXXIX JA9656-9658; JA9688-

9702; XLI JA10137-10156, JA10167-10180, JA10189-10192, JA10194-10202; XLII JA10314-10329; XLIII JA10776-10801.

2. The district court reduces some, but not all cost categories.

During the hearing on Cotter Jr.'s Motion to Retax Costs, the district court questioned RDI's counsel about the need to incur $1.2 million in expert witness fees, noting that there "was nothing I saw in the experts that were presented to me or provided information in this case that would put us in the realm of a million two." LIII JA13134. Nevertheless, the district court believed it was appropriate to exceed the statutory limitation of NRS 18.005(5) "given the nature of this particular case," and awarded the directors $250,000 for Roll, $250,000 for Klausner, $152,000 for Strombom, and $201,000 for Foster. LIII JA13148.

The district court also asked RDI's counsel why he "hadn't pro rated [sic] the expenses for the e-discovery and the hosting" over the various court cases, and if he had, how the court could see it was done. LIII JA13139-13140. RDI's counsel responded that he would have to ask his partner but was "sure it was prorated" and referred to phone calls he received from counsel in the trust case in California as to why they still need to pay Navigant. LIII JA13140. The district court also questioned

why Navigant's consulting expenses were billed as e-discovery costs, LIII JA13141, and reduced these costs to $450,000. LIII JA13149.

G. The Cost Judgment.

On November 6, 2018, the district court entered a cost judgment for $1,554,319.73 ("Cost Judgment"). LIII JA13163-13167. The district court denied director Gould all his costs, including his expert witness fees, because he did not timely file his Cost Memo following the final judgment that was entered in his favor on January 4, 2018. LIII JA13164 (¶ 3). The district court granted in full—without reduction—defendants' cost categories 1, 2, and 4 through 11, which included, in relevant part, all deposition court reporter costs ($111,208.15), deposition travel expenses ($52,053.77), and computerized legal research ($53,936.41). LIII JA13166 (¶¶ 1-11).

The district court awarded a total of $853,000 for the directors' four expert witnesses. LIII JA13166 (¶ 3). To support the $853,000 award for expert witness fees, the district court adopted the findings submitted by the defendants (to which Cotter Jr. had formally objected), which stated that:

> The expert testimony was very important to the Defendants' preparation of their defense, particularly in light of the Plaintiffs damages expert's opinion that damages were as high

> as $150 million, as well as Plaintiff's retention of a former Chief Judge of the Delaware Chancery Court as a corporate governance expert. While the matter here ultimately resolved without a trial, Defendants had to prepare their experts for a trial that had been scheduled to commence in January, and also were engaged in preparation in anticipation of the rescheduled trial. Had the matter gone to trial, and Plaintiff presented the testimony of his designated experts, the experts' testimony would most likely have been highly significant to the outcome of the case.
>
> Defendants experts were each well known in their fields, with academic and professional accomplishments. The hourly fees charged were reasonabl [sic] comparable to similar experts, including those retained by Plaintiff, and in line with the fees ordinarily charged by experts in the respective fields.

LIII JA13164; JA13151-13162.

In reducing RDI's $902,000 E-discovery costs to $450,000, the district court found that "the consulting fees that were included in the invoices would be more appropriate as a request for attorneys' fees or should not have been included as expert expenses . . . ." LIII JA13165 (¶ 6).

Finally, the district court denied RDI's costs for its directors' and officers' travel, and the Cotter directors' counsel's court travel expenses, temporary office space and housing, and parking. LIII JA13165 (¶ 7).

1. The district court denies Cotter Jr.'s motion for reconsideration.

A week after Cotter Jr. filed his Motion to Retax Costs—which argued that RDI should be denied all its costs as a non-prevailing nominal

defendant that did not obtain a judgment in its favor, XXXVI JA8918-19—RDI filed a "Motion for Judgment in its Favor." XXXVI JA9201-9107. Cotter Jr. opposed the Motion. LIII JA13113-13125. The district court denied RDI's motion on the basis that RDI was a mere nominal defendant. LIII JA13179-13182. Based on this ruling, Cotter Jr. moved for reconsideration and amendment of the Cost Judgment under NRCP 59(e), asking the district court to reduce the cost judgment by $581,718.69—the amount of costs awarded to RDI—because RDI was not a prevailing party. LIII JA13199-113207. The district court denied Cotter Jr.'s motion for reconsideration by order dated December 6, 2018. LIII JA13216-13219, JA13223-13229. Cotter Jr. timely appealed from the cost judgment that same day. LIII JA13220-13223.

VI. SUMMARY OF ARGUMENT

The district court abused its discretion by awarding RDI and the Cotter directors **$1.5 million** in costs. The extraordinary award of $853,000 for four expert witnesses—more than 140 times the statutory maximum $1,500 amount per expert—was unreasonable and clearly erroneous under *Frazier v. Drake*, 131 Nev. 632, 649, 357 P.3d 365, 377 (Ct. App. 2015). Most *Frazier* factors weighed heavily against awarding much more than the statutory $1,500 per expert. *None* of the four experts

testified in court. *Not one* of the Cotter directors' many motions for (partial) summary judgment relied on the testimony of their four experts, and neither did the district court's orders granting them. Rather than putting to use, for example, the work of expert Richard Roll—who was paid $425,000 to "opine" on whether RDI's stock had gone up or down after Cotter Jr. was terminated—the directors cited to historical stock data freely available on the Nasdaq website. Thus, the district court's finding that the expert testimony of these four experts was "very important" to the directors' "preparation of their defense" is not supported by the record evidence. To the contrary, substantial evidence contradicts this finding.

It was also not necessary—in fact, it was reckless—for the Cotter directors to retain two initial experts on issues as to which Cotter Jr. carried the burden of proof, only to be faced with having to retain two more rebuttal damages experts instead of one, because the initial damages expert lacked the expertise to address, and did not anticipate, all opinions expressed by Cotter Jr.'s damages expert. The district court made no findings, because none could justify, why it was reasonable or necessary for the Cotter directors to retain three separate damages experts, and award them more than $600,000. Nor did the district court make or

support findings to justify awarding *all* fees billed by rebuttal experts Strombom ($152,000) and Foster ($201,000), given their limited tasks and their retention of between four and ten staff members who charged between $275 and $750 per hour to perform duplicate, paralegal-type work that was barely described. None of the four experts' exorbitant support staff costs should have been awarded.

The district court also abused its discretion in awarding RDI costs. As a nominal defendant and a *non*-prevailing party, RDI was not entitled to any costs, let alone $581,718.69. RDI did not prevail on a single claim (nor could it) or issue, and was *denied* a judgment in its favor. Thus, there is no basis for a cost award to RDI under NRS 18.020 and NRS 18.110.

Even assuming RDI was entitled to costs, $450,000 in e-discovery costs was unreasonably excessive, given: (1) RDI's failure to prove that these costs were actually incurred in and allocated to this case and not three other matters the ESI vendor serviced; (2) the defendants' relatively small number of documents produced in this case; and (3) the defendants' repeated failure to timely produce all documents, despite incurring hundreds of thousands of dollars in ESI costs. Most other costs incurred by and awarded to RDI—such as $47,000 for Westlaw costs, and

more than $80,000 for travel to and reporting of depositions—were indiscriminately incurred. RDI was not "forced to expend enormous amounts of money to defend against [Cotter Jr.'s] claims," as it argued below; most of its costs were self-inflicted. Instead of maintaining a "wholly neutral position," *Swenson v. Thibaut*, 250 S.E.2d 279, 293-94 (N.C. Ct. App. 1978), nominal defendant RDI recklessly spent hundreds of thousands of dollars defending against claims that were not made against it but *on its behalf*.

For these reasons and those discussed in this Brief below, the Court should reverse the Cost Judgment, hold that RDI is not entitled to any costs, hold that the Cotter directors are not entitled to more than the statutory maximum in expert witness fees, and remand the matter to the district court with instructions to further reduce the cost categories discussed below.

VII. ARGUMENT

A. Standard of review.

A decision regarding an award of costs is reviewed for an abuse of discretion. *LVMPD v. Blackjack Bonding, Inc.*, 131 Nev. 80, 89, 343 P.3d 608, 614 (2015). Whether a party is a prevailing party entitled to costs under NRS 18.020 is a question of statutory interpretation, which is

reviewed *de novo*. *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 422, 373 P.3d 103, 106-107 (2016) ("*Golightly*").

B. The limits of the district court's discretion in awarding costs.

The district court's discretion to award costs is not unlimited. *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). Because a cost award is in derogation of common law that the parties bear their own fees and costs, cost statutes like NRS 18.005 should be "strictly construed." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998) ("*Berosini*"). Costs may only be awarded if they satisfy three statutory criteria: the "costs must be [1] reasonable, [2] necessary, and [3] actually incurred." *Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054 (discussing NRS §§ 18.005, 18.020, and 18.110); *accord*, *Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 24, 125 P.3d 1160, 1166-67 (2006) (defining "reasonable costs" as costs that are both "actually" incurred and reasonable). This Court has made clear that it "will reverse a district court decision awarding costs if the district court has abused its discretion in [] determining" that the costs were reasonable, necessary, and actually incurred, *Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054, and the Court should do so here.

C. The district court abused its discretion in determining that an award of $853,000 four non-testifying experts was reasonable.

Under NRS 18.005, a prevailing party may recover:

> Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

NRS 18.005(5).

"[A]ny award of expert witness fees in excess of $1,500 per expert under NRS 18.005(5) must be supported by an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." *Frazier*, 131 Nev. at 649, 357 P.3d at 377 (citing NRS 18.005(5)). Factors "pertinent to determining the reasonableness of the requested fees" include, in relevant part:

> [1] the importance of the expert's testimony to the party's case; [2] the degree to which the expert's opinion aided the trier of fact in deciding the case; [3] whether the expert's reports or testimony were repetitive of other expert witnesses; [4] the extent and nature of the work performed by the expert . . .; [5] the amount of time the expert spent . . . preparing a report, and preparing for trial; [6] the expert's area of expertise . . .education and training; [7] the fee actually charged . . .; [and] [8] comparable experts' fees charged in similar cases . . . .

Id. at 650-51, 357 P.3d at 377-78.

As discussed below, it was an abuse of discretion to award $853,000 for four expert witnesses. None of them testified in court; none of the directors' dispositive motions relied on their expert witnesses' testimony; the testimony did not aid the district court in deciding the directors' summary judgment motions; the vast majority of expert witness costs were needlessly and recklessly incurred; and the fees charged were exorbitant under any circumstances.

1. None of the four experts testified in court.

This Court recently clarified that it is an abuse of discretion to award a party more than $1,500 in costs for a non-testifying expert. In *Busick v. Trainor*, No. 72966, 2019 WL 1422712, at *4 (Nev. March 28, 2019) (unpublished disposition), the Court held that "[a] non-testifying expert is not entitled to more than $1,500 under NRS 18.005(5)." *Busick*, 2019 WL 1422712, at *4 (citing *Pub. Employees' Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017)) (holding that "it is within the district court's discretion to award up to $1,500 in reasonable costs for a non-testifying expert consultant under NRS 18.005(5)"); *see also Las Vegas Land Partners, LLC v. Nype*, No. 68819, No. 70520, 2017 WL 5484391, at * 7 (Nev. Nov. 14, 2017) (unpublished disposition) (holding that "under *Gitter*, the

district court abused its discretion by awarding more than $1,500 per non-testifying expert").

Here, the district court awarded $853,000 for expert witness fees, when none of the four experts testified. While the experts were deposed, the directors did not offer or otherwise present any of their deposition testimony to the court: Not one of the six Partial MSJs quoted, cited to, or attached expert testimony or any affidavit of the experts. VI-XIV JA1486-JA3336; XIX JA4678-4735; XX JA4981-5024. The Directors' Ratification MSJ also did not quote, cite, attach, or rely on any expert testimony. XXXII JA7173-7221, JA7841-7874. Thus, under *Gitter*, as clarified by *Busick*, the district court could not award more than $1,500 per expert and abused its discretion in awarding more than 140 times that amount per expert.

2. The district court's finding that the expert testimony was "very important" is not supported by substantial evidence.

"[I]n awarding expert fees in excess of $1,500 per expert, **the** . . . **importance** of the expert's testimony to the party's case plays a ***key role*** in assessing the propriety of such an award." *Frazier*, 131 Nev. at 650, 357 P.3d at 377 (emphasis added); *Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 273, 89 P.3d 1000, 1006-07 (2004) (affirming an

award of $7,145 in expert witness fees under NRS 18.005(5) because the expert's testimony constituted most of the party's evidence).

Even assuming the directors could be awarded more than $1,500 per expert, the district court must first determine that the "circumstances surrounding the expert's testimony" made it a necessity, NRS 18.005(5), "and state the basis for its decision." *Khoury v. Seastrand*, 132 Nev. 520, 540-41, 377 P.3d 81, 95 (2016). A district court abuses its discretion when its factual findings are not based on substantial evidence or are clearly erroneous. *MB America, Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

Here, the district court's finding that the expert testimony was "very important to the Defendants' preparation of their defense" is not supported by substantial evidence; it is directly contradicted by the record evidence. *First*, ***no expert testimony*** from these four experts was ever presented to the district court. *Not one* of the directors' Partial MSJs relied on *any* of their four experts' testimony. VI-XIV JA1486-JA3336; XVII-XIX JA4518-4567; XIX JA4678-4723; XX JA4981-5024.[6]

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[6] Director Gould, who was denied expert witness costs, also did not rely on Osborne's testimony. While he cited to and attached excerpts of Osborne's expert's *report*, *e.g.*, III JA600, JA604; V JA1096-1108, XIX JA4623-24; XXII JA5550; XXIII JA5617-18, an expert report is not expert witness testimony.

Second, the district court's finding that expert testimony was particularly important in light of "Plaintiff's retention of a former Chief Judge [Steele] of the Delaware Chancery Court as a corporate governance expert," LIII JA13164, disregards these record facts: (1) the Cotter directors had already retained and paid more than $200,000 for and initial expert witness on corporate governance, Klausner, *before* Cotter Jr. disclosed Judge Steele on August 25, 2016, XXXV JA8638-8663; X JA2489hh; (2) neither the directors' Partial MSJ No. 1 on Cotter Jr.'s Termination, their Reply Brief, or their Supplement thereto filed in 2017 relied on Klausner's testimony, VI-IX JA1486-2216; XV JA3707-17; XX JA4981-5024; and (3) the directors only relied on the expert's report and testimony of *Cotter Jr.'s expert*, Steele. X JA2489A-hh; XXIV JA5935-5981. Thus, Mr. Klausner's expert testimony was not even relevant, let alone "very important," to the directors' case and defenses.

Third, the district court's finding that the directors were justified in recouping most of their expert witness costs "in light of the Plaintiffs damages expert's opinion that damages were as high as $150

See Maxwell v. Amaral, 79 Nev. 323, 329, 383 P.2d 365, 368 (1963) ("A written report is not a 'witness' within the purview of [NRS 18.110(2)], nor is it the deposition of a witness").

million," LIII JA13164, is also directly refuted by the record: (1) the directors retained and spent more than $250,000 on an *initial* damages expert (Richard Roll) *before* learning Tiago Duarte-Silva's opinion that damages could exceed $110 million, XXXV JA8677-8699; VII JA1548; IX JA2136A-D; (2) the directors retained Roll only to address Cotter Jr.'s allegation that RDI's stock price dropped as a result of his termination, XXXIV JA8522-8523; and (3) none of the directors' Partial MSJs relied on Roll's testimony or opinion. VI-XIV JA1486-JA3336; XVII-XIX JA4518-4567; XIX JA4678-4735; XX JA4981-5024.

In fact, the directors' Reply in support of Partial MSJ No. 1 on Cotter Jr.'s termination—filed months after Roll was retained and had prepared his report—did not rely at all on Roll's testimony for their argument that RDI's stock had not suffered: they simply cited—in a footnote!—to the Nasdaq website where the historical stock price data for RDI could be found. XVIII JA4540 (n.16); *see also* VII JA1517; IX JA2126-2135. Thus, the directors' own motion papers demonstrated that Mr. Roll's work—for which he billed $445,000—was entirely inconsequential to the directors' case and defense. This evidence eviscerates the directors' argument that that were "obligated to engage" Roll to "protect" them "from

the threat of a nine-figure verdict," as their counsel argued. XXXIV JA8522. (¶ 7).

Thus, the district court's finding on the "key" *Frazier* factor—*i.e.*, that the expert testimony was "very important"—was not supported by substantial evidence and was therefore clearly erroneous.

3. The district court was not guided by the directors' expert testimony.

The "degree to which the expert's opinion aided the trier of fact in deciding the case," *Frazier*, 131 Nev. at 650, 357 P.3d at 377, is also a factor that should have weighed against awarding $853,000 in expert witness fees.

The evidence plainly shows that the district court did not rely (expressly or impliedly) on any expert testimony in granting summary judgment in favor of the directors. The district court based its decision to dismiss the five directors on the law and the absence of evidence sufficient to show a genuine issue of material *fact* as to their disinterestedness and/or independence. XXIII JA5750-5758; XXV JA6065-6071. Moreover, none of the four experts testified to issues of director disinterestedness on which the court based its decision to grant summary judgment in their favor. Expert testimony was also not cited in, and wholly irrelevant to, the

district court's decision on the three remaining directors' Ratification MSJ. XXXIV JA8401-8411.

The district court's finding that "[h]ad the matter gone to trial, and Plaintiff presented the testimony of his designated experts, the experts' testimony would most likely have been highly significant to the outcome of the case" rests on mere wishful speculation by the directors who drafted the finding. LIII JA13167, JA13161-13162. Moreover, it is meaningless under *Frazier*. There must be evidence in the record that the expert testimony *in fact* "aided the trier of fact" in order to warrant a fee of more than $1,500 per expert. *Frazier*, 131 Nev. at 650, 357 P.3d at 377. There is no such evidence in this case.

The finding is particularly speculative given the defense counsel's knowledge and representation to the district court that Cotter Jr. had already abandoned his alleged $150 million damages claim before trial, LIII JA13136-13137, which would moot the testimony of the Cotter directors' three damages experts rather than make it "highly significant." The directors also knew at least by May 12, 2018—two months before the continued trial—that Cotter Jr. would not call his (rebuttal) damages expert Finnerty. XXIX JA7074, JA7082.

4. The directors needlessly increased their expert witness costs.

The retention and testimony of the directors' four experts was also needlessly cumulative. For example, Klausner was tasked with preparing an initial expert report on corporate governance without knowing what Cotter Jr.'s expert would opine, and despite Cotter Jr. bearing the burden of proof and the additional hurdle of overcoming the business judgment rule. XXXIV JA8522 (¶ 7(a)). The directors tasked Klausner with preparing a rebuttal report, despite the fact that Judge Steele did not offer an expert opinion as to the independence or interestedness of any non-Cotter director. XX JA2489 Y-2489HH; XXIV JA5949-5650, JA5959, JA5968. In fact, the Cotter directors moved to strike Steele's testimony as offering mere legal opinion. VI JA1401, JA1415-1417.

The Cotter directors retained three different damages experts to offer a rebuttal opinion to Cotter J.'s initial damages expert, Duarte-Silva. XXXIV JA8522-24 (¶ 7 (b)-(d)). Not because their defense required it, but because the directors prematurely hired and paid $250,000 to Roll for an *initial* damages expert report before knowing Cotter Jr.'s damages expert's opinion or the basis therefore—and despite Cotter Jr. bearing the burden of proof on damages. XXXIV JA8523 (¶ 7(b)), XXXV JA8677-8699. Once

Duarte-Silva's expert report was disclosed, they realized that Roll was not "qualified to opine as to all three areas" of damages identified by Duarte-Silva. XXXVII JA9125. The Cotter directors therefore retained two rebuttal damages experts *in addition* to Roll: Jonathan Foster and Dr. Bruce Strombom. XXXIV JA8522-8523 ¶ 7(c)-(d). Yet, without explanation or justification, the district court awarded the cost of these two additional rebuttal damages experts who never testified in full. LIII JA13166 (¶ 3). Thus, the majority of costs expended on initial experts were self-inflicted and redundant and should have been disallowed.

5. The fees charged by each of the four experts and their support staff were exorbitant given their limited tasks.

Other factors to consider in awarding expert witness costs are "the extent and nature of the work performed by the expert"; "the amount of time the expert spent . . . preparing a report, and preparing for trial"; and the "actual fee charged." *Frazier*, 131 Nev. at 650-652, 357 P.3d at 377-78.

Here, the district court made no findings as to the reasonableness of the total fee charged by each expert given the amount of time each expert spent on his tasks. The district court only found that the "*hourly* fees charged were reasonabl [sic] comparable to similar experts." LIII JA13172.

As a matter of statutory law, however, the hourly rates of the four experts could not be reasonable if they bear no reasonable relationship to the $1,500 total statutory limit *per expert* under NRS 18.005(5). Not only were the experts' own hourly rates excessive—Roll charged $1,200 per hour; Foster $990; Klausner $950; and Strombom $690—but their support staff of five or more individuals charged between $275 and $720 per hour and billed hundreds of hours for their work. XXXV JA8656, JA8698, JA8721, JA8739. This over-staffing effectively tripled the hourly rates of these experts, rendering them unreasonable, particularly given their limited tasks, as discussed below.

6. $201,000 is unwarranted for a rebuttal expert witness opining on a collateral issue.

Foster was a rebuttal damages expert charged with the limited task of addressing the Patton Vision offer. XXXIV JA8523-8524. However, Foster employed **ten** staff members charging rates between $275 and $550 per hour who collectively billed **283.85** hours in addition to the 91.5 hours billed by Foster himself:

Professional	Title	Hourly rate	Total hours billed
K. Gold	Vice President	$550	87.2
A. Stichman	Vice president	$525	9.6
A.Nabi	Vice President	$495	1.1
T.McClure	Senior Analyst	$300	4.0
C. Morley	Analyst	$285	81.95

N.Bergmann	Analyst	$275	8.1
S. Murphy	Analyst	$275	10.9
V.Chen	Analyst	$275	47.1
L.Petruzzi	Research sp.	$250	7
C.Crant	Unknown	$390	14
J.Levine	Unknown	$390	13

See XXXV JA8720-8721, JA8727-8728, JA8797-8800.

The work of the staffers was vaguely described—*e.g.*, "review of report"; "analysis for report"; or "making exhibit[s]"—but suggestive of work of a clerical, paralegal-type nature. XXXV JA8722-8725, JA8797-8800. The district court's failure to consider his total fees of $201,814.53, and the excessive staffing in light of his limited task was an abuse of discretion.

7. The reasonableness of the $250,000 awarded for Klausner is contradicted by his own testimony.

Klausner charged the directors almost half a million dollars for his "opinion and testimony on matters of corporate governance related to the termination of Plaintiff James J. Cotter." XXXIV JA8522. But even the "reduced" award of $250,000 is an abuse of discretion because unsupported by substantial evidence.

First, Klausner's billing records did not describe what work he did, only the number of hours he billed each month. *E.g.*, XXXV JA8667 (10.2 hours; no description); JA8650 (same for 30.9 hours); JA8657 (same for

18.70 hours). Moreover, all of Klausner's invoices showed substantial over-billing and duplication of efforts by his four staffers who each simultaneously billed numerous hours for reviewing unidentified depositions and documents. *E.g.* XXXV JA8644-8653. In July and August, 2016, three staffers collectively billed more than 300 hours for simultaneously "assist[ing] with [the] preparation" of Klausner's expert report, which—it is worth repeating—focused on the single issue of whether Plaintiff's termination comported with principles of proper corporate governance. XXXIV JA8522; XXXV JA8651-8653, JA8656-8663.

The 300 support hours were not only exceptionally high given this limited task; they were implausible considering Klausner's testimony that "nearly 100 percent of the words in the report are [his]" and that "his team" was tasked with providing citations to documents and deposition testimony Klausner had read and wanted to use to support his opinions. XXXVI JA8957 (at 14:9-15:5). Klausner also testified he wrote his own rebuttal report. *Id.* (at 16:10-13). Nevertheless, his five staff members collectively billed 269.95 hours (more than $80,000) in September 2016 to purportedly assist with the preparation of his rebuttal report. XXXV

JA8666. Providing clerical and paralegal-type support does not qualify as reimbursable fees for expert witness testimony under NRS 18.005(5).

8. The $250,000 award for Roll's expert fees was arbitrary.

In addition to all other *Frazier* factors weighing heavily against an award of more than $1,500, the nature of Richard Roll's task should have reduced his fees to the bare minimum. Roll was retained to opine on Cotter Jr.'s allegation that RDI's stock suffered as a result of his termination. XXXIV JA8522-8523. Just for his initial expert report which, despite being a mere 13 pages, managed to be repetitive and needlessly academic considering the remarkable simplicity of his task—to say whether the RDI stock went up or down—Mr. Roll and his squadron of staffers spent more than 450 hours and charged more than $200,000 to prepare the report. XXXV JA8677-8703; XXXVI JA8972-8975 (¶¶ 29-34).

Roll's invoices, like those of Foster and Klausner, did not describe the work he did for the hours he listed. *E.g.*, XXXV JA8691, JA8714. Roll's invoices were also padded with countless hours of four to six support staff members who billed between $260 and $720 per hour for patently duplicative work. *E.g.*, XXXV JA8683 (162.4 support hours); JA8698 (200.8 hours); JA8714 (118.6 hours); XXXV JA8684-8687, JA8692-8695. Thus, while the district court reduced Roll's fees to $250,000, even

this amount was grossly excessive given his limited task, the deficient billing statements, pervasive duplication of the same work, and his failure to identify what he or what his staffers did.

9. The district court abused its discretion by awarding the full amount of Strombom's expert fees.

Dr. Strombom "only prepared a rebuttal expert report in response to Plaintiff's damages expert, Dr. Duarte-Silva." XXXIV JA8523. But the directors were awarded nearly all of his $152,352.20 invoiced fees—$152,000—hundred times the presumptive maximum under NRS 18.005(5)). LIII JA13172.

Dr. Strombom's bills, too, show pervasive bill-padding and overstaffing. *E.g.*, XXXV JA8739-8744 (200 hours for assisting Strombom with the rebuttal report and analysis, when Strombom himself billed just 18 hours for drafting the report). The billing entries were devoid of even a minimum degree of specificity to verify whether any of the costs were necessarily incurred. *E.g.*, XXXV JA8741 (36 hours for "Analysis for rebuttal report" billed at $550 per hour); XXXV JA8741-8742 (79 hours for "assist[ing] with rebuttal report" billed at $495 per hour); XXXV JA8736 (11 hours to assemble "backup binders" billed at $260 per hour). None of the

staff members' expenses should have been awarded with respect to *any* of the four experts.

10. The exorbitant expert witness fees are not comparable to reasonable expert fees charged in similar cases.

RDI did not cite to any "similar cases" in the district court in which experts charged similar fees, and the district court's finding that they fees were "reasonabl[]" [sic] on that basis is not supported by proof. The hourly fee charged by Cotter Jr.'s most prominent expert on corporate governance, former Delaware Chief Justice Myron Steele was $1,050—$150 less than expert Richard Roll. XXXIV JA8524. Cotter Jr.'s expert Nagy charged $650 per hour, and as of September 30, 2016, his fees for a rebuttal report amounted to $49,630. XXVII JA7022. The fact that some of Cotter Jr.'s other experts also charged excessive expert and support staff fees does not make the directors' expert fees reasonable. As they know, Cotter Jr. had a billing dispute for precisely this reason with his expert Finnerty. XXVIII JA6938-6942.[7] To be sure, the directors were free to spend as much money as they wanted on expert witnesses, but NRS 18.005(5) limits

[7] Cotter Jr. subsequently settled the dispute, after Finnerty agreed to substantially reduce his bills.

imposition of expert fees on a party against whom judgment is rendered to those that are necessary and reasonable.

Thus, all the *Frazier* factors discussed above weighed heavily against awarding much more than the statutory $1,500 per expert. The district court abused its discretion when awarding $853,000 for the four non-testifying experts.

D. The district court abused its discretion in awarding $581,000 to nominal defendant RDI.

As this Court has held, "a party must prevail before it may win an award of costs." *Golightly*, 132 Nev. at 422, 373 P.3d at 107. Whether a party is a "prevailing party" under NRS 18.020 is a legal question of statutory interpretation. *Golightly*, 132 Nev. at 422, 373 P.3d at 107. A "prevailing party" is one that "succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit." *Blackjack Bonding, Inc.*, 131 Nev. at 90, 343 P.3d at 615 (internal quotations omitted).

A party is not a prevailing party if the action did not proceed to judgment in its favor against an adverse party. *See* NRS 18.020 ("Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered"); NRS 18.110(1) ("The party in whose favor judgment is rendered, and who claims costs, must file a [timely] . . .

memorandum of . . . costs . . . ."); *N. Nev. Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498,__, 422 P.3d 1234, 1236–37 (2018) ("A party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not proceeded to judgment").

As discussed below, the district court abused its discretion in awarding RDI costs, because it disregarded the "guiding legal principle[s]" of NRS 18.020. *See Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993), *superseded by statute on other grounds as stated in In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1093 (2017) ("where a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion") (citing cases).

1. RDI was a nominal defendant.

A nominal defendant in a derivative case is the "real party in interest" on whose behalf the derivative case is brought. *Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970). "While nominally the company is named as a defendant, actually and realistically it is the true *complainant*, for any avails realized from the litigation belong to it and it alone." *Solimine v. Hollander*, 129 N.J. Eq. 264, 266, 19 A.2d 344, 345 (1941) (emphasis added). As the *Solimine* court explained:

> Whatever be the circumstances furnishing license to the individual stockholder to bring a class action of this kind, the fact remains that **when suit is brought and determined on its merits the company must be treated in all respects, including liability for costs . . ., as any other complainant in the ordinary cause**.

Id. (emphasis added).

Here, RDI was a mere nominal defendant. I JA1. Cotter Jr. did not make any claims against RDI and did not seek any damages against RDI. His derivative claims were made on RDI's behalf. His damages were sought on RDI's *behalf*. I. JA25-28; II JA304-309; III JA556-573. RDI was thus aligned with Cotter Jr.; Cotter Jr. was *not* an "*adverse party* against whom judgment is rendered . . . ." NRS 18.020 (emphasis added). As the real party in interest on whose behalf the derivative case was brought, RDI was the *non*-prevailing party when judgment was entered against its representative, Cotter Jr.

2. RDI did not obtain a judgment in its favor.

The district court only entered "[j]udgment . . . in favor of Defendants Ellen Cotter, Margaret Cotter, and Guy Adams" and "in favor of Defendants Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak . . . ." XXXIV JA8410; XXV JA6187. The district court—correctly— denied RDI's Motion for Judgment in its Favor

because RDI was a nominal defendant LIII 13179-13182. As a nominal defendant without a judgment entered in its favor, RDI was not entitled to costs under the plain language of NRS 18.020 and NRS 18.110.

3. RDI did not prevail on a significant issue.

As a nominal defendant, RDI could not "challenge the merits of [the] derivative claim[s] filed on its behalf and from which it [stood] to benefit" except Plaintiff's right to bring the case. *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005, 84 Cal.Rptr.3d 642, 652 (2008). RDI could not change its nominal defendant status and transform itself into a prevailing party by answering Cotter Jr.'s complaints and by joining in almost all of the directors' dispositive motions on the merits, as it did here. *E.g.*, XV-XVI JA3704-3814; XIX JA4589-4603. The fact remained that not a single claim was made against RDI so that, as a matter of law, fact, and logic, it could not prevail on any of the claims.

RDI did not prevail on any significant issue in the case, either. Notably, the district court denied **all** RDI's motions to dismiss for failure to make a pre-suit demand. It also denied RDI's joinder in the directors' Motion for Evidentiary Hearing Re Cotter Jr.'s Adequacy as Derivative Plaintiff. It also denied RDI's motion to compel arbitration. II JA257-259, JA260-262; XX JA5033; XXV JA6273-JA6274; XXXIV JA8410. As a nominal

defendant that lost each motion in which it joined and was denied a judgment in its favor, the district abused its discretion in nevertheless awarding RDI $581,718.69 in costs.

E. The district court abused its discretion by awarding nominal defendant RDI unnecessary, unreasonable, and unsubstantiated litigation costs.

Even assuming RDI is entitled to costs under NRS 18.020, the district court abused its discretion by awarding the company **$581,718.69** because most of these costs were "self-inflicted," unreasonable, and are not supported by substantial evidence that they were actually incurred for this case.

1. RDI's costs were by and large unnecessary.

Courts outside Nevada have persuasively held that a nominal defendant such as RDI is generally not permitted to "defend a derivative action filed on its behalf" and "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 652 (citing cases). The only exceptions are "defenses contesting the plaintiff's right or decision to bring suit, such as asserting the shareholder plaintiff's lack of standing" for failure to make a demand on the board. *Id.* at 1004-05; *see also Apple Inc. v. Sup. Ct.*, 18 Cal. App. 5th 222, 239, 227 Cal. Rptr. 3d 8, 20–21 (2017) (same).

Where, as here, directors are alleged to have breached their fiduciary duties, the corporation named as a nominal defendant " 'is required to take and maintain a wholly neutral position taking sides neither with the complainant nor with the defending director.' " *Swenson*, 250 S.E.2d at 293-94 (quoting *Solimine*, 129 N.J.Eq. at 266-67, 19 A.2d at 345-46). As the *Swenson* court noted:

> The anomaly of a corporation, in whose name and right a derivative action is brought, being allowed to defend itself against itself is apparent. It is particularly apparent in the situation, such as is found in the instant case, where the alleged wrongdoers are in control of the corporation.

Swenson, 250 S.E. 2d at 294.

A nominal defendant may defend against a derivative case only "[i]f the derivative action threatens rather than advances the corporate interests," such as when a derivative plaintiff seeks to prevent a merger or seeks to appoint a receiver. *Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 37 (Tex. App. 1959). No such threat existed here.

RDI, however, went far beyond asserting standing defenses: It took an active and aggressive role in litigation and in the process incurred substantial discretionary costs that it could and should have avoided. For example, RDI needlessly incurred (but was nevertheless awarded) all of its filing fees, including those for seven joinders to the director defendants'

summary judgment motions on the merits—$209.50 each—and the filing fee for its motion to compel arbitration— $1,530.99—for a total of $2,993.99. LIII JA13166, JA13204. RDI also gratuitously incurred, yet was awarded, all of its deposition transcript fees—$53,344.70—as well as its counsel's deposition travel costs—$23,942.59—even though RDI did not notice a single deposition, and did not have to defend against any claims. LIII JA13166, JA13204. RDI was also awarded $47,324 for Westlaw costs—more than seven times the amount incurred by the eight directors. *Id.*; XXXVI JA8840.

Given RDI's nominal defendant role in the case, its deposition transcript costs, deposition travel costs, filing fees, and Westlaw fees for adversarial motion papers were not "necessary," and it was an abuse of discretion to award them.

2. The $450,000 award for ESI costs is unreasonable and not supported by substantial evidence that the costs were actually incurred in this case.

Electronic discovery costs fall in the rest category of "[a]ny other reasonable and necessary expense incurred in connection with the action." NRS 18.005(17); *In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1093 (2017). As with all costs, "a district court must have before it evidence that the [electronic discovery] costs were

reasonable, necessary, and actually incurred." *Cadle Co.*, 131 Nev. at 120, 345 P.3d at 1054.

Here, RDI sought $902,000 in ESI costs and was awarded approximately half of that amount—$450,000—because the ESI vendor's consulting fees "were more appropriate as a request for attorneys' fees or should not have been included as expert expenses." LIII JA13165 (¶ 6). Indeed, Navigant's invoices showed that $455,129.40 was billed for non-descriptive "consulting" and "project management" fees that were mostly block-billed at hourly rates between $225 and $350 per hour. XLI JA10132-XLIII JA10774.[8]

However, the $450,000 award is still unreasonable "considering the circumstances of this case." LIII JA13165. As this Court recognized, the justification for awarding ESI costs under NRS 18.005(17) is that a "party

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[8] The district court correctly ignored those consulting fees, as other courts have. *See, e.g., Klayman v. Freedom's Watch, Inc.*, No. 07-22433-CIV, 2008 WL 5111293, at *2 (S.D. Fla. Dec. 4, 2008) (E-discovery consultants performing work which in a "non-electronic document case . . . would be performed by paralegals and associate attorneys" are not properly taxed as costs): *Windy City Innovations, LLC v. America Online, Inc.*, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006) (disallowing costs for coding services and keyword searching because "[t]he computer document coding systems . . . perform [ ] the work an attorney, paralegal or law clerk would have to perform in its absence [and thus] expenses for such systems are more properly considered expenses incidental to an award of attorneys' fees, not costs of suit' that are recoverable in a bill of costs").

requesting that documents be copied must pay the reasonable cost therefor." *In Re DISH Network Deriv. Litig.*, 401 P.3d at 1093 (citing and quoting NRCP 34(d)). There, the Court affirmed a $151,000 award for ediscovery based on the district court's finding that the costs were both reasonably and necessarily incurred " 'to acquire and process the information that was required to be produced in response to [Jacksonville]'s NRCP 56(f) discovery requests.' " *In re Dish Network*, 401 P.3d at 1093 (quoting district court's findings).[9]

Here, RDI was awarded $450,000 for a total production of 128,000 pages (representing 27,000 documents) over the three-year life of the case. XXXVI JA9025 (*Il.* 16-18). In August 2015 alone, RDI incurred $121,823.24 in processing costs and $45,089.75 in consulting fees when it imaged the "entire [company] server"—almost 2 terabytes of data. XLI JA10137-10138; XXXIV JA8514. There was no justification for doing so based on Cotter Jr.'s six document requests, which were limited in time to "documents created or dated on or after January 1, 2014 . . . ." LII JA12933-12934. The total ESI costs were the more unreasonable considering that

[9] In *In re Dish Network*, it appears that the ediscovery costs associated with producing 60,000 pages of documents necessitated searching the records of 13 custodians from three different servers going back to 2008. SLC Answering Brief Case No. 69729, at p. 72.

RDI and the other directors throughout the case failed to timely respond to Cotter Jr.'s discovery requests. II JA356-374; XV JA3698-3700; XXV-XXVII JA6298-6561; XVII JA6699-6723; XXIX-XXXI JA7222-7568; XXXIV JA8395-8397; XXXIV JA8398-8400. It took years before the 128,000 pages were produced. XXXIV JA8514-8516; XXXVI JA8984-8995.

Moreover, RDI was awarded $450,000 without proving that these costs were "actually incurred" in connection with *this* case and for *Cotter Jr.'s* derivative complaint. RDI admitted (and Navigant's invoices showed) that the electronic database was also used, if not first created, for unrelated trust and estate litigation and arbitration proceedings initiated by RDI and the Cotter sisters in Los Angeles, where Navigant was based. LIII JA13139-13140, XLII JA10422 (1.5 hours for discussion with GT attorneys "RE Cotter Trust matter"). RDI and the Cotter directors also used the database to respond to the T2 Plaintiffs' discovery requests, which were also served in August 2015 and asked for data going back to June 1, 2013. LII JA12966-12986, JA13008-13017, JA13030-13047.

While Navigant created separate invoices for document "productions" made in the arbitration and trust and estate litigation—(which RDI deducted only *after* Cotter Jr. questioned those costs in his

Motion to Retax Costs, XXXVII JA9136 (fn. 17)—RDI charged (and the district court awarded) all hosting and processing fees, such as the $121,000 in costs to upload its server, to Cotter Jr. alone, without allocating these costs over the various other matters. RDI also charged all costs of its document productions and those of the Cotter directors to Cotter Jr. alone, even though its productions distinguished between documents responding to Cotter Jr.'s and documents responding to the T2 Plaintiffs' document requests. LII JA13030-13047; LIII JA13062-13076; JA13085-13088; JA13093-13103.

Thus while RDI's counsel represented to the district court upon its questioning that he "thought" they had separated costs related to other litigation and the T2 Plaintiffs, RDI did not show how that had been one, and the billing records do not confirm counsel's thoughts.[10]

In the absence of proof that the ESI costs were "actually" and necessarily incurred for this case—as opposed to the Trust and Estate litigation and arbitration cases pending in California—and Cotter Jr.'s

[10] Navigant used the same project number for all cases and did not identify in its services descriptions what services were provided for which case.

claims—as opposed to those of the T2 Plaintiffs—it was an abuse of discretion to award RDI $450,000 for its ESI costs.

3. The $47,324 award for RDI's computerized legal research costs was not supported by substantial evidence.

Reasonable costs for computerized legal research are recoverable, NRS 18.005(17), but only when they are sufficiently itemized and were actually "incurred in the action." NRS 18.110; *Waddell*, 125 P.3d at 1167 (holding that the district court did not abuse its discretion in denying legal research costs that were not sufficiently itemized).

There is no substantial evidence that all RDI's $47,324 Westlaw charges—more than six times the amount incurred by all directors combined—were incurred in *this* action, as NRS 18.005(17) requires. First, RDI's counsel admitted there was no supporting backup information for $15,274.51—*i.e.*, a third—of the $47,324 in Westlaw costs. XXXVII JA9133 (fn.14); XLIII JA10776 (billing starting at June 1, 2016). Therefore, $15,274.51 of the Westlaw charges should have been denied outright. Second, GT provided only printouts for charges "by client"; not case. XLIII JA10776-10801. GT also represented RDI in the Los Angeles arbitration XXXIV JA8515-8516. Notably, the declaration of RDI's counsel did not say these costs were incurred in this case, but only that these costs (and all

other costs for that matter) were "*related to* this litigation." XXXIV JA8450-8451 (¶ 2). That is not enough. The district court therefore abused its discretion by awarding RDI all of its unsubstantiated and unreasonable Westlaw costs.

VIII. CONCLUSION

The district court's finding that $853,000 for four expert witnesses was reasonable and necessary is contradicted by the record. Not one of the many motions for partial summary judgment filed by the directors relied on expert testimony and none of the experts testified in court. It was also an abuse of discretion to allow RDI—a nominal, non-prevailing defendant—more than half a million dollars in costs, which were by and large unsubstantiated and gratuitously incurred.

The Court should reverse the $1.5 million Cost Judgment, hold that RDI is not entitled to any costs; hold that the Cotter directors are not

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entitled to more than the statutory maximum in expert witness fees; and remand the matter to the district court with instructions to further reduce the cost categories discussed in this Brief.

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1. I hereby certify that I have read this OPENING 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 11,992 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 is to be found.

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I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 29th day of August, 2019, a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF IN CASE NO. 77648** was served by the following method(s):

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