IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

JOINT APPENDIX TO OPENING BRIEFS FOR CASE NOS. 77648 & 76981
Volume XXIV
JA5809 – JA6058

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CERTIFICATE OF SERVICE

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

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By: /s/ Gabriela Mercado

(TS0000073). But before May 19, 2015, each of Adams, Kane and McEachern communicated to EC their agreement to vote as RDI directors to terminate plaintiff as President and CEO of RDI. App. Ex. 1 (EC 6/16/16 Dep. Tr. 175:17-176:8); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 96:5-91:4, 98:21-100:8, 100:14-101:11); App. Ex. 9 (Adams 4/28/16 Dep. Tr. at 98:7-17; 98:18-99:22); App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 378:15-370:5); *see also* App. Ex. 6 (TS 8/31/16 Dep. Tr. at 66:22-67:20) and App. Ex. 26 (Dep. Ex 131).

During their planning that predated the supposed May 21 meeting, Kane sent an email to Adams on May 18, 2016, in which he (Kane) agreed to second the motion for plaintiff's termination:

> See if you can get someone else to second the motion [to terminate Plaintiff as President and CEO]. If the vote is 5-3 I might want to abstain and make it 4-3. If it's needed I will vote. It's personal and goes back 51 years. If no one else will second it I will.

App. Ex. 19 (Dep. Ex. 81 at GA00005500).

Also prior to May 21, 2015, Kane and Adams discussed other motions related to plaintiff's termination, such as the appointment of an interim CEO. App. Ex. 9 (Adams 4/29/16 Dep. Tr. at 366:5–367:6); *see also* App. Ex. 20 (Adams Dep. Ex. 82 at GA00005502–03). In a May 19, 2015 email to Kane, Adams confirmed they had chosen sides in a family dispute:

> Ed,
>
> I am sorry, as I know your relationship with the family started long before they were born. I also know—and now see for myself—why SR placed such a high value on you and your counsel. More than anyone else on the board, you worked behind the scenes attempting to bridge every problem with the kids. Lastly, I know that more than anyone else, you have been at SR's side at every turn as he built his empire. I think you and I share a [sic] *obligation to the family* . . . . based upon our commitment to our friend.... Unfortunately, it seems that we have no choice but to choose a side.

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App. Ex. 21 (Adams Dep. Ex. 85 at GA00005544–45 (emphasis added); *see also* App. Ex. 6 (TS 8/3/16 Dep. Tr. at 65:12–66:20). Where is the "interest" of RDI in this admission? NRS 78.138(1).

In the face of a pre-arranged agreement among Adams, Kane and McEachern to vote to terminate plaintiff, Gould warned that they all could "face possible claims for breach of fiduciary duty if the Board takes action without following a *process* . . . ." App. Ex. 318 (Gould Dep. Ex. 318). (Emphasis added). Storey used the term "kangaroo court," and observed as to the non-Cotter directors that, "as directors *we can't just do what a shareholder* [meaning EC and MC] *asks*." App. Ex. 22 (Kane Dep. Ex. 116) (emphasis added). Kane rejected their request to meet separately from the Cotters, stating that "the die is cast." App. Ex. 23 (EK Dep. Ex. 117 at TS000069).

The supposed May 21, 2015 special meeting was convened and concluded with no termination vote having been taken. Sept. 23, 2016 JJC Declaration In Support of Plaintiff's Motion ("JJC Decl.") ¶ 11.

On or about Wednesday, May 27, 2015, a lawyer representing MC and EC in the California Trust Action sent an attorney representing Plaintiff in that action a document outlining terms on which EC and MC would resolve their disputes with him. *Id.* ¶ 12; App. Ex. 4 (MC 6/15/16 Dep. Tr. at 154:19–156:19); App. Ex. 32 (Dep. Ex. 322). Not coincidentally, EC on May 27, 2015 emailed RDI directors stating "that the board meeting held last Thursday [May 21] was adjourned, to reconvene this Friday, May 29, 2015. The board meeting will begin at 11:00 a.m. at our Los Angeles office." JJC Decl. ¶ 13; App. Ex. 1 (MC 6/16/16 Dep. Tr. at 185:13-186:9); App. Ex. 35 (Dep. Ex. 340).

Once the termination threat had been made, Kane continued misusing his position of trust and power as a director at RDI to pressure

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Plaintiff to give in to the threat of his sisters and resolve his disputes with them by acceding to their demands. For example, on May 28 Kane wrote Plaintiff: "Ellen is going to present you with a global plan to end the litigation and move the Company forward. If you agree to it, you, Ellen and Margaret will work in a collaborative manner and you will retain your title." App. Ex. 4 (Dep. Ex. 118 at EK 00000396 (emphasis added). Kane further warned, "If it is a take-it-or-leave-it, then I STRONGLY ADVISE YOU TO TAKE IT, even though I have not seen or heard the particulars." *Id.* (emphasis added).

The supposed special board meeting on May 29 commenced and Adams made a motion to terminate Plaintiff as President and CEO. In response, Plaintiff questioned Adams' independence and/or disinterestedness. JJC Decl. ¶ 15. Adams refused to speak to the subject, and neither Gould nor any other RDI director received or required an explanation from Adams. *Id.* The supposed special meeting was adjourned until 6:00 p.m. that evening. Plaintiff was then told by Kane, McEachern and Adams that he needed to resolve his disputes with his sisters by then or they would to terminate him. *Id.* That threat was memorialized by director Storey, whose contemporaneous handwritten notes state:

> **long board discussion**
>
> **ended with basically a command from "majority" – Jim go settle something with sisters in next hour or you will be terminated.**

App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 110:6–12); App. Ex. 15 (Storey Dep. Ex. 17) (emphasis added).

The Board reconvened telephonically around 6:00 p.m. and Ellen Cotter reported that she and Margaret Cotter had reached an agreement in principle with plaintiff to resolve their disputes. Ellen Cotter concluded that, while no definitive agreement had been reached, she would have one

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of their lawyers provide documentation to counsel for plaintiff. No termination vote was taken. JJC Decl. ¶ 16; Motion App. Ex. 3 (MC 5/13/16 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 15 (Dep. Ex. 17) and Ex. 1 (Kane 5/2/16 Dep. Tr. at 191:6–24). On Wednesday, June 3, 2015, counsel for EC and MC transmitted a new document to counsel for JJC. JJC Decl. ¶ 17; App. Ex. 3 (MC 5/13/16 Dep. Tr. at 377:7-24); App. Ex. 28 (Dep. Ex. 167).

A few days later, on June 7 and 8, 2015, Kane *admitted* that the termination threat was in furtherance of the *interests of EC and MC, not RDI.* In a June 8 email to Plaintiff, Kane stated that "there is no one more qualified to be the CEO of this company than you." App. Ex. 2 (JCOTTER009286) (emphasis added). A day earlier, Kane said "I want you to be CEO and run the company for the next 30 years or more." *Id.* Kane thus confirmed that when he, Adams, and McEachern threatened to terminate Plaintiff and thereafter did so, they not only were not acting in the interests of RDI, but that they were acting against of RDI's interests, *in breach of their fiduciary duties.*

On June 8, 2015, Plaintiff advised EC and MC that he could not accept their so-called settlement document. MC responded that she would advise the RDI board of directors. JJC Decl. ¶ 18; App. Ex. 3 (MC 5/13/16 Dep. Tr. at 368:13–369:22); *see also* App. Ex. 3 (MC 5/12/16 Dep. Tr. at 271:22-279:7); App. Ex. 27 (Dep. Ex. 156). On Wednesday afternoon, June 10, 2015, EC transmitted an email to all RDI board members stating, among other things, that "we would like to reconvene the Meeting that was adjourned on Friday, May 29th, at approximately 6:15 p.m. (Los Angeles time.) We would like to reconvene this Meeting telephonically Friday, June 12 at 11:00 a.m. (Los Angeles time) . . ." JJC Decl. ¶ 19.

When the termination vote was rescheduled for the next day, Kane resumed pressuring Plaintiff stating on June 11, 2015: "I do believe

that if you give up what you consider 'control' for now to work cooperatively with your sisters," Kane admonished, "you will find that you will have a lot more commonality than you think." App. Ex. 5 (Kane Dep. Ex. 306 at EK 00001613). "**Otherwise**," Kane threatened, "**you will be sorry for the rest of your life, they and your mother will be hurt and your children will lose a golden opportunity**." *Id.* Tellingly, Kane also wrote:

> "[F]or now I think you have to concede that Margaret will vote the B stock. As I said, your dad told me that giving Margaret the vote was his way of 'forcing' the three of you to work together. Asking to change that is a *nonstarter*."

App. Ex. 5 (Kane Dep. Ex. 306) (emphasis in original).

On Friday, June 12, 2015, a supposed RDI board of directors special meeting was convened. Adams, Kane and McEachern voted to terminate JJC (as did MC and EC). App. Ex. 10 (Kane 5/2/16 Dep. Tr. at 191:25–192:12, 193:–194:10); App. Ex. 5 (Storey 2/12/16 Dep. Tr. at 139:22–140:11); *see also* App. Ex. 6 (TS 8/3/16 Dep. Tr. at 75:4–76:16 and 81:22–82:6). Kane in deposition admitted that JJC was fired because he did not acquiesce to the termination threat made by Kane, Adams and McEachern:

> Kane:I—I said to him at one point, "Take it. You have nothing to lose. You're going to get terminated if you don't. If you can work it out with your sisters, it will go on and I will support you. I'll even make a motion to see if the company will reimburse the legal fees." I did not want him to go. And you, I'm sure, see emails in there to that effect. Even though I voted—was voting against him, I wanted him to stay as C.E.O.
>
> * * *
>
> Q.: But that resolution did not come to pass because Jim Cotter, Jr., rejected it, correct?
>
> Kane: He rejected it, yes.
>
> Q.: And he got himself terminated, right?
>
> Kane: Yes.

App. Ex. 1 (Kane 5/2/16 Dep. Tr. at 194–195 (objection omitted).

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b) The Aborted CEO Search

Rather than recite the record evidence regarding the CEO search again, Plaintiff respectfully refers the Court to his prior briefs and the evidence described therein and proffered therewith. *See* October 13, 2016 Oppositions to Partial MSJ No. 5 and Gould's MSJ and December 1, 2017 Supplemental Opposition to Partial MSJ Nos. 2 and 5. By way of summary, that evidence shows that the CEO search committee, comprised of MC, McEachern and Gould (after EC declared her candidacy and withdrew), effectively terminated the search on the same day EC declared her candidacy. That was the last day the committee had a substantive communication with Korn Ferry, the outside professional search firm employed and paid by RDI to lead the CEO search. Shortly thereafter, Korn Ferry was told to stand down, to not provide the agreed and paid for proprietary assessment of final qualified candidates and, in effect, to not interfere with the decision of MC, McEachern and Gould to ignore the fact that EC did not possess the experience and qualifications that they had agreed were the sine qua non to be selected as RDI's new CEO. The CEO search committee then presented (surprise!) EC as their choice, and did not present the full Board with the final three candidates as the previously set *process* prescribed. The Board dutifully agreed, and EC was made CEO. For Judy Codding, a close family friend who had been a Board member for only two months, that was the result she previously had determined to bring about, because it was her view that RDI was a "family business" of which only a Cotter should be CEO. JJC Decl. ¶ 24.

c) The Matters Which Were the Subject of MSJ No. 6

Because the Court is familiar with the matters raised in Partial MSJ No. 6 and denied that motion, Plaintiff will not recite the record evidence bearing upon those matters. However, Plaintiff respectfully reminds the Court that it was director defendant Kane who, together with

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Adams, authorized the exercise of the 100,000 share option, and did so notwithstanding the fact that (1) questions he deemed needed to be answered before doing so were not answered, and (2) the responses provided were identified as insufficient by director Storey. Together with the context of that conduct—to enable EC and MC to retain control of RDI—Plaintiff respectfully submits that these facts alone preclude dismissal of this action as against Kane.

d) Gould's Recurring Intentional Misconduct.

Rather than attempt to recite the record evidence contained in Plaintiff's oppositions to the various motions addressing matters to which Gould was a party, Plaintiff respectfully refers to Court to the motions. However, for ease of reference and the convenience of the Court, Plaintiff provides the following inventory of facts that he contends show that director-defendant Gould engaged in intentional misconduct, meaning that he intentionally failed of to act in the face of a known duty to act, demonstrating a conscious disregard of his duties to RDI, and/or that he intentionally acted with a purpose other than advancing the best interests of RDI. The inventory of misconduct includes the following:

- Gould failed to take steps to prevent or to terminate the efforts by Kane, Adams and McEachern to extort plaintiff.
- Gould failed to follow through and require Adams to produce, and the Board assess, information regarding his financial dependence on EC and MC, as a result of which Gould allowed Adams to cast the decisive vote to terminate Plaintiff.
- Gould failed to require the Board to decide whether the position taken by EC, that Plaintiff was required to resign as a director upon termination as an executive, notwithstanding the fact that Gould new the position was erroneous, thereby acquiescing to conduct that was erroneous if not improper.
- Gould acquiesced to the use of an executive committee he knew at the time it was put in place would be used to limit the participation of Plaintiff and Storey as directors.

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- Gould acquiesced to stacking the RDI board with unqualified loyalists to the Cotter sisters, even acknowledging at the time that he did not have sufficient opportunity to make an informed decision about whether to disagree or acquiesce.
- Gould as one of three members of the executive committee allowed EC to manipulate the process and then took affirmative steps to abort the CEO selection process, in order to bend to the wishes of EC to be CEO.
- Gould admitted at the time and subsequently that MC lacked real estate development experience, making her unqualified to be the senior executive vice president of RDI responsible for development of its valuable New York City real estate, but he nevertheless acquiesced to her being given that position and paid as if she were qualified.
- Gould acquiesced to EC's recommendation that Adams be given $50,000, without having any RDI basis for doing so.
- Gould took his cue from EC and Craig Tompkins and directed the discussion at the 1 hour and 25 minutes telephonic board meeting regarding the Patton Vision offer to the subject of whether the controlling shareholders would approve, thereby pre-empting and preventing any genuine consideration of how RDI should assess and respond to that offer.
- Gould repeatedly acquiesced to RDI issuing and not correcting erroneous SEC filings, including a June 15, 2015 Form 8-K that asserted the erroneous statement that Plaintiff was required to resign as a director upon termination as a senior executive, as well as a materially misleading if not erroneous Form 8-K in January 2016 regarding the selection of CEO, which included a statement from Gould implying that the selection of EC was the result of a "thorough search process," when in fact the process had been aborted and selection was not the result of the proper process.

The motion papers are devoid of any explanation, much less justification, for the conduct of Kane, McEachern and Adams in threatening Plaintiff with termination in order to force him to settle trust disputes with his sisters on terms that suited them, as distinguished from terms suitable to RDI. The evidence regarding the aborted CEO search, for which MC, Gould and McEachern are responsible, likewise raises disputed issues of material fact that preclude dismissal of this action against any of them. Finally by

way of example, when viewed collectively and in context, as it must be, Gould's recurring abdication of his fiduciary responsibilities evidences disputed issues of material fact that require denial of Gould's separate motion.

IV. CONCLUSION

For the reasons stated above, the Court should clarify, reconsider, and vacate its rulings on Partial MSJ Nos. 1 and 2, and on Gould's MSJ.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b)(2)(D) and E.D.C.R. 8.05, I certify that I am an employee of MORRIS LAW GROUP and that on the date below, I cause the following document(s) to be served via the Court's Odyssey E-Filing System: **MOTION FOR RECONSIDERATION OR CLARIFICATION OF RULING ON MOTIONS FOR SUMMARY JUDGMENT NOS 1, 2, AND 3 AND GOULD'S SUMMARY JUDGMENT MOTION AND APPLICATION FOR ORDER SHORTENING TIME** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System. The date and time of the electronic proof of service is in place of the date and place of deposit in the mail.

DATED this _____ day of December, 2017.

By:_____

Exhibit 1

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CLERK OF THE COURT

ORDR

Mark G. Krum (SBN 10913)
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Attorneys for Plaintiff
James J. Cotter, Jr.

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,

Plaintiffs,

vs.

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

Defendants.

CASE NO.: A-15-719860-B
DEPT. NO. XI

Coordinated with:

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

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

Jointly Administered

Business Court

[PROPOSED] ORDER REGARDING DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT NOS. 1–6 AND MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY

Date of Hearing: October 27, 2016
Time of Hearing: 8:30 a.m.

and

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

THESE MATTERS HAVING COME BEFORE the Court on October 27, 2016, Mark G. Krum appearing for plaintiff James J. Cotter, Jr. ("Plaintiff"); H. Stanley Johnson, Christopher Tayback, and Marshall M. Searcy appearing for defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, Edward Kane, Judy Codding and Michael Wrotniak; Mark E. Ferrario and Kara Hendricks appearing for Reading International, Inc.; and Ekwan Rhow, Shoshana E. Bannett appearing for William Gould, on the following motions:

- Individual Defendants' Motion for Summary Judgment (No. 1) Re: Plaintiff's Termination and Reinstatement Claims;
- Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: The Issue of Director Independence;
- Individual Defendants' Motion for Partial Summary Judgment (No. 3) On Plaintiff's Claims Related to the Purported Unsolicited Offer;
- Individual Defendants' Motion for Partial Summary Judgment (No. 4) On Plaintiff's Claims Related to the Executive Committee;
- Individual Defendants' Motion for Partial Summary Judgment (No. 5) On Plaintiff's Claims Related to the Appointment of Ellen Cotter as CEO;
- Individual Defendants' Motion for Partial Summary Judgment (No. 6) Re: Plaintiff's Claims Related to the Estate's Option Exercise, the Appointment of Margaret Cotter, the Compensation Packages of Ellen Cotter and Margaret Cotter, and the Additional Compensation to Margaret Cotter and Guy Adams; and
- Defendants' Motion *In Limine* to Exclude Expert Testimony of Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty;

LEWIS ROCA ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

IT IS HEREBY ORDERED THAT the Motion for Partial Summary Judgment No. 1 is DENIED. There are genuine issues of material fact as to the issues related to interested directors participating in the process.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to Motion for Partial Summary Judgment No. 2, and supplemental briefing will be discussed once the relevant discovery is complete. The independence issue needs to be evaluated on a transaction or action-by-action basis, because the independence related to each needs to be separately evaluated; even though facts overlap, the Court cannot evaluate this in a vacuum. Motion for Partial Summary Judgment No. 2 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is GRANTED with respect to Motion for Partial Summary Judgment No. 3, because depositions have not been completed and the relevant documents have not been produced. Motion for Partial Summary Judgment No. 3 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Motion for Partial Summary Judgment No. 4 is GRANTED IN PART. As to the formation and revitalization (activation) of the Executive Committee, the motion is GRANTED; as to utilization of the committee, the motion is DENIED. Formation and revitalization includes a decision by the company to make use of their previously dormant Executive Committee and put people on that Executive Committee.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for Partial Summary Judgment No. 5. Motion for Partial Summary Judgment No. 5 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT Rule 56(f) relief is granted with respect to Motion for Partial Summary Judgment No. 6. Motion for Partial Summary Judgment No. 6 is CONTINUED pending Plaintiff's submission of a supplemental opposition.

IT IS FURTHER ORDERED THAT the Motion *in Limine* to Exclude Expert Testimony of Myron Steele, Tiago Duarte-Silva, Richard Spitz, Albert Nagy, and John Finnerty is GRANTED IN PART. With respect to Chief Justice Steele, he may testify only for the limited purpose of

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identifying what appropriate corporate governance activities would have been, including activities where directors are interested, including how to evaluate if directors are interested. As to Dr. Finnerty, the Motion *In Limine* was WITHDRAWN. As to the other experts, the motion is DENIED.

DATED this 20 day of December, 2016.

DISTRICT COURT JUDGE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Mark G. Krum*
MARK G. KRUM (SBN 10913)
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, NV 89169
Attorneys for Plaintiff

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Exhibit 2

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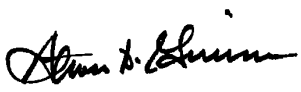


CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS

THURSDAY, OCTOBER 27, 2016

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

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

of a breach whether they are in and of themselves a breach. See, there's a different concept that I'm trying to deal with as a trial judge than I think you're dealing with in your motions, which it's your job.

MR. TAYBACK: There's two issues. One is could it be a breach as a matter of law. And my answer to that question is no. The second question is is there evidence that it's a breach. And the answer to that is no, as well.

THE COURT: That's not what I said, Counsel. Is this activity taken with other activities evidence of a breach of fiduciary duty?

MR. TAYBACK: I understand his argument, plaintiff's argument.

THE COURT: That's not his argument. That's what trial judges think about.

MR. TAYBACK: The question -- it begs the question, though, is what is the breach. There has to be a specific thing that occurred that is a breach --

THE COURT: Uh-huh.

MR. TAYBACK: -- as opposed to saying, this is a course of conduct. And that's the way plaintiff has characterized it. And the course of conduct can be relevant to a breach --

THE COURT: Yes.

MR. TAYBACK: -- but it begs the question what is

the breach, what is the breach. This is not the breach. This is not a breach. It's not a valid basis for a breach claim. And to say it might be relevant evidence of something else, some other breach, that's a decision you could make.

THE COURT: You're not asking me to exclude evidence of this, only to not instruct it or include it on a special interrogatory that it could be found an independent breach --

MR. TAYBACK: That's correct.

THE COURT: -- as opposed to evidence of breaches that have occurred.

MR. TAYBACK: That's absolutely correct.

THE COURT: I just needed you to say that, because that's not what your motion says.

MR. TAYBACK: I believe it's not -- I believe ultimately it wouldn't be relevant perhaps. But that's a different question. That's a different question. And that's not our motion. Our motion is to summarily adjudicate the basis of this unsolicited offer as being a breach.

THE COURT: There is no -- there is no allegation of the unsolicited offer as the breach of fiduciary duty claim. It is one of many things that are alleged as evidence of breach of fiduciary duty.

MR. TAYBACK: If I'm --

THE COURT: I pulled the complaint to read it again, because --

MR. TAYBACK: I did, too.

THE COURT: Okay.

MR. TAYBACK: And if in fact we misunderstood what his basis of the alleged breach is, then you're right, then it's not an issue, then it's not an alleged breach how we dealt with the -- how the company dealt with this unsolicited offer. It's merely evidence. But it's only relevant evidence if it relates to a breach. And certainly I think somewhere in our motions we address the thing that he says was actually the breach. But begs the question is what he's saying is the breach. What occurred that breached a fiduciary duty by individual directors, individual directors. For instance, Mr. Wrotniak, who's never even been deposed, who's seemingly collateral to every theory that's being proffered by the plaintiff, was in the room to discuss this particular unsolicited offer. What, if anything, did he do to breach any duty, and what is the relevance, I suppose, to address Your Honor's question, of how he did it to some other breach that is alleged but unspecified at least in our conversation right now as to what it is that plaintiff is saying breached a fiduciary duty to the company.

THE COURT: Okay. Anything else?

MR. TAYBACK: Only if you have questions, Your Honor.

THE COURT: I don't have any more. I asked you

them.

MR. KRUM: Your Honor, as I see this motion, the partial issue is the one you identified. And it's not just this motion, it's arguably all of them. But it's certainly this one. It's certainly the executive committee motion. And I've said this. I said it when we moved for leave to amend. We pleaded the complaint this way, as you saw it. We haven't alleged 10 or however many isolated acts as individual unrelated fiduciary duty breaches. That's not the nature of the case. And in point of fact the offer issues in some respects sort of close the loop that begun with the seizure of control of the company. So I can go through that whole argument that you've obviously read and you understand better than I do, because you try cases all the time. It's an argument that is a practical, realistic, and legal issue from the perspective of trying a case, it's an argument that has a basis in the law of corporate fiduciaries.

THE COURT: So let me ask you a question. So you've got your couple of breach of fiduciary duty claims and your aiding and abetting claim, and it is your intention, I assume, to submit special interrogatories to the jury.

MR. KRUM: Yes.

THE COURT: What are you going to ask them?

MR. KRUM: Well, I need to finish the discovery. I'm not trying to be nonresponsive, Your Honor, but, for example,

we're talking about the offer. I haven't deposed a single witness, so I can't tell you today whether I'm going to take the position that what transpired with respect to the offer is evidence only or is evidence and independent breach. Your question is a perfectly correct question. I acknowledge that.

THE COURT: Okay. So when after you finish the discovery are you going to be able to answer that question for me? Because that impacts like six of these motions.

MR. KRUM: That, Your Honor, is on our whole list of trial-related activities to perform. So obviously we'll turn to that as quickly as we can after we complete the discovery. Perhaps I can answer it when we speak on December 1st. I'll do my best.

And, by the way, I have all sorts of arguments here on this particular motion, a 56(f) argument about the facts and the law.

THE COURT: I know.

MR. KRUM: But I assume you don't need to hear those from me.

THE COURT: No. The reason I did this one next is because it's the most closely related to the 56(f) issues. And it makes it hard for you to finish when you don't have the last little bit of information, haven't finished the depos. But I was hoping you could tell me what questions you thought you were going to ask the jury.

will have to, as discussed, decide what exactly the special interrogatories are going to be. But it is absolutely, positively compelling evidence of what transpired here. It was a whole exercise to seize and perpetuate control. So it's not -- it's not -- you know, it's legal and therefore everything is copacetic is just wrong as a matter of law.

I don't have anything unless you have questions for me.

THE COURT: Thank you.

The motion related to the executive committee is granted in part. As to the formation and revitalization of the committee the motion is granted.

As to the utilization of the committee it's denied.

MR. KRUM: Point of clarification, Your Honor. By revitalization are you referring -- is that something different than -- that's activation? Is that what that is?

THE COURT: Activation. I think you called it repopulation, putting people on it. I'm not including utilization, which is the activities of the executive committee afterwards.

MR. KRUM: And utilization includes the purposes for which these other activities were done?

THE COURT: No. Formation and revitalization include a decision by the company, whether it's a decision by the company to make use of their previously dormant executive

plaintiff. There's no wrong to the company for the company following the bylaws, following Nevada law, following the terms of the contract, and on these facts, taking them as he said, where people are fighting and its infecting the operation of the company for the board to say, I'm picking these two over that one. It's literally that simple.

THE COURT: Okay. Are you done?

MR. FERRARIO: Yes.

THE COURT: All right. The motion's denied, as there are genuine issues of material fact and issues related to interested directors participating in a process.

If I could go to the motion in limine related to plaintiff's experts.

So, for the record, in September of 2013 I spoke on a panel called Multijurisdiction Case Management Litigation Being Pursued in Multiple Forums with Chief Justice Myron Steele. I don't think it affects my ability to be fair and impartial, but I make that disclosure to you just in case you need it.

MR. SEARCY: Thank you, Your Honor. I'll try and go through the four experts that were touched upon in our motion in limine fairly briefly, because it's getting late.

THE COURT: And I've got to find them in the book. So you keep going.

MR. SEARCY: Okay. If the Court has any questions,

CERTIFICATION

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

AFFIRMATION

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

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

10/31/16

DATE

Exhibit 3

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

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

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

APPEARANCES:

FOR THE PLAINTIFF:	MARK G. KRUM, ESQ. STEVE L. MORRIS, ESQ. AKKE LEVIN, ESQ.
FOR THE DEFENDANTS:	H. STANLEY JOHNSON, ESQ. MARSHALL M. SEARCY, ESQ. CHRISTOPHER TAYBACK, ESQ. JAMES L. EDWARDS, ESQ. MARK E. FERRARIO, ESQ. KARA B. HENDRICKS, ESQ. EKWAN RHOW, ESQ.

LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

(Court was called to order)

MR. FERRARIO: Ms. Hendricks has something to take up with you.

MS. HENDRICKS: I just have a question.

THE COURT: On what?

MS. HENDRICKS: On how many drives we each need.

THE COURT: Wait. That's not me. Wait. Don't go there yet.

MS. HENDRICKS: Okay.

THE COURT: Who are you looking for?

MR. MORRIS: I'm so unaccustomed to being on the plaintiff's side.

(Pause in the proceedings)

THE COURT: All right. So moving on. Good morning. We were talking about the pro bono awards at the 8:00 o'clock session this morning, and Mr. Ferrario didn't get one this year, so I was giving him a hard time because nobody from his firm did a lot of work. But apparently they did. It just didn't get reported because it was done with a different agency.

Right, Ms. Hendricks?

MS. HENDRICKS: Yes. We're getting that fixed right now.

THE COURT: Okay. So before we start on your

motions I need to hit some practical problems. As those lawyers who practice here in the Eighth all the time know, as the chief judge I do not have a courtroom. That occurred because when the Complex Litigation Center was investigated for purposes of conducting the CityCenter trial we determined that it had a structural issue and some electrical issues. As a result, we did not renew the lease --

When was that, Mr. Ferrario?

MR. FERRARIO: It was 2013.

THE COURT: In 2013 we did not renew the lease, and since that time we have been down one courtroom. The person who gets screwed is the chief judge. So since 2013 we have had the chief judge be a floater. Unfortunately for you guys, I'm the first judge who kept my docket, because Business Court cases have a lot of history and it's not one of those things you can get rid of and assume somebody else is going to be able to be familiar with it fairly quickly.

So the down side for all of you is that I don't have a courtroom. Which is why sometimes we borrow Judge Togliatti's courtroom when you guys see me, sometimes in this courtroom. And you've been in the two Family Court courtrooms a couple of times here. I also have judges who lend me their courtrooms on a regular basis on the third floor, and sometimes I have courtrooms in other places in the building I borrow.

Recently I learned that I am going to be able on behalf of the court to acquire the seventeenth floor that used to be occupied by the Supreme Court and to build a new Complex Litigation Center, because since 2013 every time we have a complex trial we build out a courtroom, it costs a quarter of a million dollars, and then when we're done with it we take it back down to put it back in regular shape. And so finally the County has realized that's probably not an effective use of the funds, and so we're going to build out the seventeenth floor as a complex litigation, jury, and criminal caseload accommodated. Unfortunately, that's a construction project, and it is in process. And when I say in process it means they're still in the bid evaluation process and it has to now go to something called long-term planning at County management, which means that some day there'll be a courtroom there. In the meantime --

MR. MORRIS: So our trial will start when the construction is complete on 17?

THE COURT: No, no. You're going to start. I just don't know where we're going to be, Mr. Morris. This is the reason for the speech, because Mr. Ferrario says nobody believes me that I don't have a courtroom. I don't have a courtroom. So I will have a courtroom when I end being chief judge. I'll go back to being a regular judge and I'll have a courtroom, and then the new chief won't have a courtroom

unless we finish building out the seventeenth floor by then.

So right now the reason I'm telling you that is it impacts your trial. The trial I am currently in is a bench trial, so it's not a jury trial and we have moved from courtroom to courtroom during our 10 days we've been in proceedings so far. So we've not been in the same courtroom every day. But that's sort of the life of being in this department at the moment. That's the history.

Now let's go to the electronic exhibit part of our problem. Brandi is the head of the Clerk's Office, Mike is the head of IT, so they are the two people who are here to make sure that they are able to interact with you -- and then I'll let them leave while I hear your motions -- about the electronic exhibit protocol. Because when we use the electronic exhibit protocol there's two ways that we have to deal with it, from an IT standpoint and from the Clerk's Office standpoint. So instead of us hauling all the paper volumes from courtroom to courtroom, depending on where we're going to be, the clerk won't have to do that. They will have the drives, as Ms. Hendricks mentioned earlier, for that purpose so that Dulce will then -- after IT has cleared the drives Dulce will then work with the drives, and then we usually keep one that is called golden that we don't mess with, and we have one that's a working drive. But I'll let Mike explain that and Brandi explain it, because not all of

you have been through the electronic exhibit protocol in the past.

Mike, you're up.

MR. DOAN: So this is a jury trial, so a high level. We expect three drives, a working copy, a golden copy, and then a blank for the jury that everything that gets accepted or submitted in a group will be over on that drive.

Depending on the number is drives is just based on the space. So if your teams, whoever's putting these drives together -- we have problems if you get a million exhibits on one drive or even 600,000 on one drive. Not so much even the space, it's just navigating through those files. And so as long as your team can navigate and view the files, that's okay for us. We don't have like a set number. We just ask that the drives be twice as big as the amount of the exhibits, because in theory everything could get accepted, and therefore everything would be stamped and there'd be duplicate on the drive.

THE COURT: And when it's stamped there's a program that goes through and it puts a stamp on each page of the electronic exhibit that says it's admitted so that we have your original proposed copy and then your admitted copy. The one drawback for lawyers is if you decide you want to admit a partial version if an exhibit, we cannot do that with electronic exhibits. We need you to submit a replacement

electronic exhibit that includes only the pages that you are offering. That will then have an exhibit marker placed upon it. But I can't with the electronic exhibits admit pages 6 through 10 of the 25-page document.

So, Mike, what did I miss?

MR. DOAN: That's it.

THE COURT: Okay, Brandi. You're up.

MS. WENDELL: Have you already given them the ranges? Do we have --

THE COURT: No, we have not done ranges yet.

MS. WENDELL: Okay. The protocol is pretty basic. Your paralegals or your IT people that are going to be working on those might have questions. Usually -- a lot of times on all the other trials Litigation Services was used. They're very familiar with this program. I'm not advocating for them or anything, but if anybody's contracted with them, they're pretty familiar with how to do it. It's really important that you pay attention to the naming convention. Make sure there are no letters in it. It has to be strictly numbers and then .pdf. The last time there was a question about whether .tifs worked, and Mike was able to verify that .tifs are -- we're able to use those. But color photos can be done as long as there's a little border up at the top for the stamping program to mark all of the information.

Another thing that we have found useful, it's not in

the protocol, but at least a couple weeks before the trial starts we do like a dry run, because your exhibit list, the templates that Dulce went ahead and emailed to you, you cannot change that, the formatting. It's critical because Mike's team will do a validation, and it validates the exhibit numbers to what is on the drive, each exhibit. And it'll identify if there's something that's missed or skipped that's on the list but it's not actually on the drive. And a lot of times there's been some formatting problems when people try to get creative. So, you know, just a little advice that we found from trial and error that that is an important piece.

What else?

MR. DOAN: That's the biggest thing, is if you can get with us -- and we'll make ourselves available as soon as you're available to do like an initial run before you start all printing and doing all these other things just so everything can be tested for format so there's not a lot of time wasted.

MS. WENDELL: The clerk must have -- the exhibit list must be printed out.

THE COURT: Not in 2 font, Ms. Hendricks.

MS. HENDRICKS: [Inaudible] that was not our office's fault, Your Honor.

MS. WENDELL: That should be in a binder so that the clerk as you're actually offering and admitting the evidence

during the trial, she'll be working on that. Later that day she'll be doing the electronic stuff or we'll have a second clerk that'll be helping her. Antoinette is court clerk supervisor, and so she's here to make sure that, you know, if we have any questions that have to be answered.

A lot of times -- oh. Last trial somebody asked if because the exhibit list itself was going to be like 14 of those big binders, they asked if they could print on the front and the back. That was in Judge Kishner's big trial. We let them do it, and -- but the trial settled, so it wasn't an issue.

THE COURT: It's not a good idea.

MS. WENDELL: It's not ideal, so --

THE COURT: Please don't do a front and back.

MS. WENDELL: Anybody have any idea how many exhibits you're looking at?

THE COURT: We're going to start with them and do our ranges first. But we're not quite there yet.

So if anybody has questions or your staffs have questions, would you like contact information to reach out to either Antoinette, Brandi, or Mike?

MR. TAYBACK: Yes.

MS. HENDRICKS: That would be great, Your Honor.

THE COURT: So tell them or give them business cards.

MS. WENDELL: Okay.

MR. FERRARIO: If you all have cards, then that'd be easiest.

THE COURT: They're County employees. Does that mean they get cards?

MR. DOAN: Yeah.

THE COURT: Oh. Look at that.

MR. DOAN: You know, and it's best to have one point of contact so then we don't get confused.

MS. WENDELL: I'm putting my cards away now.

THE COURT: Who do you guys want to be the person that calls? Do they want to call Antoinette, they want to call you, want call Mike?

MS. WENDELL: Well, Antoinette is -- she's not Dulce's direct supervisor, but I can be the point of contact, and then I can go ahead and let you guys know. My email address and my phone number are both on here. If you could pass some of these out, that'd be great. And then I'll probably hand you off depending on the questions that come up. Most of them are going to be technical questions, but I'll try to help if I can.

THE COURT: All right. So do you have any more questions for the Clerk's Office, the IT folks, in the electronic exhibit protocol? You will notice because of what happened in CityCenter in paragraph 6 it now says the exhibit

list will be font size 12, Times New Roman. So we're very specific on what size, because the clerk's actually have to work with the paper copy. And so although you can blow up the Xcel spreadsheet and see it when it's 2 font, they can't. So we have to have it in a larger font.

Any more questions?

Okay. Mr. Krum, how many exhibits do you think you're going to have so I can set the exhibit ranges?

MR. KRUM: The answer is it's in the hundreds, not in the thousands. So if --

THE COURT: So if I give you 1 to 9999, you will be okay?

MR. KRUM: Yes.

THE COURT: All right. Who wants to have 10000 as their start? Mr. Searcy, how many have you got?

MR. SEARCY: I think our approximation is basically the same. It's in the hundreds, not the thousands. So if we had 10000 to --

THE COURT: 1999 [sic]?

MR. SEARCY: Yeah, that would be perfect.

THE COURT: I have to give you lots of extras, because if you're going to do partial exhibits, we need that space to be able to add those. So if you've got subparts of one exhibit, I need an exhibit number for each one of those. So I'm giving you more than you need.

Mr. Ferrario, how many do you need?

MR. FERRARIO: Your Honor, Your Honor, I would suspect our -- any exhibits we would introduce independent of what Mr. Krum and the other defendants would be nominal. So you can give us a very short range.

THE COURT: 20000 to 2499 [sic].

THE COURT: Who else wants exhibit lists that's not one of those three? Anybody else need --

MR. TAYBACK: Counsel for Mr. Gould is sitting behind me.

THE COURT: So Mr. Gould's counsel, you want about the same range Mr. Ferrario has, 25000 to 30000?

MR. RHOW: That's fine, Your Honor. Just for protocol --

THE COURT: Hold on. They've got to get your name, because otherwise I'm going to get really -- I'm going to screw up.

MR. FERRARIO: Can you let Ekwan speak today? He's been here all -- he hasn't even got to argue one time, Your Honor.

THE COURT: All right, Mr. --

MR. RHOW: I'm actually in this case. Ekwan Rhow, Your Honor. Thank you.

THE COURT: Okay.

MR. RHOW: We can have a separate range for sure,

but is there any problem with incorporating Mr. Gould's exhibits into the exhibits for Mr. Searcy that he presents?

THE COURT: There is absolutely no problem with your exhibits being within their exhibit range, but I need to give you a separate range for your own in case you all don't reach an agreement.

MR. RHOW: I see.

THE COURT: So my exhibit ranges based on what I've heard today is 1 to 9999 for the plaintiffs, 10000 to 1999 [sic] for the Quinn Emanuel folks and their associated, which includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic] for Mr. Ferrario and his team. And, Mr. Krum, we gave you 25000 to 2999 [sic] for Mr. Gould.

Do we anticipate there is anyone else who's going to need more numbers? Anybody else who's going to show up randomly in the case?

All right. Any other stuff I need to do on your part?

MS. WENDELL: No. Based on that, that's very good news. The goal will be for all counsel to prepare your exhibits and then everybody put them one drive. The only reason why we do different drives is because if there's like 10,000 exhibits on one, like Mike said, so if there's any way possible -- and you all have to use the same exhibit list template. Now, if that's a problem to do that, then if your

exhibits are on your own hard drive, then your exhibit list must be what is on that drive. So if two of you get together or three of you get together, everything that's on that drive must be one exhibit list, because it cross-checks and makes sure it validates.

THE COURT: So it's okay for the plaintiffs to have one drive and an exhibit list of 1 through 9999 -- or up to that number, and the defendants to decide jointly they're just going to use the 10000 to 1999 [sic], have one drive, and one exhibit list?

MS. WENDELL: That is okay. But based on the size, you know, we're -- I think that, you know, it's better to always have one --

THE COURT: Yeah. But you're asking for cooperation?

MS. WENDELL: Yes.

THE COURT: Just because you worked for Commissioner Biggar for however many years and you could make them cooperate doesn't make I can as a trial judge.

All right. So anybody else have more stuff?

Yeah. Your history will never die.

MS. WENDELL: I know. It's going to follow me out of here in February.

THE COURT: All right. Anybody else have any more questions for my IT team or my Clerk's Office team so that

they can leave and not have to sit here through your motion practice?

Dulce wants you to set the dry run date today. We have a holiday coming up, and you have asked me to let you go the second week. I'm going to be able to accommodate that request. I found some victim to go the first week.

MR. FERRARIO: So we start on the 8th now?

THE COURT: Plan is for you to start on the 8th. So when do you want your dry run to be with your staff to bring over the lists and the drives? It doesn't have to be you guys. It can be your paralegals.

MR. FERRARIO: But you said you want enough time in case there's glitches. So --

MS. WENDELL: If there's a glitch, then you'll need time to fix it.

MR. FERRARIO: So at least the week before -- we need it two weeks before; right?

THE COURT: Two weeks before is the week of Christmas, so we'll be here the 26th through the 29th working that week.

MR. FERRARIO: And then you guys will be here to do that?

MR. DOAN: We'll make it work.

THE COURT: Some of them will be here.

MR. FERRARIO: I think it has to be that week in

case there's a problem. Because then the following week is short, and then we're right up on trial and won't be able to correct any of the stuff.

MR. KRUM: So why don't we say the 29th?

THE COURT: You guys all okay with the 29th? What time do you want to meet?

MR. KRUM: I think we need to talk to the people who are going to do it.

THE COURT: Okay. I would recommend the morning. And the reason I recommend the morning is typically on the weekend of New Year's Eve they try and get everybody out of downtown by about 2:00 o'clock because of all the things that happen in the streets here on that weekend.

MR. KRUM: Understood.

THE COURT: So -- and we will tell you what courtroom we are able to find. I'm pretty sure on that day I could get a courtroom on this floor. And if you guys want a morning, if you can accommodate that, we'll do that. Otherwise --

MR. FERRARIO: I'm going to tell you, Judge, [inaudible] people are going to be in this trial, I think if you could convince Judge Sturman to let you have this for the length of the trial, that would [inaudible].

THE COURT: She has a trial that I had to vacate when her mom became ill that I think she's going to try and

restart in January. I will know better when she actually gets back to town. But we will talk to her. Her courtroom and Judge Johnson's courtrooms are equipped differently than the other courtrooms, so they are a little bit bigger.

MR. FERRARIO: Yes. This would accommodate [inaudible].

THE COURT: I was thinking of putting you in Potter's courtroom and having a special corner for you.

MR. KRUM: Your Honor, I've just been reminded that it was presumptuous of me to speak for others.

THE COURT: You want to talk to the staff members to see who's taking the week off?

MR. KRUM: Here's the question. And I'm now taking Mr. Ferrario's line. Would it be possible for us to start the following week so we could make --

THE COURT: No. We won't get done. If we do that, we won't get done in time for me to do my February stuff. It's a five-week stack. It starts on the 2nd of January. So if you need to talk to your teams and see if being here on January 2nd at 8:00 o'clock in the morning is a preference for them instead of the 29th, which gives you -- you lose the weekend, but you're here the rest of the time. It gives you almost two weeks to straighten it out.

MR. KRUM: Okay.

THE COURT: And that's okay with me. Even though

Mike would say he needs two weeks before, January 2nd is okay with me.

MR. KRUM: Okay. We will check with our people.

THE COURT: Okay. So any other electronic exhibit lists?

So, Dulce, just mark them down that they are planning to visit with you on January 2nd. I'm fairly certain I can find a courtroom on January 2nd, but there's no guarantees on that day.

All right. 'Bye, guys. Thank you for being here. Antoinette, thank you for being here. I know it's going to be exciting again.

All right. That takes me to the motions. Do you have a preferred order you'd like to argue them in? I usually try and do the summary judgments and then go to the motions in limine.

MR. KRUM: That would be our suggestion, as well.

MR. TAYBACK: That makes sense, Your Honor. You can go numerical order is fine.

THE COURT: Whatever you want to do.

Can I have my calendar. I don't need -- well, I have notes all over the motions, so --

MR. FERRARIO: Are we on the clock?

THE COURT: You have until five till 12:00. So we've got an hour.

(Pause in the proceedings)

MR. TAYBACK: Mr. Krum was just suggesting that I raise the parties' -- both filed joint motions -- or filed motions to seal. We'd ask you to grant them.

THE COURT: Is there any objection to any of the motions to seal? They weren't all motions to seal. Some of them were motions to redact, and that was appropriate. The motions to seal I do have a question for Mr. Morris's office, and so I'll ask you -- hold on, if I can find the one I wrote the page on. Got a question. It was a process question, not a substance question, so let me hit it before we go to the next step.

When you sent me a courtesy copy and the courtesy copy had a sealed envelope in that did you also file the sealed version of the document that has like this sealed envelope that's with the Clerk's Office?

MS. LEVIN: I don't believe, Your Honor.

THE COURT: And we have to do it that way --

MS. LEVIN: Okay.

THE COURT: Because otherwise I can't even grant your motion now, because then it's going to get screwed up.

MS. LEVIN: I understand, Your Honor. And I think that this was based on our conversations with the clerk, who said you cannot submit it until you have the order. And we were saying, but that --

THE COURT: No. You submit it when you file the motion. When you file the motion with it, which is why you have to file them at the counter. You can't efile when you're filing under seal.

MS. LEVIN: Right.

THE COURT: And that's why it gets screwed up.

So I have some process concerns about the plaintiff's filings related to that, and I'm going to let you and Dulce talk about those after we finish the hearing to see, if we can.

I'm going to grant the motion, but it may be that you have to do something different to have a motion that actually goes with it to the Clerk's Office instead of an order. Because having the order will not accomplish what you want.

All right. So to the extent that you asked previously for a motion to seal and/or redact, it appears to be commercially sensitive information related to financial issues, and there's some other sensitive information that relates to individuals' personal information, so I'm going to grant the requests for sealing and redacting that have been submitted.

Okay. You're up. What motion do you want to start with?

MR. TAYBACK: It'll be Summary Judgment Motion

Number 1. And it also -- there's -- relates to Summary Judgment Motion Number 2. So I will argue them jointly. They were at least opposed jointly, and we replied jointly with respect to those two motions.

THE COURT: Okay.

MR. TAYBACK: I'm here on behalf of the director defendants Michael Wrotniak, Judy Codding, Douglas McEachern, Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As Your Honor will recall and as addressed in the briefing, Your Honor said, and this is a truism, really, for any case, you've got to analyze claims defendant by defendant, in this case director by director, and transaction by transaction. And that's, you know, just basic, basic legal analysis.

On top of that, sort of as an overlay, another thing that I know Your Honor is well aware of is the recent law that clarifies -- I see you chuckling --

THE COURT: I don't know anything about the Wynn-Okada case. You don't know anything about it, because your firm wasn't involved at all, and Mr. Ferrario doesn't know anything, and Mr. Morris I'm sure was involved, too, because he's been involved in some of the appellate process in that case, too.

Right, Mr. Morris?

MR. MORRIS: Yes.

THE COURT: See, so we all know.

MR. TAYBACK: But all I need to know, all I need to know and all I really care about here and all that matters here is the language of the Supreme Court's opinion, because that's really what animates the business judgment rule in Nevada as we stand here now. And I think that combined with the recent clarifications by the legislature regarding the latitude afforded directors work together to set the bar very, very high. I'm sure Your Honor has read the opinion multiple times, applied it in that case, a case I'm not privy to, but it's --

THE COURT: I did. I granted partial summary judgment, which is on a writ.

MR. TAYBACK: And, as you well know --

THE COURT: Are we supposed to be calling somebody?

MR. FERRARIO: No.

THE COURT: I have a call-in number. I'm not in charge of doing this.

(Pause in the proceedings)

THE COURT: Hold on. Apparently someone thinks they're calling in.

MR. RHOW: It's okay, Your Honor. No need. I'm here.

THE COURT: Oh. It was you?

MR. RHOW: Not necessary.

THE COURT: Okay. Good. I'm glad we don't have to

call you.

Okay. Keep going. So I granted partial summary judgment, but I found some directors were not disinterested, so not all of the directors were covered by the summary judgment. I also in that case made a determination the business judgment rule only applies to officers and directors, it does not apply to the corporation itself. Just so you know.

MR. TAYBACK: And I'm aware of that only through having read the pleadings and having read now the court's opinion here. But the question is as it applies to this case. And as it applies to this case collectively that recent guidance and the guidance from the legislature make it clear that it's not really the province of a plaintiff or a court or jury to come in and say the business judgment rule should be overridden in order to second guess a particular decision made by a corporation's directors or its officers. And if you start at that premise, the idea that the applicable Nevada statutes here elevate -- give that sort of latitude to directors in the first instance and then you take it to sort of the next level of analysis, that is to say, even if one could rebut the presumption, even it's rebutted the standard then for imposing liability is even higher, because there remains still a two-prong test for which plaintiffs have to show a material disputed issue of fact to proceed to trial.

Both an individual director on a particular transaction breached their fiduciary duty and, secondly, that that individual director did so with fraud, knowing -- as a knowing violation of the law or engaged in intentional misconduct.

THE COURT: Well, you understand that finding is only needed to make a determination as to whether the individual officer or director is insulated from -- for personal liability purposes, as opposed to derivative liability, which would be funded through the corporation.

MR. TAYBACK: Correct.

THE COURT: Okay.

MR. TAYBACK: Though they are seeking personal liability. Their complaint makes that clear.

THE COURT: I understand they are. But your motion seemed to take the position that unless I found fraud they need to be dismissed. And that's not how it works.

MR. TAYBACK: Well, but they do need to rebut the presumption with respect to the business judgment rule.

THE COURT: That's a different issue, Counsel.

MR. TAYBACK: It is a different issue. And it's a multiple-hurdle test.

THE COURT: Yes.

MR. TAYBACK: And with respect to that second hurdle even the issue comes down to Your Honor's adjudicating their claim for personal liability, then that's also part of the

motion.

But you don't need to get there, because they have not established the evidence necessary to rebut the initial presumption. And that's clear because when you look at what governs the decision here by these individual directors on termination, which I'm going to take that transaction because that's the subject of our first motion for summary judgment, if you look at that, what governs that decision are the bylaws. And the bylaws which we've submitted are amply clear that the board was given complete discretion, that officers, including the CEO, serve at the pleasure of the board and can be terminated with or without cause at any time.

With the bylaws being the operative rules of the road, so to speak, and the law being what it is with respect to the deference afforded boards and individual board members, plaintiff's efforts to try to get around the idea that that presumption should be applied here are based on generalized allegations of disinterestedness. But you don't see specific evidence in the record anywhere that any of the three directors who voted to terminate Mr. Cotter, Jr. --

THE COURT: And you're including Mr. Adams in that, are you?

MR. TAYBACK: I am including Mr. Adams in that.

THE COURT: Just checking. So what happens if I make a determination that Mr. Adams is not disinterested? You

then do not have a majority of disinterested directors; correct?

MR. TAYBACK: If you made that finding that would be true. But it wouldn't change the liability, the claim against Mr. McEachern or Mr. Kane.

THE COURT: You mean for personal liability?

MR. TAYBACK: I mean whether -- not whether or not you can say we need to revisit that action, but whether or not they were disinterested, whether they breached their fiduciary duty. That would be adjudicated in their favor even if you found against Mr. Adams on a particular transaction -- but I would say you should not find against Mr. Adams on this transaction. The evidence isn't that his -- that the decision to terminate had any connection to his -- the level of his income, the amount of his -- the amount of his income, the amount of his expenditures, his continuity on the board. There's no connectivity, which is required in order to find disinterestedness even if disinterestedness was the standard. Because I will say the standard in Nevada is not independence for -- unless it's a transaction in which the director is on both sides of the transaction or it's a change of control circumstance. The termination of a CEO is an operational matter where you don't get to the independence question unless and until you have established a basis, a legitimate basis in the law to show that the presumption should not apply.

In light of the law, in light of the bylaws, in light of the undisputed evidence with respect to Mr. Adams, Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Codding -- and, of course, Mr. Wrotniak and Ms. Codding weren't even on the board at the time of this transaction -- the fact is that there's no basis upon which to allow plaintiff's claim to proceed.

The last point that I want to make with respect to Summary Judgment Motion Number 1 and 2 as it relates to that point is the plaintiff has tried to really muddy the law. And I think whatever you ultimately decide on this motion for summary judgment -- and I absolutely believe that these defendants are entitled to summary judgment on this record, but whatever you decide the parties will be well served by understanding Your Honor's view of the law. Because we do not see eye to eye with the plaintiffs on the law. They strive to import this Delaware entire fairness test.

THE COURT: I rejected that in Wynn, because that was the part that the Okada parties argued once the writ came back on [inaudible].

MR. TAYBACK: And notwithstanding that, I believe the plaintiffs are still advocating for it. It shows up in their papers.

THE COURT: I understand it's in their briefing.

MR. TAYBACK: And the law at least in Nevada with

respect to that is that it doesn't apply here. Independence for the same reasons is not required for the benefit of the business judgment rule where, as here --

THE COURT: You don't think the Shoen case says that independence is required for application of business judgment rule?

MR. TAYBACK: In Shoen to the extent it says that at all it says it in the context of demand futility. It's not the presumption that we're talking about here. And in fact that's -- I believe that's exactly what certainly the Wynn Supreme Court --

THE COURT: There's two Shoen cases; right?

MR. TAYBACK: Yes.

THE COURT: There's the first Shoen case and the second one that they gave a different name to.

MR. TAYBACK: Independence is not required unless you have a director who's on both sides of a transaction.

THE COURT: Okay.

MR. TAYBACK: I believe the law is amply clear on that.

THE COURT: Okay. I think their analysis is slightly broader than that, but okay.

MR. TAYBACK: Given the bylaws, given the fact that entire fairness does not apply, you cannot simply get past or rebut the presumption of the applicability of the business

judgment rule by saying a director is biased, a director has some family connection, a director has income that's attributable to the company. And that's really what this case comes down to. Where the facts here are frankly undisputed summary judgment is warranted.

That's it for Summary Judgment 1 and 2, Your Honor, unless you have any questions.

THE COURT: No. It's okay.

Mr. Krum, Mr. Morris?

MR. KRUM: Good morning, Your Honor. Thank you.

So I have some argument to make about what are pervasive misstatements of the law that were made with respect to Number 1, as well as the other ones. That said, if I'm listening, you're prepared to deny Number 1, just as you did previously, nothing has changed, including the law; and if that's the case, I'll just defer those comments till we get to something else.

THE COURT: Well, then let me ask you a question. Because when I read all these I have notes all over them, because some of them are interrelated and the disinterestedness issue is an issue that is involved in some of the motions in limine, as well as this.

Can you tell me what evidence, other than what is listed on page -- you had -- in your brief you had a list of all of the company activities that you believe show decisions

that were made by certain of the directors that showed they were interested. Can you tell me, other than that list -- and I can't, of course, find it right now, but I'm looking for it -- is there any other information other than from Mr. Adams that you have that would provide a basis for the Court to determine that they are not disinterested?

MR. KRUM: I'm sorry. That who is not disinterested with respect --

THE COURT: Anyone except Mr. Adams and the two Ms. Cotters. The two Ms. Cotters I think is fairly easy. They didn't even move, from what I can tell. But, for instance, for Mr. Kane.

MR. KRUM: Certainly, Your Honor. In our -- first let me say I think the list to which you're referring is a list that I had understood the Court to request when we last argued summary judgment motions and was intended, Your Honor, to identify the particular matters which we contend give rise to or constitute breaches of fiduciary duty in and of themselves as well as together with other matters. And so --

THE COURT: I don't know that that's the reason you did it. I found it. It is on pages 5 and 6. I'm on the Supplemental Opposition to Motion for Summary Judgment Number 1 and 2 and Gould Motion for Summary Judgment, and there is a list that includes threats of termination if you don't get along with your sisters and resolve the probate case --

MR. KRUM: Yes.

THE COURT: -- exercise of the options, the termination, the method of the CEO search. All of those are company transactions. What I'm trying to find out is, other than for Mr. Adams, is there other evidence of a lack of disinterestedness that you have other than what is included in the list of activities that relate to their work as directors which are on pages 5 and 6 of that brief in the bullet points.

MR. KRUM: Let me answer it this way, Your Honor. 5 and 6 was our effort to do what I just said. And what that is, to try to be clear, is to identify particular activities that we thought would be the subject of, as is appropriate, either instructions or interrogatories to the jury with respect to these particular matters.

So let's take Number 1 bullet point, the first bullet point, the threat by Adams, Kane, and McEachern to terminate plaintiff if he did not resolve trust disputes with his sisters on terms satisfactory to them. That, Your Honor, from our perspective is separate from the termination which is the subject of Number 1. And on this --

THE COURT: I see that. But let me have you fall back, because I certainly understand those may be issues that you may want to submit interrogatories or just to include in jury instructions related to breaches of fiduciary duty by someone who survives this motion, who I don't grant it on

behalf of.

But my question is different. Other than these which you've argued in your brief are evidence of a lack of disinterestedness separate and apart from Mr. Adams, who you have other evidence that is presented related to a lack of disinterestedness, is there any evidence that has been attached to your various supplements and other motions related to a lack of disinterestedness for the other directors known as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Codding, and Mr. Wrotniak?

MR. KRUM: The answer is yes, Your Honor. So I'm going to try to do it a couple ways.

THE COURT: Tell me where to go. Because I looked through this whole pile of about 2 foot of paper last night trying to find it, and the only one I could find specific allegations of a lack of disinterestedness, besides the two Cotter sisters, was Mr. Adams.

MR. KRUM: Okay. Well, so, for example, with respect to Mr. Kane in the response to MSJ Number 1 and 2 we introduced evidence that showed that Kane was of the view that he knew best what James Cotter, Sr., wanted in his trust documentation.

THE COURT: I see he understood what Mr. Cotter, Sr.'s plan was. How does that make him have a lack of disinterestedness?

MR. KRUM: Well, the answer, Your Honor, is he acted on that. That was the basis on which he decided to vote to terminate the plaintiff. He -- and, for example, the evidence includes an email from Mr. Adams to Mr. Kane in April or early May 2015 in which Mr. Adams says, "This was difficult. We had to pick sides in this family dispute. But we can take comfort that Sr. would have approved our decision." And so the point from our perspective, Your Honor, is Kane, in acting as a director, in fact acted to carry out what in his judgment were the personal interests of Sr. with respect to his trust planning. And on that basis he voted to terminate Mr. Cotter. There are emails from Mr. Kane to Mr. Cotter telling him, I don't know what the sisters' settlement is but I urge you to take it. Well, we think the evidence also shows that he knew what it was, that it entailed Mr. Cotter giving up control of the issues they've been litigating.

THE COURT: Under the Shoen analysis do you believe that that contact and that information is sufficient to show that Mr. Kane is not disinterested?

MR. KRUM: Well, the answer is, yes, we do, Your Honor. And I hasten to add that the way Shoen puts it is that disinterestedness and independence are a prerequisite to having standing to invoke the business judgment rule.

THE COURT: I'm aware of that. Which is why we're having this discussion. So -- but usually we have either a

direct financial relationship, even if it's not on both sides of the transaction, or we have a very close personal or familial relationship with the people who are subject to the transaction. And simply believing you understand Sr.'s plan -- estate plan does not, I don't think, rise to that same level to show a lack of disinterestedness; but I'm waiting for you to give me a spin on that argument I may not have thought of.

MR. KRUM: Sure, Your Honor. The answer is -- and I say this because I appreciate what the finder of fact -- what the Court has to do now and what the finder of fact has to do. The evidence has to be assessed collectively, not individually. And you understand that. We've cited cases for that. The other side disputes that. There's "The complaint of acts and omissions upon which plaintiff's claims are based must be viewed and assessed collectively, not separately in isolation." That's the Ebix case that we've cited. And there are other cases for that proposition. The point, Your Honor, is "assessing whether a director was independent and in a particular instance acted independently or whether the director was disinterested as required or whether -- and made the decision based entirely on the corporate merits, not influence by personal or extraneous considerations," that was CVV Technicolor, that's the test. And so, Your Honor, in Shoen, just to go back to that, "Independence can be

challenged by showing that the directors' execution of their duties is unduly influenced." If Kane made a decision based in any respect on his view that Sr. intended for one or both of the sisters to have something and Jr. was in the way of that, that, Your Honor, at a minimum survives summary judgment so the finder of fact can make a determination after considering all the evidence whether the director acted and decided in that particular instance entirely on the corporate merits. So what is --

THE COURT: Let's skip ahead, then. Mr. McEachern. What evidence of disinterestedness do you have for Mr. McEachern? And if you could tell me where in the briefing it is, I will look at it again. But, as I've said, other than Mr. Adams I did not see evidence of disinterestedness as opposed to allegations of breach of fiduciary duty.

MR. KRUM: Mr. McEachern attempted to extort Mr. Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter, you need to go resolve your disputes with your sisters and we're going to reconvene at 6:00 o'clock and if you don't you'll be terminated. Now, there's no dispute about that. We have in evidence the testimony --

THE COURT: I understand that that's one of your claims of breach of fiduciary duty. But I'm trying to determine if there was any additional evidence, other than those items that are those bullet points you put in the brief,

which are on pages 5 and 6 of your supplemental opposition, that goes to Mr. McEachern. And then I'm going to ask you the same question for Mr. Gould and Ms. Codding and Mr. Wrotniak.

MR. KRUM: Your Honor, as a threshold matter, the presumption can be rebutted by showing conduct in derogation of the presumption. It's not simply a interest or disinterested phenomenon, cite Shoen. Let me be clear. I don't want to talk past you. The other side argues there are only two circumstances in which interestedness matters. Well, that's belied by Shoen. It says, "Business judgment rule pertains only to directors whose conduct falls within its protections. Thus, it applies only in the context of a valid interested director transaction --" that's 138 -- 78.140, excuse me "-- or the valid exercise of business judgment by disinterested director in light of their fiduciary duties." And to be a valid exercise, Your Honor, it has to be made in the interest of the corporation.

So Mr. McEachern -- let me go through the list mentally. He attempted to extort Mr. Cotter to resolve the trust disputes in favor of the sisters, he voted to terminate -- he decided not to terminate after he understood an agreement had been reached to resolve those disputes. And when that didn't come to pass he voted to terminate. He, along with Mr. Gould, chose the wishes of the controlling shareholders. Rather than to complete the process he had set

up, they aborted the CEO search. So, Your Honor, that's squarely within the Shoen language of manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the person doing the controlling.

Now, I heard you. You view that as a fiduciary breach.

THE COURT: An allegation of a fiduciary duty breach.

MR. KRUM: Allegation of fiduciary duty breach, right. But that's -- if proven, that rebuts the presumption, and off we go.

I skipped over Mr. McEachern's role in involuntarily retiring Mr. Storey. Mr. McEachern, together with Mr. Adams and Mr. Kane, in October and November -- September or October I guess it was of 2015 comprised the ad hoc first time one time special nominating committee. That committee had two roles. One was to tell noncompliant director Timothy Storey that he wasn't going to be renominated, and they explained to him that the sisters, who controlled the vote, had told him they weren't going to vote to elect him so he could either resign and get a year's benefits of some sort or just be left off.

What else did that committee do? They approved Judy Codding and Michael Wrotniak. Did they undertake to search for candidates? No. Did they do anything that one would do

as a director of a nominating committee to identify and recruit directorial candidates? No. What did they do? They did what they were asked and told. Ellen Cotter gave them Judy Codding, good friend of Mary Ellen Cotter, the mother, with whom Ellen Cotter lives, and Michael Wrotniak, husband of Patricia Wrotniak, one of Margaret Cotter's few good friends. And they obviously did virtually nothing, because promptly after the company announced Ms. Codding had been added to board a shareholder brought to their attention there were lots of Google articles that raised questions about Ms. Codding's relationship with her prior employer and the prior employer's conduct.

So on the nominating issue, Your Honor, on the board stacking our view is that all evidences loyalty to the controlling shareholders. And that, Your Honor, would be somewhere in the range of lack of independence or disinterestedness.

THE COURT: So, Mr. Krum, if we're going to get through all the motions this morning I need you to wrap up. Because I think I have all the information I need on Motion for Summary Judgment Number 1.

MR. KRUM: Okay. Certainly, Your Honor.

So just to finish the bullet points which you brought to my attention, these directors, Kane, Adams, McEachern, they're all on record dating back to the fall of

2014 that, yes, we should find a position for Margaret Cotter at the company so she can have health insurance, but, no, she can't be running our real estate. Well -- that's in the emails we have in the evidence actually, Your Honor, the first time around. And there's some more from Mr. Gould or McEachern. We had some additional testimony that we added this time. And so what happens? Ellen Cotter is made CEO after the aborted CEO search, she says, I want Margaret to the have the senior executive position, for which she has no prior experience and no qualifications. And what do these people do as committee members and board members? They say, where do we sign.

So, Your Honor, it's an ongoing, recurring, pervasive lack of independence or disinterestedness. And the conclusion of that, Your Honor, of course, was by what they did in response to the offer -- and I've sort of wrapped up the whole thing without talking about the law I intended to discuss -- and that is they ascertained what the controlling shareholders wanted to do and they did it in an hour-and-twenty-five-minute telephonic board meeting.

I didn't discuss what I intended to discuss, but I tried to answer your questions.

THE COURT: I understand, Mr. Krum. But the briefing was very thorough, which is why I tried to hit the questions --

MR. KRUM: Understood.

THE COURT: -- because I had some questions after reading it.

So Motion for Partial Summary Judgment Number 1 is granted in part. It is granted with respect to Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak.

It is denied as to Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness of each of those individuals. As a result, they cannot at this point rely upon the business judgment rule.

MR. TAYBACK: Your Honor, is there a ruling on the aspect of the motion that goes to inability to hold the individuals personally liable for this claim?

THE COURT: For the three that I didn't grant the business judgment?

MR. TAYBACK: Correct.

THE COURT: No, you do not get a ruling to that effect.

Did you want to go to your next motion for summary judgment?

MR. TAYBACK: Yes, Your Honor.

THE COURT: And I'm trying to be consistent with the decision I made in the Wynn based upon the facts that seem to

be slightly different on the conduct of directors. I've got this thing in my head that nobody understands but me, so I'm trying to draw that line by asking questions so I can figure out where that is. Mr. Ferrario knows nobody understands but me. And I can't say it in a way the Supreme Court will understand, because they don't understand it, except for Chris Pickering, and she won't be deciding your appeal.

MR. TAYBACK: Your Honor, we have a second motion. It's Motion Number 2. It's also woven through some of the other motions. For the sake of just clarity I'll address Motion Number 2 separately, and I'll only --

THE COURT: Briefly.

MR. TAYBACK: -- briefly. I'll only say this. Even if you go to the -- well, I've certainly said my piece already, and I think you can just incorporate what I've said previously on this point, that independence I do not believe is a legal prerequisite to the invocation of the business judgment rule. Even if you look at the Shoen case, which Your Honor has discussed, where it talks about interestedness and the word it uses "interestedness," the quote there is, "To show interestedness a shareholder must allege that --" it's talking about allegations in that case "-- allege that a majority of the board members would be, quote, 'materially affected' either to benefit or detriment by a decision of the board in a manner not shared by the corporation and the

stockholders." To the extent there is a question of independence, it's not the generalized allegations that I think pollute the claims here, the transaction-by-transaction claims that the plaintiff seems to be asserting. You can't just say independence is lacking because there's -- one of the directors favored one of the board members versus one of the others, favored the sisters versus the brother. You have to show that there's a material impact in the transaction itself that was being voted upon, and that's the contention that we're making with respect to independence and how plaintiff's claims, all of them against all of the individual defendants transaction by transaction should fail under a summary judgment standard.

With that I'll stop, and then I'll allow him to address it, and then I've got on Motion Number 3.

THE COURT: Okay. Mr. Krum, anything else on Motion Number 2?

MR. KRUM: Just briefly, Your Honor, because I think we have a fundamental -- I'm going to repeat myself in one respect -- misapprehension of law. This is not a check-the-box exercise.

THE COURT: No, it is not.

MR. KRUM: So in Shoen the court says, "Thus, as with the Aronson test, under the Brehm test, director independence can be implicated by particularly alleging that

the directors' execution of their duties is unduly influenced, manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the person doing the controlling."

Now, we know that's a demand case, but that doesn't change the law, it just changes the application of the law. And so the point isn't any more complicated than what it said elsewhere in Shoen, and that is "Directors' discretion must be free from the influence of other interested persons."

So Motion Number 2 is -- it's nonsensical, because that has to be assessed based on facts and based on the particular application. You just did it with respect to Number 1. And so it doesn't work that way. And the -- in Rails the court said, of which Shoen is cited with approval, "Directorial interest exists whenever divided loyalties are present." And we have this ongoing set of transactions that entail furthering and protecting the interests of the Cotter sisters. That, Your Honor, is a perfect example of circumstances that show divided loyalties. Thank you.

THE COURT: Thank you.

Motion for Summary Judgment Number 2 is granted in part. To the extent that you asked me to make a determination as to whether there has been a showing of a lack of disinterestedness there is a lack of disinterestedness for Margaret Cotter, Ellen Cotter, and Guy Adams.

With respect to the other directors who were involved in the motion there does not appear to be sufficient evidence presented to the Court to proceed with a claim of lack of disinterestedness.

Okay. That takes you to Number 3.

MR. TAYBACK: Your Honor, with respect to the Motion for Summary Judgment Number 3, which relates to what's called the patent vision expression of interest --

THE COURT: Yeah.

MR. TAYBACK: -- there are --

THE COURT: The unaccepted offer which may not have been a real offer.

MR. TAYBACK: Not may not have been. Was admitted by plaintiff --

THE COURT: Eh, you know.

MR. TAYBACK: Was admitted by the plaintiff was nonbinding expression of interest that could have been withdrawn or rejected at any point in time. Moreover, when you look -- that in and of itself disposes of the claim, because there are no damages that flow from that. There cannot be. And that Cook case, which is a Delaware case, but the Cook case really makes that clear.

THE COURT: I thought I wasn't supposed to look at Delaware law according to you. You know the legislature can't tell the court what it's allowed to look at.

MR. TAYBACK: And I did know that.

THE COURT: Okay.

MR. TAYBACK: I'm encouraging you to look at it.

THE COURT: I'm looking at all sorts of things, but I'm trying to interweave it into the legislative intent related to business judgment and the protections that we should give to officers and directors in Nevada.

MR. TAYBACK: Yeah. And I think what it is is it's factually analogous. It's factually analogous.

THE COURT: Right. I just had to give you a hard time. Anything else you want to tell me?

MR. TAYBACK: The only other thing that I would tell you is that when you look at what it is that the board members can look at with respect to the consideration of potential change of control overtures, call it expression of interest or anything else, it's nonexclusive. It says they may consider any of the relevant facts. And here the undisputed evidence is that they did consider a lot of relevant facts, including the views of the plaintiff, the views of the two Cotter sisters, including the presentations of the board. And they're entitled to rely upon that. And the reasonableness of the decision is not something that can be second guessed at this juncture based upon the showing that plaintiff has made.

THE COURT: Mr. Krum. Let's skip past a couple of those arguments and focus on a different issue. Other than as

evidence of breaches of fiduciary duty, do you have any claim of specific damages to the failure to accept the unsolicited offer?

MR. KRUM: Well, first, Your Honor, the notion that it's nonbinding and therefore it cannot result in damages is belied --

THE COURT: No. I asked you a very direct question.

MR. KRUM: I'm sorry.

THE COURT: Do you have damages that you have provided me evidentiary basis for strictly related to the failure of the company or the directors to accept the unsolicited offer?

MR. KRUM: Mr. Duarte Solis speaks to that in his expert opinion which was the subject of a motion in limine you denied in October of last year.

THE COURT: I know. But I'm asking you a question. Do you have specific evidence of damages related to the decision by the board not to accept the unsolicited offer?

MR. KRUM: No. The answer I have is the one I just gave, Your Honor.

THE COURT: All right. So that's the only answer you have. Okay. Anything else you want to tell me?

MR. KRUM: I just wanted to say again on law, different point, though, intentional misconduct, one of the ways that occurs is where the fiduciary acts with a purpose

other than advancing the best interests of the corporation. I think the evidence on this subject, Your Honor, the offer raises a question of fact, a disputed question of material fact as to whether that's what the directors did.

Another category of intentional misconduct is where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. That is a pervasive and recurring phenomenon here, and I submit, Your Honor, with respect to the so-called offer that's what happened. So the point is, as I said before on the offer in particular, Your Honor, it sort of bookends this whole sequence of events, starting with the seizure of control. And you've read the papers, so I'll leave it at that.

THE COURT: Anything else?

MR. KRUM: No.

THE COURT: Okay. Because of the failure of damages related to an unenforceable, unsolicited, nonbinding offer, I am granting the motion.

However, that does not preclude the plaintiff from utilizing that factual basis for claims of a breach of fiduciary duty. Okay?

MR. TAYBACK: Or for other alleged -- to prove other alleged breaches you're saying it might be admissible as evidence.

THE COURT: Well, it may be additional evidence of breach of fiduciary duty. But they don't get to claim any damages from it, since they haven't established damages related to that because of the legal issues related to the nature of the offer.

So what is your next motion for summary judgment, if any? I think there were six.

MR. SEARCY: Your Honor, I'm addressing Motion for Summary Judgment Number 5. That relates to the CEO search. And --

THE COURT: Ready for me to say denied?

MR. SEARCY: If you'll let me --

THE COURT: You can talk, Mr. Searcy, but we're leaving here in 25 minutes whether you guys are done or not.

MR. SEARCY: All right. Well, if you're going to -- before you say denied then let me just address a few of the points in it. If you're going to say granted, then I'll certainly sit down.

THE COURT: I'm not going to say granted.

MR. SEARCY: The point, Your Honor, is that there's no dispute on the material facts here. There was a process that was undertaken by the board here to appoint a CEO. The board appointed a special committee, the special committee hired a search firm, that search firm went out and got information, they interviewed candidates, those candidates

were selected by the search firm Korn Ferry, and they were considered along with internal candidates. The board -- or the committee, rather, interviewed Ellen Cotter and decided that she was the best candidate, and the board agreed with that decision. And in the context of the law here you have a majority of disinterested directors who agreed with that decision. There's a presumption that all of this was conducted in good faith. There hasn't been a rebuttal of the presumption here, Your Honor, and, as a result, the motion should be granted.

Are there particular issues, though, that I can address for Your Honor?

THE COURT: Not that will cause you to be able to get me to change my mind on denied.

MR. SEARCY: Okay. Are there any that I can at least make an effort on, Your Honor?

THE COURT: Nope.

MR. SEARCY: Thank you, Your Honor.

THE COURT: All right. So that motion is denied.

Can we go to Number 6.

MR. SEARCY: Number 6 is mine, as well.

THE COURT: This has to do with the special bonus to Mr. Adams.

MR. SEARCY: That's correct, Your Honor. There are three main issues here. One has to do with the exercise of

options, and in that case there was an executive committee that considered those options. There's no doubt, no dispute that that was an existing plan, that the committee received advice from counsel, and approved of the -- approved of the exercise of the options.

THE COURT: Okay. Anything else?

MR. SEARCY: In addition to that -- and that's -- again, that is an exercise that is presumed to be done in good faith and especially here, where the statute provides that you can obtain information. And that's what the committee did.

In addition to that, Your Honor, there's the issue of the payment to Mr. Adams that you just raised. That again was approved by the board, approved by unanimous board who were disinterested in the subject and are entitled to business judgment on that subject.

And finally, with respect to Margaret Cotter's appointment it's certainly within the board's discretion to decide that someone who's worked for the company and been affiliated with the company for approximately 20 years or so has the qualifications to take on that job. And as Mr. Tayback said, hiring someone to fill a role is certainly -- that's an operational decision that's within the discretion of a board of directors, and certainly they're entitled to be able to exercise the business judgment when it comes to that, especially here. And with all of these decisions, Your Honor,

you're talking about a decision made by a majority of disinterested directors, directors that you've found to be disinterested.

THE COURT: Some directors I found to be disinterested.

MR. SEARCY: Well, for those directors, though, Your Honor, that you found to be disinterested, they constitute a majority of the decision makers here. And --

THE COURT: Well, they're protected. Those people are protected.

MR. SEARCY: And exercising their business judgment they approved these decisions.

THE COURT: Okay. Anything else?

MR. SEARCY: Thank you, Your Honor. That's it.

THE COURT: Denied.

So you had Number 4 I think we didn't get to. Was Number 4 reserved for this time, or had I ruled on it previously?

MR. TAYBACK: Your Honor, you --

MR. KRUM: You ruled on it previously.

THE COURT: Okay. So that takes me to your motions in limine. There were two that I think are important. One is Mr. Gould's motion in limine to exclude irrelevant and speculative evidence.

MR. RHOW: Your Honor, can I speak on this one?

THE COURT: It's your motion.

MR. RHOW: Thank you, Your Honor.

MR. FERRARIO: Hey, come on. This is his first time.

MR. RHOW: I feel honored to actually --

THE COURT: Here's my first question.

MR. RHOW: By the way, is it tentative to grant? I'd like to know that first.

THE COURT: My first question for you is one that I'm going to ask all the people in motions in limine. Did you have an opportunity to meet and confer with opposing counsel before you filed the motion to see if there were areas of agreement?

MR. RHOW: The answer is I don't think we did.

THE COURT: You know, we have a rule.

MR. SEARCY: I'm going to have to disagree with Mr. Rhow. We actually did meet and confer with Mr. Krum on the phone.

MR. RHOW: Oh. I'm sorry.

MR. SEARCY: Mr. Rhow wasn't part of the meet and confer, but his associate, Shoshana Bannett, was.

THE COURT: Oh. Okay. All right.

MR. RHOW: Okay. I had looked at -- I should have looked at Mr. Searcy.

THE COURT: Because usually -- usually I get a

declaration that tells me, we met and conferred on this date --

MR. RHOW: Correct.

THE COURT: -- so that I can then gauge whether somebody's being unreasonable or not. So it's your motion.

MR. RHOW: Thank you, Your Honor.

I think the motion was short and sweet on purpose. During the deposition of Mr. Cotter, Jr., and it lasted days and days and days, and throughout the questioning it was quite clear that he was testifying based on not what he saw, what he heard, what he observed; he was literally saying, here's what I think -- thought at the time, here's what I was thinking Mr. Gould was thinking and others were thinking and so therefore I believe the claim is sufficient because of my subjective belief as to what other directors were thinking. If that's going to be part of this trial, first, this trial's not going to be four weeks, it's going to be eight weeks; but, second, there's nothing in the law, there's nothing based on common sense that tells you that what the subjective beliefs of the plaintiff are none of that is relevant, none of that is relevant under the law, none that is relevant under common sense. So to streamline this case, if he's going to talk about what he saw, what he heard, certainly that's admissible. But if he's going to talk about what he believes, that's subjective and should not be part of this trial.

THE COURT: Thank you.

Ms. Levin, is this your motion?

MS. LEVIN: Yes, Your Honor.

As we said in our opposition, we believe this is an improper and premature motion just because Mr. Cotter obviously will be here at trial testifying.

THE COURT: So you want me to rule on the questions and answers as they're given. So if somebody asks him, well, did you talk to Mr. Adams about what he was going to do, he can then tell me what he said.

MS. LEVIN: Correct, Your Honor.

THE COURT: Well, what did you think he meant? That's speculation.

MS. LEVIN: Unless, of course, he's got a basis for his belief. And I think that some of the deposition testimony, those responses were invited by the very questions. So to the extent that he has a basis to believe -- you know, to state his belief I think that, again, it should be determined on the question by question.

THE COURT: Okay. So the motion is denied. It's premature. It's an issue that has to be handled at trial based upon the foundation that is laid related to the issue.

So -- and plus you won't be here. You won't be here; right?

MR. RHOW: I'm sorry?

THE COURT: You won't be here; right?

MR. RHOW: I don't know. I hope not. Is Your Honor saying I should not be here or that my client won't be here then?

THE COURT: That's what the business judgment ruling deals with; right? So I granted your client's business judgment rule motion. Well, you know, he may be a witness.

MR. KRUM: I'm sorry, Your Honor. Did I miss something?

THE COURT: What?

MR. KRUM: We haven't had that motion argued yet, Mr. Gould's motion.

THE COURT: I included Mr. Gould because you briefed it relate to all of the motions for summary judgment and I asked you questions about all the directors, except Mr. Adams.

MR. KRUM: I'm sorry. I didn't understand that, Your Honor. I didn't answer as to Mr. Gould.

THE COURT: Do you want to tell me an answer to Mr. Gould?

MR. KRUM: I do, because we have a hearing set for the 8th on his motion, which is why misunderstood that.

THE COURT: I used it because it was included in your opposition, the supplement to those motions.

MR. KRUM: That was confusion that we created, and I apologize. The reason we did that, Your Honor, is that we

didn't have an opportunity to prepare a Gould brief, but we didn't want to be accused of doing nothing. And some of the evidence in those motions in our view did relate to Gould, and we therefore put him on there.

That said, he filed two pieces of paper, they asked me if we could have the hearing today. I told them no, I wanted to respond. So -- but let me try to answer your question with respect to Mr. Gould. So we start, Your Honor, as we do, with the threat to terminate and the termination. And I respectfully submit --

THE COURT: I will tell you that on your Mr. Gould you've got the same list that we've already talked about. What I'm trying to find out is -- and I understand the threat is part of what you've alleged related to Mr. Gould along with the other six or seven bullet points that are on pages 5 and 6 of the opposition. Is there something else related to Mr. Gould, something like you have with Mr. Adams that would establish a lack of disinterestedness?

MR. KRUM: Let me answer, and then you'll decide.

THE COURT: Yeah. That's what I'm trying to pull out of you.

MR. KRUM: So, for example, with respect to the termination Mr. Cotter raised the question of Mr. Adams's independence before a vote was taken, and Mr. Gould asked Mr. Adams, well, can you tell us about that. And Mr. Adams got

mad and said in words or substance, no. And Mr. Gould said, okay. That, Your Honor, is a perfect example of a failure to act in the face of a known duty to act. We're not talking about someone who is unfamiliar with fiduciary obligations here. Mr. Gould is a corporate lawyer.

So we get to the -- we get to the executive committee, same meeting, June 12. Ellen Cotter says, I want to repopulate the executive committee, Mr. Gould, would you like to be on it. His testimony, his deposition testimony was that he declined because he knew that it would take a lot of time. Now, if he knew that it would take a lot of time, Your Honor, how is it that it didn't occur to him that this was what the sisters were doing in October of 2014 when they were trying to circumvent the board?

THE COURT: These are all on your list of bullet points.

MR. KRUM: Okay.

THE COURT: What I'm trying to find out is if there's anything that's not on the list of bullet points that are on pages 5 and 6 of your supplemental opposition that relate to Mr. Gould. Because when I made my ruling I was including Mr. Gould as someone because I specifically excluded Mr. Adams and the two Ms. Cotters.

MR. KRUM: Bear with me. I'm mentally working.

THE COURT: I'm watching you. I'm watching him

work.

MR. KRUM: So I don't think we had the executive committee there, but I just said that.

So then, Your Honor, the composition of the board. So Mr. Gould was not a member of the nominating committee. His testimony was that, on a Friday Ellen Cotter called me and asked me if she could come to my office and she and Craig Tompkins came to my office and showed me Judy Codding's resume and said we were going to have a board meeting on Monday to put Ms. Codding on the board. And Bill Gould said, this isn't sufficient time, I can't do my job. But he voted for her nonetheless. That, Your Honor, is the same thing that happens over and over and over again with Mr. Gould. That is, in the face of a known duty to act he chooses not to do so. That is intentional misconduct. Your Honor, you've denied the motion with respect to the CEO search. That is Mr. Gould. It is Mr. Gould and Mr. McEachern who are the ones who together with Margaret Cotter aborted the CEO search. Literally the last time they spoke to Korn Ferry was the day Ellen Cotter declared her candidacy. After the what did they do? They told Craig Tompkins to tell Korn Ferry to do no more work. And Mr. Gould, he was the one whose name was on a press release saying, Ellen Cotter was made CEO following a thorough search. She was not made CEO as a result of that search. She was made CEO in spite of that search.

THE COURT: Okay. So all of those are issues that I'm aware of considered when I had previously included Mr. Gould in the granting of the summary judgment related to the business judgment rule. The fact that I am denying certain issues related to other summary judgments does not diminish the fact that the directors that I found there was not evidence of a lack of disinterestedness have the protection the statute provides to them.

Okay. So let's go back to Mr. Cotter's Motion Number 3. This is related to the coach.

MS. LEVIN: Your Honor, this motion should be denied because the hiring of High Point, that's post hoc --

THE COURT: It's your motion. You wanted it granted.

MS. LEVIN: I'm sorry. You know, the Court -- I'm sorry. The Court should exclude the after-acquired evidence on the -- in the form of any testimony or documents relating to the hiring of High Point, because the breach of fiduciary duty claims, they are -- they concern what the directors did and knew at the time that they decided to fire the plaintiff. So we cited the Smith versus Van Gorkom case, which holds post hoc data is not relevant to the decision.

So at the time that they made this decision they did not have nor did they rely on the High Point evidence. So therefore the after-acquired evidence cannot be as a matter of

law relevant to their decision to terminate the plaintiff. That would amount to a retroactive assessment of his ability, which are not at issue. And I think that that's the -- you know, the --

THE COURT: The problem I have with that is part of what your client's position has been in this case is he is suitable to be acting as the CEO, and if there is information that is relevant to that suitability, that's where I have the problem on this. I certainly understand from a decision-making process that that information was not in the possession of anyone who was making the decisions at the time. But given the affirmative proposition by your client that he is suitable to CEO, I have concerns about granting the motion at this stage.

MS. LEVIN: Well -- okay. So -- but with respect to the decision which you can agree that they could not use that evidence to show that after the fact they made the right decision because of the after --

THE COURT: No. That's a problem if your client is saying he's suitable and therefore he should be able to be CEO. Because part of what he originally asked for was to make them make him be CEO.

MS. LEVIN: All right. And here at issue I believe it's the -- we're seeking to void the termination.

THE COURT: I know.

MS. LEVIN: So -- but I think that even -- and I think that in that respect if you were inclined to allow it on his suitability, the problem then becomes first of all the hiring of consultant doesn't necessary mean that somebody is unsuitable.

THE COURT: Absolutely. It may mean they're trying to get better.

MS. LEVIN: Exactly. And I was thinking -- when I read these facts I was thinking about the analogy. If you were a professional runner and you hire a runner coach --

THE COURT: Coach.

MS. LEVIN: -- doesn't mean that you're not a good runner. You may --

THE COURT: You want to be better.

MS. LEVIN: Exactly. So that was --

THE COURT: I understand.

MS. LEVIN: So and the other thing is that, you know, the opposition argues, well, but it looks like in his own assessment he wasn't good for it. And that, of course, again doesn't follow from that. And so then we get into the category of even if there's a remote relevance, Your Honor, then whatever that relevance is would be substantially outweighed by the unfair prejudicial effect that that would cause. Because, again, his assumed thoughts, then the jury could think like, well, you know, he thinks he's not qualified

because he hired a coach. So all in all I believe that it's unfairly prejudicial.

Just on the point of the unclean hands defense, again they are citing the Fetish, Las Vegas Fetish case. But, again, the unclean hands defense requires egregious misconduct and serious harm caused by it. And they haven't further substantiated that. So with that being said, our position is to exclude it for those reasons.

THE COURT: Thank you.

MS. LEVIN: Thank you.

THE COURT: Mr. Searcy --

MR. SEARCY: I'll address that.

THE COURT: -- I am inclined to deny the motion. But if the evidence is admitted at trial, to admit it with a limiting instruction that says that it only goes to suitability.

MR. SEARCY: And, Your Honor, I think that we're okay with that.

THE COURT: Okay.

MR. SEARCY: I just want to clarify that we can certainly ask Mr. Cotter about the Alderton documents --

THE COURT: You ask him about it, then I'm going to give the limiting instruction, and we'll probably give it five times or six times, and it'll be a written instruction, so it's part of it. And if the plaintiff doesn't want me to give

the limiting instruction because they believe that calls to much attention to it, they can, of course, waive that request.

MR. SEARCY: Thank you, Your Honor.

THE COURT: Okay. So think about whether you really want the limiting instruction, come up with your text for the limiting instruction, and then we'll talk about it when we have our final pretrial conference as to whether you think you really want it.

That takes me to the last motion in limine by Mr. Cotter, which relates to the ability of Mr. Ferrario to participate at trial, also known as Motion in Limine Number 2.

MR. KRUM: Thank you, Your Honor. I enjoy this very much, showing that perhaps I've spent too many years in the corporate governance jurisprudence. Three points, and it's not complicated. First, as a general rule a nominal defendant is not allowed to introduce evidence and defend the merits of claims against the director defendants.

Second, the handful of exceptions to that are exceptions where it's a serious fundamental corporate interest that is challenged by the derivative suit, a reorganization or restructuring, an effort to appoint a receiver. None of those exist here.

Third, if you disagree with us on all of that, there's a question of unfair prejudice and waste of time. And, you know, the individual defendants are represented by

capable counsel. They don't need a second lawyer carrying their water. And for a jury to have someone who represents the company asking questions that imply conclusions adverse to the plaintiff is, if not unfairly prejudicial, something beyond that.

So that's the argument in a nutshell, Your Honor. If you have any questions, I'd be happy to answer them.

THE COURT: Nope. Motion's denied.

All right. So let's go to your Motion in Limine Number 1 regarding advice of counsel. I forgot we need to hit that one. Ms. Levin.

And then we're going to go to the Chief Justice Steel that I'm not going to really hear, because I didn't give you permission to refile.

MS. LEVIN: Your Honor is familiar with the share options, so if I talk about the share option, I don't --

THE COURT: I am.

MS. LEVIN: Okay. Well --

THE COURT: And also with the drama related to the production and the creation and all the stuff about the advice of counsel issue.

MS. LEVIN: Okay. I'll just --

THE COURT: But I also am aware the Nevada Supreme Court has told us on a business judgment issue we cannot reach behind the advice of counsel except to make a determination as

to essentially process issues, how the attorney was hired, what the scope of the retention was, and those kind of issues, as opposed to the actual advice.

MS. LEVIN: That's true, Your Honor. And so our arguments are really twofold. Number one is that Adams and Kane, who were two of the three directors on the compensation committee, they testified, as the Court found in its October 27, 2016, hearing, that they relied solely on the substance of advice of counsel to determine whether the authorization decision to authorize the estate to invoke the option was proper. So, unlike in Wynn or in Comverge, on which the defendants rely, they did not rely on anything else. So if they are asked at trial to explain why they authorized the option, they must rely on that legal advice.

So the second point is that the defendants waived the attorney-client privilege by partially disclosing attorney-client privileged information. Now, they're saying -- or RDI says in the opposition that individual directors cannot waive the privilege.

THE COURT: That's the Jacobs versus Sands case.

MS. LEVIN: Exact, Your Honor. And I agree with that. But, of course, RDI can only act through its officers and directors.

THE COURT: That's the Jacobs versus Sands case.

MS. LEVIN: And the current officer -- and I think

in particular if you look at the Exhibit 4 that we attached to our motion, is that that email was produced by Ellen Cotter, who is a current CEO and is an officer and director, and she --

THE COURT: I understand.

MS. LEVIN: So, in other words --

THE COURT: And then Mr. Ferrario clawed it back.

MS. LEVIN: Right. So she produced it, and so there's a Supreme Court case that says, "The power to waive the corporate attorney-client privilege rests with the corporation's management and is usually -- and is normally exercised by its officers and directors." And that's what happened here.

So I think especially Exhibit 4, but even Exhibit 2 and 3, the 2 and 3 they raise the legal issues. 2 and 3 identify the legal issues of whether there was a reason why Ellen Cotter could not exercise the option and whether enough -- whether the trust documents did not pour over -- the share option didn't pour over into the trust. But Exhibit 4 specifically seeks legal advice from the company attorney and as to the legal rights of the estate to exercise the option in light of the proxy language. So that is -- under our statute is an attorney-client communication for the purpose of obtaining legal advice. So they partially disclosed that, so we believe there's a waiver issue. And under Wardleigh you

cannot use the attorney privilege both as a shield and a sword, which is what they're now doing, is because what they're going to say is, well, we partially disclosed but you cannot find out what it was. But even the very --

THE COURT: But that's the Nevada Supreme Court who's made that decision, not the rest of us. They were very clear that we're not allowed to get behind that.

MS. LEVIN: Correct. But one thing that the Wynn decision did not decide was the waiver issue. And that was in Footnote 3 of the decision.

THE COURT: I made that decision separately after that came back. But that's a case by case, and I haven't made that decision in this case. In fact, my belief is you guys have a writ pending on this issue still. Right?

MR. KRUM: I think the writ pending is on a different privilege issue, Your Honor.

THE COURT: Okay.

MS. HENDRICKS: Your Honor, the writ relating to this issue was filed by RDI, and the Supreme Court actually came back and said the facts were analogous to Wynn and it needed to make a decision, and that was shortly after you did make the decision when we were back before you on it.

THE COURT: Yeah. We had a hearing.

MS. HENDRICKS: And we had the supplemental briefing.

THE COURT: Yep. Okay. So anything else on this one?

MS. LEVIN: Only -- the only thing is that the partially disclosed privileged emails themselves show that the board had information that would cause reliance on advice to be improper. So that would --

THE COURT: Okay. So your motion's denied. Come up here. I'm going to give you these. These are your I believe documents you actually want sealed. Since I granted your motion, it was on the calendar today, hopefully you can work out with the Clerk's Office so they will actually take the sealed documents and put them so they're part of the record in some way.

MS. LEVIN: And I brought them with me, too.

THE COURT: Yeah. Good luck. You've got to do it at the counter.

MS. LEVIN: Okay. Thank you.

THE COURT: Okay. So I am declining to hear again the motion in limine on Chief Justice Steel. I've previously made a ruling on that. I've reviewed your brief, and there's nothing in it that causes me to change my mind.

I have already granted your motions to seal and redact. It was on calendar for today.

And now we need to set our final pretrial conference. I usually do it the week before.

MR. KRUM: The week before is fine, Your Honor.

(Pause in the proceedings)

THE COURT: The week before is fine?

MR. KRUM: The week before is fine, Your Honor.

THE COURT: What day are you guys arguing in the Supreme Court?

MR. TAYBACK: That's the 3rd.

THE COURT: 3rd. So do you want to come in on --

MR. TAYBACK: 4th?

THE CLERK: [Inaudible].

THE COURT: No, I'm not seeing them on January 2, you're seeing them on January 2.

How about on January 5 at 3:00 o'clock?

MR. TAYBACK: That's good. Thank you.

MR. KRUM: Perfect.

MR. FERRARIO: Thank you, Judge.

THE COURT: That will be your final pretrial conference. At your final pretrial conference we're not going to bring exhibits, because you're already going to deal with that. But you are going to bring any jury instructions, you're going to exchange your draft jury instructions. If you have limiting instructions you think are appropriate, try and have those, as well. And we're also going to deal with any exhibits that you want in a notebook for the jury. The only reason I suggest that is sometimes documents that we show on

screens aren't easily able to be seen by a juror. There's contract documents and things you may want. If there are selected items you want to have in a jury notebook, it will be a single jury notebook. It will be not more than 3 inches. So whatever we put in it has to fit in the 3 inches. And so if you have things you think you want included in that, we'll talk about that. And you're going to -- I will make final decisions on voir dire questions at that time. I encourage you to exchange them a week ahead of time.

MR. KRUM: Your Honor, with respect to exhibits we have a date this week of Wednesday or Thursday for our exhibit list. I think in view of today's developments it would be a good idea to push that back to next week.

THE COURT: You guys need to get working on it.

MR. KRUM: No, we're working on it.

THE COURT: It takes a lot longer than you think it does.

All right. Anything else that I missed?

MR. FERRARIO: There may be some utility to that, Mark, in light of the rulings of the Court today, because the complexion of the case has changed.

MR. KRUM: Well, that's -- we're working on it. We understand that, Your Honor. So may we have until Wednesday of next week you think, Mark?

MR. TAYBACK: Yeah, that's fine.

THE COURT: I still need to see representatives from those parties who remain in the case at the calendar call on December 18th. If you are out of town, I do not do call-ins for calendar calls, Mr. Krum, so just make sure Mr. Morris and Ms. Levin know whatever it is they need to say.

I am going to be asking you whether given the rulings I made today it has changed the estimate that you provided to me through Ms. Hendricks on December 4th as the amount of time for trial. Because I need to negotiate for space, and knowing the time that I need is important for me in my space negotiations.

MR. RHOW: Your Honor, sorry. One point of clarification as to Mr. Gould specifically. He is out of the case entirely?

THE COURT: Well, I granted the motion on the business judgment for him. My understanding is that is the only way that you would be involved, because there are no direct breach of contract claims against you. If there were other types of claims against you that were not protected by the business judgment rule, you might not be out. But I didn't see that in the briefing. But I don't know your case as well as you do.

MR. RHOW: Assuming that's the case, I just want to make sure that no one's going to sanction me if I don't show up.

THE COURT: Do you think you have any remaining claims against Mr. Gould given my ruling today?

MR. KRUM: Your Honor, probably not. But I'll go back through it.

THE COURT: If you could communicate if you think there are any, and then I'll have to handle that on a supplemental motion practice.

MR. RHOW: Understood, Your Honor.

THE COURT: Okay. So the people who I anticipate will be here only in the capacity as witnesses would be -- okay, I've got to go back to this list -- Kane, McEachern, Gould, Codding, Wrotniak. That's all of them. So the people who remain parties are Cotter, Cotter, Adams, and then Mr. Cotter.

MR. TAYBACK: Yes, Your Honor. I understand that.

THE COURT: All right. So see you on the 18th.

MR. TAYBACK: Thank you, Your Honor.

MR. KRUM: Thank you.

MR. EDWARDS: Your Honor --

THE COURT: Yes, Jim.

MR. EDWARDS: -- on the 2nd is local counsel going to be here for the exhibits? Do you want local counsel here?

THE COURT: Counsel does not need to be here. They can send paralegals. So local counsel does not need to come sit through it if they don't want to.

MR. EDWARDS: Okay.

THE COURT: But it may be helpful if local counsel is going to be intimately involved in the process of doing it for you to have someone here. But I leave that to work out with your people.

Anything else?

MS. HENDRICKS: Your Honor, on the exhibit list did we get an extra week, then, so we kind of work through these issues?

THE COURT: I'm not involved in the exhibit list issue. That's you guys on 2.67. I'm out of that.

MR. FERRARIO: Thank you, Your Honor.

THE PROCEEDINGS CONCLUDED AT 12:00 NOON

* * * * *

CERTIFICATION

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

AFFIRMATION

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

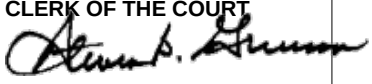
FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

12/12/17

DATE



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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR. individually and derivatively on behalf of Reading International, Inc., Plaintiffs, v. MARGARET COTTER, *et al*., Defendants. AND READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant.	Case No.: A-15-719860-B Dept. No.: XI Case No.: P-14-082942-E Dept. No.: XI Related and Coordinated Cases **BUSINESS COURT** **THE INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OR CLARIFICATION OF RULING ON MOTIONS FOR SUMMARY JUDGMENT NOS. 1, 2, AND 3** Judge: Hon. Elizabeth Gonzalez Date of Hearing: December 28, 2017 Time of Hearing: 9:00 a.m.

DECLARATION OF COUNSEL NOAH HELPERN

I, Noah Helpern, state and declare as follows:

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

2. Attached hereto as **Exhibit A** is a true and correct copy of the transcript from the October 19, 2016 deposition of Plaintiff's expert, Myron T. Steele.

3. This declaration is made in good faith and not for the purpose of delay.

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

Executed on December 26, 2017, in Los Angeles, California.

/s/ Noah Helpern
Noah Helpern

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INTRODUCTION

At the hearing held on December 11, 2017, the Court determined that Plaintiff James J. Cotter, Jr. failed to raise a genuine issue of triable fact as to the disinterestedness and/or independence of five of his fellow Reading International, Inc. ("RDI") directors: Michael Wrotniak, Judy Codding, Douglas McEachern, Edward Kane, and William Gould.[1] In light of Nevada's strong business judgment rule and consistent with the contours of well-established law, the Court granted summary judgment in favor of these directors on all breach of fiduciary duty claims asserted by Plaintiff. In contrast, the Court denied the Individual Defendants' summary judgment motions with respect to Directors Ellen Cotter, Margaret Cotter, and Guy Adams, finding that a triable issue of fact exists with respect to their disinterestedness and/or independence as to the various corporate transactions identified by Plaintiff. This was not a hasty, ill-considered decision by the Court. Rather, the Court made its ruling after affording Plaintiff over two years of extensive discovery, carefully reviewing the "2 feet" of summary judgment materials submitted by the parties, and holding multiple oral arguments on Plaintiff's ever-evolving breach of fiduciary claims. At the hearing, the Court specifically asked Plaintiff whether there were any additional facts that Plaintiff wanted the Court to consider in determining this issue. None were forthcoming.

Despite having been provided every opportunity to establish a basis for his causes of action, Plaintiff now seeks "reconsideration" of the Court's decision, particularly because it leaves only one challenged action—the RDI Board's June 12, 2015 termination of Plaintiff as CEO and President—without a majority of disinterested, independent directors voting in its favor. Plaintiff's motion should be rejected forthwith. Procedurally, Plaintiff has no basis to seek reconsideration. Plaintiff failed to comply with EDCR 2.24(a), which requires that he seek leave of the Court before filing any motion for consideration. Moreover, the Nevada Supreme Court has made clear that motions for reconsideration are to be granted "only in very rare

[1] The (lack of) merit of Plaintiff's Motion for Reconsideration with respect to Director Gould will be addressed under separate cover by his counsel.

instances" involving "new issues of fact or law." Neither are present here; Plaintiff's Motion for Reconsideration admittedly reargues what was already in evidence before the Court.

Even if the Court were inclined to revisit the merits of its decision (which is both unnecessary and unwarranted), it is plain that its ruling was not "clearly erroneous," as is required for reversal. Contrary to Plaintiff's objections of "surprise," the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence covered all claims, and their separate summary judgment motions—addressing particular issues—covered all decisions that Plaintiff has identified as independent breaches. Of course, as both the Court and Plaintiff's own expert, Myron T. Steele, have noted, Plaintiff has to establish that RDI's directors were either interested or not independent ***before*** he can proceed on the merits of any of his fiduciary duty claims against them.[2] As the record makes clear and the Court correctly found, Plaintiff has not met—and cannot meet—this burden with respect to Directors Wrotniak, Codding, McEachern, and Kane. Plaintiff's Motion for Reconsideration, which attempts to skip to the "entire fairness" of certain transactions, entirely ignores this necessary first step. For the reasons the Court previously found (which Plaintiff's motion does nothing to disturb), its December 11, 2017 ruling with respect to Directors Wrotniak, Codding, McEachern, and Kane was correct and should not be reconsidered.

ARGUMENT

I. PLAINTIFF'S MOTION FOR RECONSIDERATION IS PROCEDURALLY IMPROPER

Plaintiff's Motion for Reconsideration is procedurally defective. The Rules of Practice for the Eighth Judicial District Court state, in relevant part:

> No motions once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, ***unless by leave of the court granted upon motion thereof***, after notice of such motion to the adverse parties.

---

[2] The Individual Defendants recognize that Steele's testimony at trial is limited to what a reasonable director would do, and that he will not be permitted to offer evidence as to the requirements or standards of practice under Delaware law. Still, Plaintiff cannot ignore for purposes of this motion the opinions proffered by his own witness, as reasonably considered and applied by this Court.

EDCR 2.24(a) (emphasis added). Plaintiff did not comply with this Rule prior to filing his Motion for Reconsideration; rather than filing a motion for leave with the Court and attaching a copy of his proposed Motion for Reconsideration as an exhibit (as contemplated by the Rule), Plaintiff filed his underlying motion directly with the Court. This was improper.

The purpose of EDCR 2.24 is to assist the Court in controlling the influx of matters to which it must attend in the normal course of motion practice, such as the time required to properly review the parties' filings or hearing arguments on the merits of the matter before it and issuing an ultimate decision on the merits. These issues of judicial economy inherent in EDCR 2.24(a) are also emphasized in subsection (c) of the Rule, which provides that "[i]f a motion for rehearing is granted, the court may make a final disposition of the cause without re-argument or resubmission or may make other such orders as are deemed appropriate under the circumstances of the particular case." EDCR 2.24(c).

Plaintiff's filing of his Motion for Reconsideration without first requesting and then receiving leave of this Court to do so has initially deprived the Court of its duty and ability to make the threshold determination of whether to grant leave in the first instance. Moreover, Plaintiff's filing without leave has required the Individual Defendants' counsel to spend time formally responding to and opposing Plaintiff's Motion for Reconsideration, which they otherwise may not have been required to do if Plaintiff had followed the clear mandate of seeking leave of the Court prior to filing his motion. In light of this clear procedural defect, Plaintiff's Motion for Reconsideration should be stricken.

II. PLAINTIFF FAILS TO MEET THE NEVADA SUPREME COURT'S STANDARD FOR RECONSIDERATION

A. Plaintiff's Motion for Reconsideration Revisits the Same Facts and Same Legal Arguments Previously Raised

Even considered on its merits, Plaintiff's Motion for Reconsideration fails to meet the strict standard set by the Nevada Supreme Court for reconsideration of a court's judgment. A motion for reconsideration is not a "do over." *See Merozoite v. Thorpe*, 52 F.3d 252, 255 (9th Cir. 1995) ("Since [Plaintiff's] motion merely reiterated the arguments that he had already presented to the district court, the motion was properly denied."). Rather, the Nevada Supreme

Court has made clear that motions for reconsideration are to be granted "***[o]nly in very rare instances in which new issues of fact or law*** are raised supporting a ruling contrary to the ruling already reached." *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (emphasis added) (concluding that, because the "motion for rehearing raised no new issues of law and made reference to no new or additional facts, . . . the motion was superfluous and, in our view, it was an abuse of discretion for the district court to entertain it"). In Nevada, a district court may reconsider a previously-decided issue only if "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Constr. Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

Here, there is no new issue of fact or law raised in Plaintiff's Motion for Reconsideration that might generate a contrary ruling. This is not one of those "rare instances" in which reconsideration is appropriate, and to do so would be an abuse of discretion, negating the overriding policy in favor of finality of judgments. Instead, Plaintiff's motion is nothing more than an attempt to re-argue what was already in evidence before the Court during the summary judgment phase. Plaintiff's re-hash includes:

- An extended section focused primarily on Director Edward Kane and the RDI Board's months-long process in evaluating Plaintiff's deficient performance as CEO of RDI, which ultimately culminated in Plaintiff's termination. (*See* Mot. for Recons. at 15-21.) Plaintiff's attack cites the exact same "evidence" and repeats—almost verbatim—the same arguments that appear in Plaintiff's Motion for Partial Summary Judgment (pp. 5-8, 16-21), Plaintiff's Opposition to the Individual Defendants' Motion for Partial Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims (pp. 4-8), and Plaintiff's Reply in Support of His Motion for Partial Summary Judgment (pp. 3-7).
- The argument that "the acts and omissions of the individual director defendants must be viewed collectively, not in isolation." (Mot. for Recons. at 14-15.) In making this legal point, Plaintiff cites the same four cases in exactly the same order as in his Opposition to the Individual Defendants' Motion for Partial Summary Judgment (No. 5) re: the Appointment of Ellen Cotter as CEO (pp. 11-12).
- An attack on Director Judy Codding, who—based on an assertion contained in a declaration prepared by Plaintiff—is alleged to have voted for Ellen Cotter as permanent CEO based on her purported "view that RDI was a 'family business' of which only a Cotter should be CEO." (Mot. for Recons. at 22 (citing JJC Decl. ¶ 24).) Plaintiff previously made this same argument citing the same evidence in his Opposition to the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: Director Independence (p. 7).

- A section focused on the purportedly "aborted CEO search." (Mot. for Recons. at 22.) Here, Plaintiff does not even pretend to introduce "substantially different evidence," as required. Instead, he "respectfully refers the Court to his prior briefs and the evidence described therein and proffered therewith." (*Id.* (citations omitted).)

A party is not entitled to reconsideration simply because "he or she is unhappy with the judgment." *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001). A motion for reconsideration is not the place for "the plaintiff to 'reload and shoot again,'" *Butler v. Sentry Ins. Mut. Co.*, 640 F. Supp. 806, 812 (N.D. Ill. 1986), and it cannot "be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion." *Matter of Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983) (denying rehearing). Plaintiff's arguments are admittedly and uncontrovertibly identical to those raised during motion practice and the various summary judgment hearings before the Court. Nothing new has been added; no intervening precedent has been identified nor any "substantially different" facts adduced. The Court need not proceed any further. Reconsideration is plainly unwarranted as a matter of law. *See Bundorf v. Jewell*, 142 F. Supp. 3d 1133, 1137 (D. Nev. 2015) (denying motion for reconsideration because it "primarily rehashes the same arguments that Federal Defendants raised—or could have raised—in the earlier summary judgment briefing").

B. Plaintiff's Motion for Reconsideration Is Without Substantive Merit

Even if the Court were inclined to revisit the substance of its ruling granting judgment in favor of Directors Michael Wrotniak, Judy Codding, Douglas McEachern, and Edward Kane on all claims asserted against them in light of their disinterestedness and independence, it is plain that the Court's December 11, 2017 ruling was correct a matter of law. Plaintiff's arguments to the contrary are legally baseless and factually unsupportable.

1. The Court's Decision Was Procedurally Proper and Did Not Overlook Evidence of Any Conduct, Acts, or Omissions

Plaintiff first contends that the Court's ruling as to Directors Wrotniak, Codding, McEachern, and Kane should be reconsidered because it did not given him "proper notice and adequate time to respond," since the Individual Defendants "moved for partial summary judgment only on specific *issues*," not entire "*claims*." (Mot. for Recons. at 4 (emphasis in

original).) Plaintiff further asserts that the Court's decision was somehow "*sua sponte*," and that the Court failed to consider "additional issues not addressed in the MSJs," such as "materially misleading and erroneous board materials published in public disclosures *and* process failures." (*Id.* at 9-11 (emphasis in original).) None of Plaintiff's assertions withstand scrutiny.

First, Plaintiff's attempted distinction between "claims" and "specific issues" is meritless. Plaintiff's Second Amended Complaint generically pleaded three causes of action against Directors Wrotniak, Codding, McEachern, and Kane: (1) breach of the fiduciary duty of care; (2) breach of the fiduciary duty of loyalty; and (3) breach of the fiduciary duty of candor. (*See* Second Am. Compl. ("SAC") ¶¶ 173-192.) Due to Plaintiff's vague and obtuse pleading, the Individual Defendants consistently sought clarity from Plaintiff as to what specific RDI Board decisions he claims are actionable breaches as compared to what activities he considers to be mere evidence of entrenchment or misconduct. As a result, at the first summary judgment hearing held on October 7, 2016, the Court directed Plaintiff's counsel to "give me more information" following the completion of discovery as to the specific breaches of fiduciary duty Plaintiff is alleging. (Ex. A to the Decl. of Noah Helpern in Supp. of Ind. Defs.' Suppl. Mots. for Summ. J. (10/7/16 Hr'g Tr.) at 84:16-85:3.)

Plaintiff's counsel finally complied with this directive in opposing the Individual Defendants' Supplemental Motions for Summary Judgment, in which he set forth six "matters" that he claimed were "independently entailing or constituting breaches of fiduciary duty": (1) the threat to terminate Plaintiff "if he did not resolve [the Cotter family] trust disputes"; (2) Plaintiff's actual termination; (3) the authorization of the exercise of the 100,000 share option; (4) the permanent CEO search, which resulted in Ellen Cotter's selection; (5) the decision to hire Margaret Cotter as Executive Vice President, Real Estate Development-New York; and (6) the Board's response to the indications of interest presented by Patton Vision. (*See, e.g.*, Pl.'s Opp'n to Ind. Defs.' Suppl. Mot. for Summ. J. Nos. 1 & 2 at 5-6.) Not surprisingly, the Individual Defendants moved for summary judgment on all six of these purportedly-actionable "breaches." Contrary to Plaintiff's baseless assertions (Mot. for Recons. at 8), there was therefore no disconnect between the "*claims* for breach of fiduciary duty" against

the Individual Defendants in the Second Amended Complaint and the "*issues*" covered in their motions for summary judgment.

Second, Plaintiff was also clearly on notice that the Individual Defendants were moving for summary judgment on all claims asserted against Directors Wrotniak, Codding, McEachern, and Kane. There was no surprise "*sua sponte*" ruling by the Court, nor anything procedurally improper about its decision. Plaintiff conspicuously avoids that (i) the Individual Defendants' Motion for Partial Summary Judgment (No. 2) on the Issue of Director Independence covered ***all claims***, and (ii) Plaintiff admittedly used the ***same evidence*** to question the disinterestedness and independence of Directors Wrotniak, Codding, McEachern, and Kane in every transaction or cause of action at issue. (*See, e.g.*, Pl.'s Opp'n to Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 1-10.)

Plaintiff has advocated, and the Court has accepted,[3] a legal framework governing Plaintiff's Nevada law claims under which, "with respect to the challenged actions the individual director defendants [can] . . . invok[e] the business judgment rule" if "the majority of those making the challenged decisions were independent generally and independent specifically with respect to the challenged decisions." (*Id.* at 1.) Plaintiff's expert, Myron T. Steele, has agreed, emphasizing in his deposition that any decision by "a majority of independent, disinterested directors . . . wouldn't raise any issues under Delaware law." (Decl. of Noah Helpern in Supp. of Ind. Defs.' Opp'n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 140:15-141:12.) As Steele testified, Delaware has a "two-step analysis"; "[i]n the first step, if there are no facts sufficiently pleaded to suggest a lack of independence and interest – in – interestedness, then you get – don't

[3] For the reasons previously set forth in the Individual Defendants' summary judgment briefing relating to Plaintiff's termination and reinstatement claims, the Individual Defendants continue to disagree that this "independence-based" framework involving the potential application of Delaware's "entire fairness" test governs the particular Nevada law fiduciary duty claims asserted by Plaintiff or is a pre-condition to the application of the Nevada business judgment rule presumption. However, the Individual Defendants accept this framework for the purposes of responding to Plaintiff's Motion for Reconsideration only. The Individual Defendants further reserve their rights with respect to the Court's legal ruling as to whether a genuine issue of material fact exists as a matter of law with the independence and/or disinterestedness of Directors Guy Adams, Ellen Cotter, and Margaret Cotter, and as well as the continued viability of any claims against them.

go to the next line of inquiry and reach any decision about whether there was any breach of fiduciary duty because [the directors] get the benefit of the business judgment rule." (*Id.* at 150:6-151:8.) This is why, in his Expert Report, Steele emphasizes that the predicate inquiry is whether "an independent and disinterested majority of directors" at RDI took an action before he opines whether it could potentially constitute a breach of the Individual Defendants' "duty of loyalty to the Company" on the merits. (Decl. of Noah Helpern in Supp. of Renewed MIL re: Myron Steele, Ex. D (Initial Steele Expert Report) at 3-4.)

Thus, while Plaintiff in his Motion for Reconsideration now identifies thirteen "matters" of purported individual misconduct that he claims rebut the business judgment presumption (*see* Mot. for Recons. at 12-13), he is putting the proverbial cart before the horse. The Court correctly recognized this problem at the December 11, 2017 hearing, pointing out to Plaintiff's counsel that these are really "one of your claims of breach of fiduciary duty," and that Plaintiff—despite ample opportunity—still was not providing any "evidence of disinterestness as opposed to allegations of [conduct allegedly constituting] breach of fiduciary duty." (Ex. 3 (12/11/17 Hr'g Tr.) to Pl.'s Mot. for Recons. at 36:10-37:3; *see also id.* at 33:2-10, 33:13-17 (noting that, "I looked through this whole pile of about 2 [feet] of paper last night trying to find it, and the only [director] I could find specific allegations of a lack of disinterestedness, besides the two Cotter sisters, was Mr. Adams".)

Before Plaintiff can question the substantive merits of these thirteen RDI Board decisions and proceed to trial on some kind of generalized usurpation and entrenchment theory against the various Individual Defendants,[4] he must first show that a majority of the directors involved in these decisions were either interested or not independent—Plaintiff cannot simply skip this "first step" in the legal analysis. *See Goldman v. Pogo.com, Inc.*, No. Civ. A. 18532-NC, 2002 WL 1358760, at *2 (Del. Ch. June 14, 2002) ("Only upon a showing by a challenger that raises a reasonable doubt as to the independence and/or disinterestedness of a majority of a company's

[4] Given that two of the directors who he claims to be guilty of usurpation and entrenchment are the controlling stockholders of the Company, it remains unclear to Defendants who they usurped control from, and who they were attempting to entrench themselves against.

directors who approved the challenged transaction will the presumption of director fealty which lies at the core of the business judgment rule be rebutted."). To do so otherwise, as Plaintiff advocates, would turn Nevada's strong business judgment rule on its head, forcing defendants to prove fairness on the merits before the business judgment presumption could be applied. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006); NRS 78.138(3), (7). Even Plaintiff's expert, Myron Steele, has agreed. At his deposition, he conceded that "two independent, objective directors could disagree" on the proper process for a board decision, and admitted that "[t]he mere fact that people have voted in a certain way certainly is not dispositive on th[e] issue of breach of fiduciary duty." (Decl. of Noah Helpern in Supp. of Ind. Defs.' Opp'n to Mot. for Recons., Ex. A (10/19/16 Steele Tr.) at 160:14-161:2.)

Ultimately, what Plaintiff calls "intentional misconduct" is merely a series of RDI Board decisions, including and post-dating his termination, with which he disagrees. Standing alone, these decisions are not themselves evidence of any breach of fiduciary duty, as the Court and former Justice Steele have noted. To proceed to trial on fiduciary duty claims arising from these transactions against Directors Wrotniak, Codding, McEachern, and Kane, Plaintiff must, at a minimum, first show that these directors were either interested in, or not independent with respect to, each transaction alleged to be a breach of fiduciary duty. The Court correctly found at the December 11, 2017 hearing that Plaintiff did not meet the required interestedness/non-independence showing with respect to these four Defendants, and Plaintiff's re-hash of his previous arguments provides no basis to revisit that considered decision. Plaintiff's claim that the Court "did not adequately consider" purported "intentional misconduct by directors" (Mot. for Recons. at 5) is therefore baseless, and his Motion for Reconsideration should be denied.[5]

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[5] Putting aside that Nevada law applies here, the Delaware Supreme Court has noted that "Delaware courts have often decided director independence as a matter of law at the summary judgment stage," and the Court's choice to do so on December 11, 2017 certainly was not an outlier. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) and *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000)); *see also SEPTA v. Volgenau*, C.A. No. 6354-VCN, 2013 WL 4009193, at *12-21 (Del. Ch. Aug. 5,2013) (holding, on summary judgment, that directors on the special committee were disinterested and independent).

2. The Court Correctly Determined That Plaintiff Did Not Raise a Genuine Issue of Material Fact as to the Disinterestedness or Independence of Directors Wrotniak, Codding, McEachern, and Kane

Even if the Court were to revisit its decision with respect to the disinterestedness or independence of Directors Wrotniak, Codding, McEachern, and Kane, it is clear that the Court's December 11, 2017 ruling was correct as a matter of law, and certainly not "clearly erroneous," as required by the Nevada Supreme Court for reversal. Plaintiff's Motion for Reconsideration provides no evidence—let alone "substantially different" evidence—to the contrary.

None of these four RDI directors were "interested" in ***any*** of the transactions placed at issue by Plaintiff. In Nevada, "[n]o issue of self-interest exists where directors did not stand on both sides of the transaction or receive any personal financial benefit." *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, No. 2:12-cv-509 JCM, 2014 WL 994616, at *4 (D. Nev. Mar. 13, 2014) (applying Nevada law); *see also* NRS 78.140(1)(a) (defining "interested director"); *Shoen*, 122 Nev. at 639, 137 P.3d at 1183 ("to show interestedness" in the context of analyzing futility of demand, the board member must be "materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders"). Here, there are no allegations, let alone evidence, that Directors Wrotniak, Codding, McEachern, or Kane stood on both sides of any challenged transaction or received any personal financial benefit as the result of any decision by the RDI Board put at issue by Plaintiff. (*See* Mot. for Recons. at 12-13 (listing thirteen transactions, none of which involved financial benefits accruing to these four directors).) Accordingly, these directors are disinterested as a matter of law.

Instead, the only possible avenue for Plaintiff to challenge the decisions made by Directors Wrotniak, Codding, McEachern, and Kane is through a lack of independence. This is a difficult task. "[T]here is a presumption that directors are independent," *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013), *aff'd sub nom.*, *Kahn v. M & F Worldwide*, 88 A.2d 635 (Del. 2014), and "even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984). Plaintiff "has the burden" to show "particularized facts that create a reasonable doubt to rebut the

presumption" that Directors Wrotniak, Codding, McEachern, and Kane were independent of Ellen and Margaret Cotter. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). This requires that he introduce facts showing that these four non-Cotter directors are so "beholden" to Ellen and Margaret Cotter "or so under their influence that their discretion would be sterilized." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *Shoen*, 122 Nev. at 639, 137 P.3d at 1183 (same); *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 219, 252 P.3d 681, 698 (2011) (same).[6] To raise a genuine issue of fact as to independence, Plaintiff needs "particularized" facts showing that each of these directors "would be more willing to risk his or her reputation than risk the relationship with" Ellen or Margaret Cotter. *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59 (Del. Ch. 2015).

Plaintiff's case is nothing more than a recitation of what the directors allegedly did, coupled with his assertion that they could not possibly have done what they allegedly did if they were independent, and, ergo, that they were not independent. The "evidence" submitted by Plaintiff in his summary judgment papers and with his Motion for Reconsideration falls far short of this stringent test to show lack of "independence" with respect to Directors Wrotniak, Codding, McEachern, and Kane.

(a) Michael Wrotniak

Plaintiff's Motion for Reconsideration offers no new evidence or argument challenging the independence of Director Michael Wrotniak. As established in the Individual Defendants' prior briefing (*see* Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 21-22; Ind. Defs.' Reply in Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 8-9), Wrotniak was clearly independent of Margaret and Ellen Cotter as a matter of law. The alleged "close friendship" of which Plaintiff complains is actually between Margaret Cotter and Wrotniak's wife—not Wrotniak himself. (SAC ¶¶ 131-133.) In fact, the undisputed evidence instead indicates that Margaret Cotter did not have a substantial "ongoing relationship" with

[6] The Nevada Supreme Court has yet to make clear whether the "beholden" standard for independence applies outside of the demand futility context. Nevada statute evaluates independence solely on whether a director stands on both sides of a transaction. *See* NRS 78.140(1)(a).

Wrotniak; she would see him about "once a year" prior to his joining the RDI Board, and their communications were mainly limited to "email" and focused on the topic of "show tickets." (HD#2 Ex. 6 (5/13/16 M. Cotter Dep.) at 314:10-327:18.)[7]

"Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam*, 845 A.2d at 1050. Plaintiff's allegations and evidence vis-à-vis Wrotniak fall well short of the kind of "thick as blood relations" that could possibly undermine Wrotniak's presumptive independence. *See In re MFW S'holders Litig.*, 67 A.3d at 509 n.37 (no justified concerns regarding independence where the parties "occasionally had dinner over the years, go to some of the same parties and gatherings annually, and call themselves 'friends'"); *Beam*, 845 A.2d at 1051 ("Allegations that Stewart and the other directors moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as 'friends,' even when coupled with Stewart's 94% voting power, are insufficient, without more, to rebut the presumption of independence."); *La. Mun. Police Emps.' Ret. Sys.*, 2016 WL 3878228, at *6-7 (applying Nevada law and finding that a 23-year friendship with dominant stockholder, coupled with political contributions, threat against an opponent in an election, and a million dollar charitable contribution did not disturb the presumption of independence).

Similarly, the Cotter sisters' participation in the proposal of Wrotniak as a nominee to the RDI Board is irrelevant as a matter of law, and any argument to the contrary "has consistently been rejected" by courts. *Andreae v. Andreae*, Civ. A. No. 11,905, 1992 Del. Ch. LEXIS 44, at *13-14 (Del. Ch. Mar. 3, 1992) (also noting that "the relevant inquiry is not how the director got his position, but rather how he comports himself in that position"); *In re W. Nat'l Corp. S'holders Litig.*, No. 15927, 2000 WL 710192, at *16 (Del. Ch. May 22, 2000) (prior

[7] In order to minimize the attachment of redundant paper, "HD#2" refers to exhibits attached to the Declaration of Noah Helpern in Support of the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence, while "HD#1" refers to exhibits attached to the Declaration of Noah Helpern in Support of the Individual Defendants'

relationship with, and nomination by, a significant or controlling shareholder "merely establishes" that board member was "known and trusted," not that director was "beholden"). In light of the actual facts, the Court's decision finding that Director Wrotniak was disinterested and independent, and granting judgment in his favor on all claims, was not clearly erroneous.

(b) Judy Codding

The only "evidence" of Director Judy Codding's purported lack of independence offered by Plaintiff in his Motion for Reconsideration comes from his previously-submitted declaration, in which he claims that Codding once told him around the time of her appointment that "only a Cotter should be CEO" of RDI. (Mot. for Recons. at 22 (citing JJC Decl. ¶ 24).) This argument was already raised and refuted at the summary judgment stage. (*See* Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 20 & nn.4-5.)

It is well established that a self-serving affidavit from a party will not defeat a summary judgment motion. *See Clauson v. Lloyd*, 103 Nev. 432, 434-35, 743 P.2d 631, 633 (1987); *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 939 (7th Cir. 1997) (plaintiff's own uncorroborated testimony is insufficient to defeat a motion for summary judgment); *Dupont v. United States*, 663 F. Supp. 2d 961, 966 n.13 (D. Haw. 2009) ("uncorroborated allegations and 'self-serving testimony'" do not "create a genuine issue of material fact"). Moreover, the purported statement by Codding identified in Plaintiff's declaration is hearsay, which cannot be considered on a motion for summary judgment. *See Henry v. Nanticoke Surgical Assocs., P.A.*, 931 A.2d 460, 462 (Del. 2007) ("The Court should not consider inadmissible hearsay when deciding a Motion for Summary Judgment."). Even on the merits, the purported statement from Codding—that either Ellen Cotter, Margaret Cotter, ***or Plaintiff*** should be CEO—actually undermines his claim that Codding is not independent from the Cotter sisters, as she was apparently willing to contemplate his return as permanent CEO of RDI (which is what he seeks in this lawsuit). And, of course, any purported policy consideration held by Codding that one of

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Motion for Partial Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims.

the controlling stockholders of RDI would be best suited to run the Company is, itself, not evidence that she is "beholden" to any of them.

As established in the Individual Defendants' prior briefing (*see* Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 19-20; Ind. Defs.' Reply in Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 7-8), Codding was clearly independent of Margaret and Ellen Cotter as a matter of law. Plaintiff himself has admitted that Codding "might" satisfy a "legal technical definition of independence." (HD#2 Ex. 7 (5/16/16 J. Cotter, Jr. Dep.) at 70:18-71:6.) It is also undisputed that Codding has a "limited" relationship with Ellen and Margaret Cotter; before Ellen Cotter asked Codding to consider becoming a director, she had met Codding only five or ten times over the course of fifteen years. (*See* Ex. 16 (5/19/16 E. Cotter Dep.) to Pl.'s Opp'n to Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 307:19-308:7.)

While Codding does have a friendship with Mary Cotter, the mother of the Cotter siblings who is not a defendant and is not herself a director or significant stockholder of RDI, that relationship is entirely irrelevant to the legal issue of whether Codding is "beholden" to Ellen and Margaret Cotter, and therefore "unable to consider a business decision on the merits" as it relates to their interests. *La. Mun. Police Emps.' Ret. Sys.*, 2014 WL 994616, at *7. Indeed, like Codding, Plaintiff himself has had a "long-standing personal relationship" with his mother but considers himself "independent." (HD#2 Ex. 7 (5/16/16 J. Cotter, Jr. Dep.) at 71:8-72:15.) Moreover, there exists no non-hearsay evidence establishing what Mary Cotter thinks as to the intra-family fight, whether she has even communicated her feelings to Codding, and whether Mary Cotter's view would be in any way material to Codding's exercise of her director duties. "Mere insinuation is unfair and improper," and Plaintiff's pure speculation does not "support a *reasonable* inference" that Codding "could not act independently." *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *16.

In addition, like Wrotniak, the fact that Ellen and Margaret Cotter supported Codding's nomination to the RDI Board is irrelevant to the independence inquiry. *See White v. Panic*, 793 A.2d 356, 366 (Del. Ch. 2000) ("[T]he law is well-settled that [a defendant's] involvement in

selecting [board members] is insufficient to create a reasonable doubt about their independence."); *Frank v. Elgamal*, C.A. No. 6120-VCN, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014) ("Merely because a director is nominated and elected by a large or controlling shareholder does not mean that [s]he is necessarily beholden to [her] initial sponsor."). As with Wrotniak, Codding's limited relationships with Ellen and Margaret Cotter are hardly the kind that would support a finding that Codding is "so under their influence that [her] discretion would be sterilized." *Rales*, 634 A.2d at 936. Accordingly, the Court's decision finding that Director Codding was disinterested and independent, and granting judgment in her favor on all claims, was not clearly erroneous.

(c) Douglas McEachern

Plaintiff's Motion for Reconsideration offers no new evidence or argument challenging the independence of Director Douglas McEachern. The entirety of Plaintiff's attack focuses on rehashing his previous objections to certain Board decisions supported by McEachern (*see* Mot. for Recons. at 12-13, 15-23), but—as the Court correctly noted at the December 11, 2017 hearing—support for a particular transaction is not itself evidence of a lack of independence. *See also Aronson*, 473 A.2d at 817 ("mere directorial approval of a transaction, absent particularized facts . . . otherwise establishing the lack of independence or disinterestedness of a majority of the directors, is insufficient" to support a breach of fiduciary duty claim). Plaintiff again offers absolutely no evidence as to why McEachern's discretion would be sterilized or why he would be "beholden" in any way to Ellen or Margaret Cotter; he identifies no disqualifying financial connection or personal relationship that would call into question McEachern's impartial judgment.

Instead, the actual evidence is that McEachern made considered decisions. For instance, in determining whether to continue Plaintiff's employment as CEO, McEachern concluded after months of close scrutiny that Plaintiff lacked the necessary experience and management ability, undercut fellow executives and wasted time, did not interact with staff, acted in an abusive manner to RDI's employees, had an inability to communicate with people and create trust, and was not moving the Company forward. (HD#1 Ex. 7 (5/6/16 McEachern Dep.) at 49:25-50:7,

50:19-52:5, 112:18-114:15, 28:23-286:11, 292:25-293:9, 293:23-294:15.) As McEachern testified, "from August of 2014 until [Plaintiff's] termination, I cannot tell you one thing that we did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing." (*Id.* at 292:2-5.) Plaintiff's mere disagreement with McEachern's business judgment as an RDI director falls far short of his burden of identifying "admissible evidence" showing "a genuine issue for trial" regarding McEachern's independence. *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993); *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 543 (2010) ("bald allegations without supporting facts" are insufficient).

Moreover, as the Individual Defendants have repeatedly emphasized (*see* Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 5, 15, 23; Ind. Defs.' Reply in Supp. Mot. for Partial Summ. J. (No. 2) re: Director Independence at 4), Plaintiff has already ***admitted*** that Director McEachern is ***independent***. When asked at his deposition, "Mr. McEachern, is he independent, in your view?" Plaintiff answered: "Yes. I mean, he's – I mean, again, he's independent. He's got no relationship with Ellen and Margaret or, you know, no business relationship with Ellen and Margaret." (HD#2 Ex. 7 (5/16/16 Cotter, Jr. Dep.) at 84:21-85:1.) When pressed as to whether, "in your view, Mr. McEachern is independent and has always been independent," Plaintiff responded "Okay. Yes." (*Id.* at 85:6-86:4.) Plaintiff, as in prior briefing, never confronts this critical admission in his Motion for Reconsideration. This alone is sufficient to warrant summary judgment in McEachern's favor, and the Court's decision to do so was obviously not clearly erroneous.

(d) Edward Kane

As with Director McEachern, Plaintiff's Motion for Reconsideration offers no new evidence or argument challenging the independence of Director Edward Kane. Instead, Plaintiff admittedly provides only a repeat of his previous complaints as to the ***substance*** of Kane's decisions as an RDI Board member, beginning with Plaintiff's termination. (*See* Mot. for Recons. at 15 ("As Plaintiff demonstrated in his own summary judgment motion and in his oppositions to Partial MSJ No. 1, and as summarized again below, . . .").) As with McEachern, Plaintiff's attempt to challenge the "entire fairness" of Kane's decisions as an RDI Board

member is premature (and ultimately unsupportable). Plaintiff must first establish that Kane was not disinterested or not independent—which he cannot do.

Plaintiff's attacks on Kane's independence in his previous filings were without legal merit. Plaintiff has not identified any financial connection or monetary dependence between Kane and the Cotter sisters, nor can he. Moreover, as previously established by the Individual Defendants, Kane also has no "personal relationship" with Ellen or Margaret Cotter sufficient to raise a triable issue of fact as to his independence. (*See* Ind. Defs.' Mot. for Partial Summ. J. (No. 2) re: Director Independence at 16-17; Ind. Defs.' Reply in Supp. of Mot. for Partial Summ. J. (No. 2) re: Director Independence at 5.) As Plaintiff has conceded (*see* Pl.'s Supp. Opp'n to MSJ Nos. 1 & 2 at 8), the friendship of which he complains was actually between Kane and his father, not between Kane and Ellen or Margaret Cotter.

Plaintiff has never cited any evidence indicating that Kane's friendship with James J. Cotter, Sr. has resulted in him having a closer relationship with Cotter, Sr.'s daughters than with his son. Indeed, while Ellen and Margaret Cotter have, at times, referred to Director Kane as "Uncle Ed," so has Plaintiff. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 29:4-35:6; HD#2 Ex. 7 (5/16/16 Cotter, Jr. Dep.) at 83:6-12.) Plaintiff does not dispute that he has known Kane all of his life and even visited Kane at his home as late as the spring of 2015, just weeks before his termination, to personally implore Kane to help Plaintiff resolve his disputes with his sisters and retain his position as CEO. (HD#2 Ex. 3 (5/2/16 Kane Dep.) at 35:10-22; HD#2 Ex. 8 (7/26/16 Cotter, Jr. Dep.) at 753:9-754:8.) Even if Kane were Ellen and Margaret Cotter's actual "uncle" (and not Plaintiff's), that is considered a "more remote family relationship" that is "not disqualifying" to a director's independence as a matter of law in Nevada. *In re Amerco Deriv. Litig.*, 127 Nev. at 232-33, 252 P.3d at 706 (Pickering, J., concurring in part and dissenting in part); 1 *Principles of Corporate Governance* § 1.26 (1994) (an uncle/nephew relationship does not establish the parties as members of one another's immediate families).

In addition, Plaintiff has never explained why Director Kane's "understanding" that James J. Cotter, Sr. intended for Margaret Cotter to control his personal estate would affect his independence as an RDI Board member. (*See* Ind. Defs.' Reply in Supp. of Mot. for Summ. J.

(No. 1) re: Plaintiff's Termination and Reinstatement Claims at 5-7.) As the undisputed evidence establishes, it was actually Plaintiff who involved Kane in the trust settlement discussions; Kane supported such a settlement because, as Kane explained to Plaintiff at the time, he—like Plaintiff—believed that a settlement would end all the "ill feelings," "enhance the company, benefit [Plaintiff] and [his] sisters and allow [the Cotters] to work together going forward." Further, it would give Plaintiff the time to prove "that [he] do[es] in fact have the leadership skills to run this company." (Ex. 4 (5/28/16 emails between Kane and Cotter, Jr.) to Pl.'s Opp'n to Ind. Defs.' Mot. for Partial Summ. J. (No. 2) at 32-33.)

All evidence shows that Director Kane engaged in any settlement-related discussions on exactly the terms *Plaintiff* requested prior to his termination (*see* Ind. Defs.' Reply in Supp. of Mot. for Summ. J. (No. 1) re: Plaintiff's Termination and Reinstatement Claims at 5-7 (collecting evidence)); none of it shows the kind of bias in favor of Ellen and Margaret Cotter (and against Plaintiff) required by law to challenge Kane's independence. *See Beam*, 845 A.2d at 1050. Indeed, while Plaintiff claims that Kane somehow "extorted" him, the actual evidence is that Kane supported a negotiated resolution of the trust dispute because he knew by mid-June that "there were votes there to terminate [Plaintiff]" and that he himself would be "voting against him" if Plaintiff's leadership deficiencies were not alleviated by the kind of further oversight and more harmonious management structure contemplated in the pending settlement deal—including, for example, oversight of Plaintiff's management by an Executive Committee. (*See* HDO Ex. 7 (6/9/16 Kane Dep.) at 596:13-25; HDO Ex. 5 (5/2/16 Kane Dep.) at 193:3-195:2.)[8]

Given the clear insufficiency of Plaintiff's challenges, coupled with the fact that Plaintiff—mere weeks before his termination—approved an SEC filing that identified Kane as "independent" (HD#2 Ex. 11 (5/8/15 RDI From 10-K/A, Am. No. 1) at -5644 & -5665), the Court's December 11, 2017 that Plaintiff has not met his burden of showing a genuine issue for trial with respect to Kane's independence was not clearly erroneous.

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

CONCLUSION

For the reasons set forth above, the Individual Defendants respectfully request that the Court deny Plaintiff's Motion for Reconsideration or Clarification of Ruling on Motions for Summary Judgment Nos. 1, 2, and 3.

Dated: December 26, 2017

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EXHIBIT A

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES COTTER, JR., derivatively on behalf of Reading International, Inc.,	)	
Plaintiff,	)	
vs.	)	Case No.
MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive,	)	A-15-719860-B
Defendants,	)	
and	)	Case No.
READING INTERNATIONAL, INC., a Nevada corporation,	)	P-14-082942-E
Nominal Defendant.	)	

(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF MYRON STEELE
Philadelphia, Pennsylvania
Wednesday, October 19, 2016

Reported by:
Susan Marie Migatz, RMR, CRR
JOB No. 2463323

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T2 PARTNERS MANAGEMENT, LP, a Delaware limited partnership, doing business as KASE CAPITAL MANAGEMENT, et al.,
Plaintiff,
vs.
MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, CRAIG THOMPKINS, and DOES 1 through 100, inclusive,
Defendants,
and
READING INTERNATIONAL, INC., a Nevada corporation,
Nominal Defendant.

Videotaped Deposition of MYRON STEELE, taken at Greenberg Traurig, LLP, 2700 One Commerce Square, 2001 Market Street, Philadelphia, Pennsylvania, commencing at 10:25 a.m., before Susan Marie Migatz, a Federally Approved Registered Merit Reporter, Certified Realtime Reporter, Certified LiveNote Reporter, and Notary Public.

APPEARANCES:

For the Plaintiff James Cotter, Jr.:

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ALSO PRESENT:
RUSS STRAIN, Videographer

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EXHIBITS

(Whereupon the video record commenced:
THE VIDEOGRAPHER: We're now on the record.
My name is Russ Strain representing Veritext Legal Solutions. The date today is October 19th, 2016. The time is approximately 10:25 a.m. This deposition is being held at the office of Greenberg Traurig, 2001 Market Street, Philadelphia, PA.
The caption of this case is James Cotter, Jr., et al, versus Margaret Cotter, et al, filed in the Eighth Judicial District Court, Clark County, Nevada, Case No. A-15-719860-B and Case No. P-14-082942-E.
The name of the witness is Myron Steele.
If counsel at this time would please introduce themselves for the record.
MR. SEARCY: Marshall Searcy on behalf of Judy Codding, Michael Wrotniak, Margaret Cotter, Ellen Cotter, Guy Adams, Doug McEachern, and Ed Kane.

MR. RHOW: Ekwan Rhow and Shoshana Bannett on behalf of Bill Gould.
MR. FERRARIO: Mark Ferrario on behalf of Reading.
MR. KRUM: Mark Krum representing plaintiff, James J. Cotter, Jr., and the witness today.
THE VIDEOGRAPHER: The court reporter is Susan Migatz of Veritext. Would the court reporter please swear in the witness.

- - -

MYRON STEELE, after having been first duly sworn, was examined and testified as follows:

- - -

THE VIDEOGRAPHER: The testimony can now proceed.

- - -

EXAMINATION

- - -

BY MR. SEARCY:

Q. Good morning, Justice Steele.
A. Good morning.
Q. You understand that I'm here on behalf of certain individual defendants in this matter Cotter versus Cotter; is that right?

A. Yes.
Q. Have you had your deposition taken before?
A. Yes.
Q. In how many instances?
A. One.
Q. So you've been deposed one time previously?
A. I have.
Q. Are you familiar with the -- the basic ground rules of depositions?
A. Yes.
Q. Okay. The most important, I suppose, for today's purposes would be that we should try to avoid talking over each other so that the court reporter can take down everything. Do you understand that?
A. Yes.
Q. And if you have any -- any questions about any of my questions, if anything is unclear in my question, you'll be sure to ask me for clarification.
A. I will.
Q. Okay. And I'll do my best to clarify

it. If you don't ask me for a clarification, I'll assume that you understand my question. Okay?
A. Fair enough.
Q. Okay. Now, we're going to look at your expert report in a moment, but Exhibit A to your expert report, is that your CV? Is that right?
A. I would assume so. I really didn't look at the letter/number of any of the exhibits.
Q. All right. Well, we'll take a look at it in a second just to make sure that everything on it is true and accurate to your recollection.
Basically you've served as a judge in Delaware in some form or another over the last how many years?
A. Well, for 25 years from beginning to end.
Q. Okay. And now you're currently practicing law in Delaware?
A. Yes.
Q. Have you ever been a practitioner in Nevada?
A. No.
Q. Have you ever had the opportunity to write a paper on Nevada law?
A. No.

Q. During your time as a judge in Delaware did you ever have a case that applied or used Nevada law?
A. No.
Q. Have you ever, by yourself or working with others, ever conducted any research into Nevada corporate law?
A. The closest to that was participation in an ABA seminar in Nevada in Las Vegas with practicing lawyers from Nevada where the discussion for the audience focused on similarities and dissimilarities between Nevada and Delaware law. That's one CL -- CLE out of many over the years, but the only one where the focus was a comparison between Nevada and Delaware.
Q. And do you recall when that CLE took place?
A. No.
Q. Okay.
A. It was when I was still on the bench.
Q. For -- for purposes of that CLE did you personally conduct any research into Nevada law?
A. I looked at the Nevada statutes and compared them to our general corporation law; yes.
Q. For those purposes did you -- when

you looked at the Nevada statutes, did you write anything down?
A. No.
Q. Did you give any sort of presentation at the CLE about the similarities or differences between the Nevada statutes and Delaware statutes?
A. I -- it wasn't in the form of a paper that was presented. It was more of a panel dialogue. And the discussion was focused on Nevada's adoption of exculpation for breach of duty of loyalty as opposed to Delaware's 102(b)(7), which would not allow that to occur.
Q. All right. And so you in that presentation -- or I guess panel discussion is the way you described it --
A. Yes.
Q. -- that was a discussion between -- was it law -- I'm sorry -- lawyers or judges from Nevada and yourself?
A. All I remember are two attorneys practicing in the area from Nevada. I don't remember a Nevada judge being part of the panel.
Q. And you recall that there was a discussion on the panel of the differences between the Nevada exculpation statute and the Delaware

exculpation statute?
A. That's the only part of it that I recall discussing.
Q. And do you remember there that there was a discussion during that time that the Nevada exculpation statute -- that's a mouthful, I'll get it out -- that the Nevada exculpation statute was broader than the Delaware statute?
A. Well, the distinction, as I understood it at the time, was that Nevada allows exculpation for a breach of duty of loyalty. Delaware does not.
Q. Do you remember anything else that was discussed on that panel?
A. Oh, there was some discussion about why Nevada was doing this, whether it was to affect the number of charters that it could attract to the State, whether there was any case law that focused on what that really would mean, and there was a discussion about what implications that might have for federal intervention into state space if things went awry in a Nevada case where there was an egregious breach of the duty of loyalty that resulted in damage and then exculpation resulted in no punishment for the directors.

It was more of a political discussion, what are the ramifications potentially of that. It wasn't a discussion about which policy is the better policy relative to corporate governance.
Q. And in terms of the discussion on the panel for exculpation for breach of duty of loyalty, what was the panel's -- you said that the -- let me back up for a second.
You said that the panel discussed the ramifications of exculpation for breach of duty of loyalty in terms of bringing in businesses into Nevada; is that right?
A. Well, that was the -- ramifications meaning what could one expect, worst case/best case scenario. No one knew at the time what -- to my knowledge, no one on the panel knew at the time what the implications might ultimately be. There was speculation about it.
Q. And is that -- part of the reason why no one knew what the ramifications would be was because the Nevada exculpation statute was so different than the Delaware exculpation statute?
A. Well, different and had social policy implications that follow exculpation for a breach of

duty of loyalty. It's contrary to the common law and there are -- there are social policy implications there.

And that's what drew us into the discussion about if there's an egregious case, would this result in, by way of example, an institutional investor invested in a Nevada corporation running to Washington, D.C., as a part of a group of institutional investors and complaining to the SEC and to Congress that there was an egregious result and it was because Nevada went so far as to exculpate for a breach of duty of loyalty.

It was pure discussion about what could happen down the road with no factual basis to support there would be such a case or that Congress would do anything, but just like most CLEs, it was talking heads on a panel discussing the issues.

Q. And in -- in preparation -- excuse me -- for your report in this litigation, did you have the opportunity to review the Nevada exculpation statute?

A. I did look at it, yes.

Q. And is the text of that statute still the same as it was when you were back on the panel?

A. To the best of my recollection. But

I don't -- I didn't research any changes from what the Nevada lawyers told me and what I saw initially, what was given to me in the materials, and what I had seen most recently, which were in the papers connected to this case.

Q. So in your research in preparation for the papers in this case, did you observe that the Nevada exculpation statute was still fundamentally different than the Delaware exculpation --

A. Yes.

Q. -- statute?

A. Yes.

Q. And to your knowledge, has there ever been any of the type of federal, we'll say, interference or concerns about the Nevada exculpation statute that was discussed at that --

A. No. My focus my entire career has been entirely on federal interference and internal governance of Delaware charter corporations.

Q. Okay. So you -- so you're not aware of any -- any federal interference when it comes to Nevada corporations or in particular the Nevada exculpation statute.

A. I am not.

Q. Other than what you've just described, have you ever been involved in any other research or discussions involving Nevada corporate law?

A. No.

Q. Okay. Would you agree, sir, that you're not an expert in Nevada corporate law?

A. I would agree.

Q. In preparation for your expert reports that you submitted, you submitted an initial report and then a supplemental report; correct?

A. Correct.

Q. In preparation of those reports did you conduct any research into Nevada corporate law?

A. No.

Q. Okay. In preparation of your initial and expert report did anyone at your direction conduct any research into Nevada corporate law?

A. I asked the associate who worked with me in preparation of the report to document one footnote you'll see in the report that refers to Nevada looking from time to time to Delaware case law for guidance where there was no existing Nevada law. That's what I've understood largely because of the CLE that I mentioned earlier, but I wanted

something to document that. That is the extent to which I looked into Nevada law because that was not my role.

Q. When you say it was not your role, you mean you didn't intend to or expect to provide any expert testimony or opinion about Nevada corporate law; is that right?

A. That's correct.

Q. The associate that you mentioned, what is his or her name?

A. Diva Bole. Sorry; we have so many and I'm not sure about your firm, but they come and go. It's hard to keep up with them.

Q. All right. In terms of -- of Ms. Bole's research -- and, you know, I've got an e-mail here that may help us with the spelling of her name --

A. B-O-L-E.

Q. B-O-L-E.

In terms of her research into Nevada law, do you know what she did to conduct any research into Nevada law?

A. To my knowledge, she did what I asked her to do, and that is document the one statement that I just made so I could rely that that -- there

was some case law to support it.
Q. When you say "document the one statement," do you mean put it in the expert report?
A. Yeah. It's a footnote.
Q. And the footnote that you're referring to -- why don't we go ahead and attach your expert report right now as the next exhibit so we can refer to it. Let me see if I can pull it out.
MR. SEARCY: Okay. We're going to attach this as Exhibit 441.
- - -
(Whereupon the document was marked for identification purposes as Exhibit 441.)
- - -
BY MR. SEARCY:
Q. And looking at Exhibit 441, that's a copy of your expert report; correct?
A. Yes.
Q. And there's a footnote on Exhibit 441, Footnote No. 1 on Page 2; correct?
A. Correct.
Q. Okay. Is that the footnote that you were referring to previously?
A. It is.

Q. Okay. And looking at Page 2, you have a "SUMMARY OF OPINIONS." Do you see that? And the very first sentence of it says: "Based on the facts as I understand them, it is my opinion that a court applying Delaware law" --
A. Yes.
Q. -- "would conclude the following?"
So your opinion throughout the expert report that we've attached now as Exhibit 441 has to do with Delaware law; correct?
A. Yes.
Q. And it's a legal opinion about Delaware law?
A. It's an expression of the analytical framework that a Delaware court would use under what I understand to be the factual circumstances here.
Q. And when you say "the analytical framework," you mean the legal framework; right?
A. Yeah, the legal analysis, yes.
Q. Okay. And the Footnote 1 that's added about Nevada courts --
A. Yeah.
Q. -- that's on Page 2, that footnote isn't intended to express that you have any expertise or knowledge in Nevada law; correct?

A. That's what it says and that's correct.
Q. Okay. Because you don't have any expertise or knowledge in Nevada law; correct?
A. Yes, just as I stated earlier.
Q. The cases that are cited in Footnote 1, those were put in the footnote by Ms. Bole; is that correct?
A. Correct.
Q. And Ms. Bole, do you know where she got those cases from?
A. Do you mean do I know whether she --
Q. Well, let me ask it this way.
THE WITNESS: -- went to the Reporters or Lexus-Nexus or --
BY MR. SEARCY:
Q. It's correct that she received those cases from plaintiff's counsel; correct?
A. I don't know the answer to that.
Q. So as you sit here right now, you don't know whether Ms. Bole researched those cases independently or whether she received the case citations from plaintiff's counsel; correct?
MR. KRUM: Or both.
THE WITNESS: Well, what I know is

when I asked her to document that, I expected that it would appear only if she had found the cases by whatever method, read them, and concluded that they supported the proposition that they state. Otherwise, they wouldn't appear in the report.
BY MR. SEARCY:
Q. Okay. And did you ask Ms. Bole whether she independently researched the cases that are included in your Footnote 1?
A. I did not ask that question, no.
Q. Excuse me one second.
Let me hand you what we'll -- thank you -- what we'll attach as the next exhibit. I think it's Exhibit 442.
THE COURT REPORTER: That's right.
- - -
(Whereupon the document was marked for identification purposes as Exhibit 442.)
- - -
THE WITNESS: I have one marked and one unmarked. What do you --
BY MR. SEARCY:
Q. Oh, I'll take the unmarked one back from you so that I can share it with my colleague,

Mr. Rhow. Thank you.
Now, you see Exhibit 442 --
A. I do.
Q. -- in front of you?
Okay. And Ms. Bole, who is the -- is listed at the very top of this document; correct? It appears to have been printed out from her computer?
A. Yes -- well, I don't know whether it was printed out from her computer or not, but her name's at the top.
Q. Okay. And you see that it's a -- there's an e-mail there from Mark Krum to Ms. Bole; correct?
A. Yes.
Q. And it's dated Thursday, August 25th, at 1:25 PM?
A. Yes.
Q. And the "Subject" is "Reading"?
A. That's what it says.
Q. Okay. And then the e-mail in Exhibit 442, the substance of it contains a number of case citations; is that right?
A. It does.
Q. And if you compare those case

citations to your Footnote 1 in your expert report --
A. Yes.
Q. -- those cited cases appear to be the same; correct?
A. Yes.
Q. Okay. And your expert report that you submitted in this case was signed by you on August 25th; isn't that right?
A. That's correct.
Q. So from the e-mail at Exhibit 442, it appears that Ms. Bole received the cases that are contained in your Footnote 1 on the same day that you signed the expert report; correct?
A. That appears to be so.
Q. And she received those from Mr. Krum, who is plaintiff's counsel; correct?
A. Yes.
Q. Okay. And I believe you testified earlier, but I just want to clarify, you're not aware of what, if anything, Ms. Bole did to conduct her legal research into Nevada law; correct?
A. I don't have personal knowledge of how she did the research, no.
Q. And you're not aware of what, if any,

research she conducted to determine when or if a Nevada court would ever apply Delaware law; correct?
A. I don't think the research went beyond the footnotes; correct.
Q. And in preparing your expert report you did not conduct any research yourself into determining when a Nevada court would apply Delaware law; correct?
A. I did not.
Q. And you don't -- you're not providing any expert opinion on the circumstances under which a Nevada court would apply Delaware law; correct?
A. Correct. That's why the footnote starts with "It's my understanding that..."
Q. The term -- the use of the words there, "It's my understanding...," are an indication that you're -- you're borrowing that information from someone else; is that right?
A. Yeah.
Q. Okay.
A. Based on my limited experience as I described it with Nevada law, that's what Nevada lawyers have explained to me.
Q. Okay. And the Nevada lawyer that you're referring to, is it Mr. Krum or are you

referring back to the --
A. Both.
Q. -- members on the panel?
A. All three.
Q. Okay. So Mr. -- Mr. Krum is one of the Nevada lawyers you spoke to. You described some lawyers who were on a panel back when you were in the judiciary.
A. Correct.
Q. Any other Nevada lawyers whom you've spoken to?
A. No.
Q. Looking back at your report, I believe there's one more footnote that's also contained that makes a reference to Nevada law. Let me have you turn to it. It's Footnote 162 on Page 121.
A. Page 121?
Q. Oh, I'm sorry; Page 21. I must have misspoke. But the footnote is 162.
A. Yes.
Q. To your knowledge, Footnote 162 would have been inserted into the expert report by Ms. Bole; is that correct?
A. Correct.

Q. And do you know when she would have inserted Footnote 162 into the expert report?
A. No.
Q. And do you know where -- whether Ms. Bole conducted any research to locate the cases that are contained in Exhibit 162?
A. Let me be careful as I answer that. I certainly didn't see her do it, but the understanding was if she were to develop cases as a result of joint preparation of this report, it was assumed she would read those cases and assure me that they stood for the proposition that was recited in the footnote. But did I look over her shoulder? No.
Q. Did you have an expectation that she would conduct her research into Nevada law independently of plaintiff's counsel?
A. Yes.
Q. So if Ms. Bole didn't do that, then she wouldn't have been following your instructions; is that right?
A. No. That would have been my expectation. If she cited a Nevada case, as she did in this footnote, that basically signals the same result as the Delaware cases, I assume she found

that case, read that case, and represented to me that that is the holding of the case.
Q. Do you recall if, with respect to Footnote 162, she represented to you that she had read the cases and was aware of the holdings?
A. Not orally. That was the expectation as my assistant.
Q. Let me show you Exhibit -- what we'll mark as Exhibit 443.
You know what, I've handed that to you, Justice Steele, but the court reporter will have to mark it as Exhibit 443.
- - -
(Whereupon the document was marked for identification purposes as Exhibit 443.)
- - -
BY MR. SEARCY:
Q. And have you ever seen Exhibit 443 before?
A. No.
Q. Okay. This also appears to be another printout of an e-mail from Ms. Bole's account; correct?
A. It appears to be so, yes.
Q. And it's an e-mail from Mr. Krum, the

plaintiff's counsel, to Ms. Bole; correct?
A. That's what it says here.
Q. And it's dated Thursday, August 25th, at 3:44 PM; correct?
A. Correct.
Q. And the body of the e-mail from Mr. Krum to Ms. Bole contains a number of Nevada case citations; correct?
A. Yes.
Q. And if you look at your Footnote 162, there are a number of citations there; correct?
A. There appear to be three; yes.
Q. And a number of those citations appear to be taken from Mr. Krum's e-mail; correct?
MR. KRUM: Objection. The documents speak for themselves, foundation.
THE WITNESS: Two seem to be; yes.
BY MR. SEARCY:
Q. And, again, these case citations were sent to Ms. Bole by Mr. Krum at 3:44 on the day that you signed your report; correct?
MR. KRUM: Same objections.
THE WITNESS: They were in an e-mail of that date; yes.

BY MR. SEARCY:
Q. And with respect to Footnote 162, that footnote is to a statement that under Delaware law corporate directors and officers owe fiduciary duties to a corporation and its stockholders. Do you see that?
A. Yes.
Q. And then there's a citation to a Delaware case in your Footnote 162?
A. Yes.
Q. And then there's the statement after that: "The same is true under Nevada law."
A. Yes.
Q. Do you see that?
You're not claiming to provide any opinion in this matter about the fiduciary duties of directors under Nevada law; correct?
A. Correct.
Q. Okay. Let me ask you now some more general questions --
A. Sure.
Q. -- about your expert report.
What was the first contact that you had between -- with anyone acting on behalf of the plaintiff in this matter?

A. Well, it -- the first you mean the first person who contacted me or the date or both?
Q. Thanks for the -- that's a fair question.
Who was the first person who contacted you about providing an expert opinion in this matter?
A. The first and only person is Mr. Krum.
Q. When did he contact you?
A. I don't remember.
Q. Do you recall who -- how soon it was before the preparation of your expert report that he contacted you?
A. No.
Q. Do you recall if it was a matter of days? weeks?
A. I don't recall. If I -- I know it was more than a matter of days. It was certainly more than a matter of a week or two. So it -- to answer your question, was it a matter of weeks? I guess the answer to that has to be yes, although I don't know how many weeks.
Q. All right. In your -- as you sit here, you estimate it's more than one or two weeks;

is that correct?
A. That's my best recollection, yeah.
Q. Is it fewer than three?
A. I really can't safely answer that. I don't recall. I didn't -- I didn't focus on that.
Q. One or two weeks is your best estimate?
MR. KRUM: No. Mischaracterizes the testimony.
THE WITNESS: No. What I said was it had to be more than a week and your question said was it a few weeks, so if it's more than a week or two, it could have been a few weeks, yeah.
BY MR. SEARCY:
Q. Okay. And I'm not trying to put words in your mouth with the -- with the deposition testimony.
A. No. I --
Q. That's quite all right.
A. Sorry.
Q. I'm just trying to get your best estimate of how long it was before you prepared your expert report that you spoke to Mr. Krum.
A. I don't have a clear recollection.

Q. All right. Your best recollection, though, is -- and I want to make sure that this is correct -- more than one or two weeks.
A. Yes.
Q. Okay. But beyond that you can't be more specific.
A. That's correct.
Q. Now, when Mr. Krum contacted you, what did he say to you?
A. He contacted me and asked if I was in a position to consider an expert witness report for a case in Nevada and I said the first thing we have to do, if I'm going to help, is a conflicts check. So that was the first step.
And then he indicated to me, because I stated I didn't find myself in a position to offer an opinion on Nevada law, he said I'm interested in whether you can give an opinion on Delaware law as it may apply in this case.
And I said I can give an opinion perhaps after I review what's available to me and it will be basically the analytical framework that a Delaware court would apply in attempting to resolve the issues that are posed by the pleadings.
Words to that effect. Those

obviously aren't the exact words.
Q. Sure. When Mr. Krum indicated to you or used the words "Delaware law as it may apply," did he indicate to you that there might be instances in the case where Delaware law might apply instead of Nevada law?
A. He indicated to me, my best recollection, similarly to the Footnote No. 1, that where Nevada did not have developed law, Nevada courts often looked to Delaware to see what the Delaware answer would be. He never represented to me that Delaware was a gap-filler to the extent that a Nevada court was either obligated or even inclined to follow Delaware law. Simply that they would look to Delaware law, which is something I've heard my entire career; not just from Nevada, but from any other jurisdictions.
Q. And did --
A. So that didn't surprise me at all.
Q. Okay. But you didn't see yourself as -- as being asked to provide an expert opinion on any aspect of Nevada law; correct?
A. He absolutely never asked for that. He would have -- that would have been our last conversation.

Q. You wouldn't have --
A. I couldn't have done.
Q. Right. Okay.
And in terms of areas where a court in Nevada might look to Delaware law, did he indicate what those areas might be?
A. No. He just made the general comment, as I recall.
Q. And as you sit here today, are you aware of any areas where a Nevada court might look to Delaware law?
A. I didn't -- let me state that a little more carefully.
I made no inquiry. I only did what I was asked to do in what I believed to be a limited scope in order to provide the court guidance if the court wanted it about how Delaware would analyze this dispute.
Q. Okay. After your initial conversation with Mr. Krum, did you decide to take the -- the engagement?
A. Yes.
Q. Okay.
A. After the conflicts check.
Q. Okay. After you ran the conflicts

check, did you then prepare or start preparing a draft of your report?
A. Did I start a draft? No, I did not start a draft of the report.
Q. Who -- who did?
A. Diva Bole did.
Q. Okay. When did Diva start with her draft?
A. I don't know the answer to that.
Q. Do you know how long she spent on that?
A. Some considerable time. Obviously we talked in the interim.
Q. When you say "some considerable time," can you attach a hours figure to that?
A. I can't, no. It may be and should be reflected in any bill that she appears on.
Q. And do you know -- in terms of what Ms. Bole did to draft the report, do you know what -- what steps she took to draft the report?
A. I know she read all the material that had been sent to us.
Q. When you say all the material that had been sent to you, is that material that was sent by -- by plaintiff's counsel?

A. Correct.
Q. Is that material that's identified in -- in your expert report as Exhibit B?
A. Yes, the --
Q. I'm sorry; let me take that back.
A. Whatever the exhibit number is.
Q. Exhibit C, yeah.
A. Whatever the exhibit letter is.
Q. All right. And just for clarification, looking to Exhibit C of your expert report, that identifies the information that was considered; correct?
A. Yes.
Q. Okay. And to your -- and it's your understanding that Ms. Bole received the information considered that's on Exhibit C from Mr. Krum; is that right?
A. Either from Mr. Krum or from me. I don't know whether the e-mails would reflect that he sent information to both of us or simply to me and some was sent by my office to Diva Bole or whether she received anything directly. I don't know the answer to that.
Q. Do you recall if there was any information that Ms. Bole asked for from Mr. Krum

that was not provided for purposes of the report?
A. Not to my knowledge.
Q. Let me ask you more generally: Do you recall Ms. Bole asking Mr. Krum for any additional information?
A. I don't recall.
Q. Did you ever ask Mr. Krum for any additional information or documents?
A. Either before or after the report was prepared?
Q. Well, let me -- let me start with that.
A. Yeah.
Q. Before the report was prepared, did you ask Mr. Krum for any additional documents?
A. I didn't ask him for any specific item, no.
Q. Okay. Generally speaking, did you ask him for items?
A. Generally, I had an understanding that he would send me any documents that he thought might be helpful to me in reaching the opinion or, after the opinion was written, any additional documents that may have come to his attention that would have bearing on the issues in the opinion.

Q. And how did you obtain that understanding?
A. Just by conversation.
Q. You had a conversation with Mr. Krum where Mr. Krum told you that he would send you anything helpful; is that right?
MR. KRUM: Object to the characterization of the testimony.
THE WITNESS: It -- I don't have a specific recollection it was that broadly stated. There's -- there was an understanding that developed out of a conversation that if there were any other relevant documents that I would need, he would send them to me because there -- there is always the possibility that something pops up that could alter the opinion and I would want to know about it.
BY MR. SEARCY:
Q. Do you recall what Mr. Krum said to you about sending all relevant documents?
A. No, not specifically.
Q. And do you have an understanding as to whether or not the documents listed in Exhibit C are all the relevant documents in the case?

A. No. To my mind, they are not all the relevant documents to the case. They were the relevant documents to the opinion at the time I gave it.
Q. Okay. And then when you say relevant to the opinion, does that mean that they supported the opinion?
A. Oh, they did in part or didn't in part. It all depends on what they said and how they stated it.
Q. Beyond the 17 documents -- or beyond the documents that are listed in Exhibit C, are you aware of any other relevant documents in the case?
A. That existed --
MR. KRUM: Objection; vague.
THE WITNESS: -- before the opinion or after?
BY MR. SEARCY:
Q. Let's start with before.
A. No.
Q. Okay. And I'll ask -- then I'll ask you about after.
A. Yeah. I have seen motions for summary judgment. I have seen the objection to my report. Those are the additional documents that

I've seen.
Q. Okay. In terms of any of the documents produced by any of the parties in discovery, have you looked at any of those --
A. No.
Q. -- additional documents?
Did you ever review the deposition testimony of Jim Cotter, Jr.?
A. Yes.
Q. Okay. You did. Did you review all the -- all the deposition transcripts from his deposition, all the volumes?
A. All that I knew of.
Q. Okay. Do you recall how many you reviewed?
A. No.
Q. Okay. Now, with respect to Mr. Cotter, Jr.'s, deposition transcript, that's not identified as being information considered in Exhibit C; correct?
A. I don't -- I don't know. I haven't looked at Exhibit C.
Q. All right. So Ms. Bole prepared the first draft of the expert report; is that right?
A. Yes.

Q. Do you recall how many drafts of the expert report she prepared?
A. No; but it was more than one.
Q. Do you recall whether or not plaintiff's counsel submitted any portions of the draft from Ms. Bole?
A. I do not.
Q. Okay. You don't know whether plaintiff's counsel might have written some portion of the -- of the expert report?
A. To my knowledge, he didn't.
Q. Do you know either way?
A. What?
Q. Do you know either way?
A. With certainty? No.
Q. Okay. Do you recall how many drafts there were of the expert report?
A. Three, I believe.
Q. Now, and did you take any notes of your conversations with plaintiff's counsel?
A. The ones I produced are the notes I took.
MR. SEARCY: Let's attach this as the next exhibit.
THE COURT REPORTER: 444.

MR. SEARCY: What was that number again?
THE COURT REPORTER: 444.
MR. SEARCY: 444.
THE WITNESS: Do you want me to give these other exhibits back?
BY MR. SEARCY:
Q. Sure. That way we make sure that they don't get lost.
A. That was why I asked the question.
Q. If you hand them to me, they'll definitely get lost.
- - -
(Whereupon the document was marked for identification purposes as Exhibit 444.)
- - -
BY MR. SEARCY:
Q. Justice Steele, are these your notes?
A. Yes.
Q. Okay. And these notes reflect your conversation with Mr. Krum; is that right?
A. I'd have to read them to see whether they're a combination or not of what I read and any conversation with Mr. Krum, because Mr. Krum and I had very little one-on-one conversation about the

know how Nevada procedure worked with that respect.
And there was another conversation about production. He was to let me know what it -- what the Nevada rules expected me to produce. That's it.
Q. Okay. I want to focus on -- on the facts for just a moment --
A. Sure.
Q. -- or discussions about the facts.
You're not offering any expert opinion about the facts of this case; correct?
A. I'm not sure what you mean by an expert opinion about the facts. If -- if -- if your question means am I suggesting that the facts that are important to resolve these disputes are ones that can be found in the absence of hearing witnesses testify about them? Of course I can't offer any opinion about what is fact and what is not.
Q. When there are references in your expert report to if a finder of fact finds something --
A. Yes.
Q. -- is that a reference to the fact that you as an expert are not offering any opinion

facts.
I don't have an independent recollection that's absolutely clear about whether this -- these notes are taken from a conversation or conversations with Mr. Krum or whether in part notes taken after reading parts of depositions. But certainly part of these notes come from conversation with Mr. Krum. My -- since they're undated, it -- it appears to me to be the first introduction to what may be the dispute. And then having heard the outline of it, I waited for documentation.
Q. You said that -- just a moment ago that you had very little one-on-one conversation with Mr. Krum about the facts --
A. Yes.
Q. -- of the case. Did you have any other conversations with Mr. Krum about the case outside of one-on-one interactions?
A. What was going on. I had a conversation about what's the procedure in Nevada; what documents could I expect to get; what would be available; if an expert report were to be prepared in writing, whether my deposition would ultimately be taken; whether I might be called upon to testify as a witness or whether it would be taped. I didn't

as to what the facts are in the case; correct?
A. That -- that's correct. I'm not a fact-finder and I don't in an expert report opine to replace the fact-finder's conclusions about what actually occurred, when, where, who said what, whether X or Y witness was telling the truth or not. That's not my understanding of the expectation of any help that I could give to the Nevada court.
Q. So, for example, on the question of whether or not a particular director is independent, you're not offering any opinion on whether or not that's the case; correct?
MR. KRUM: Objection; mischaracterizes the testimony and the document.
THE WITNESS: I assume that I'm to answer unless I'm instructed not to answer for some reason and then you battle it out, which is the procedure that I'm used to?
BY MR. SEARCY:
Q. That's right.
A. And then we call a judge on the phone and bother her about whether the objection should be sustained or not. That's fine.
Q. That's right.

A. A little bit of facetiousness is necessary --
Q. I understand.
A. -- for me to get through the day because I have some clear recollections of being called at all hours and fully understand that.
It is correct that my report is not meant to be a document finding what the ultimate facts at issue would be and how to resolve disputed facts. It is not.
What it's intended to do is to set up the analytical framework that Delaware uses for determining what standard of review applies in a given fact situation.
Q. And you don't claim to have any independent understanding of the facts in this case; correct?
A. That's absolutely correct.
Q. In terms of the facts of the case, other than conversations with Mr. Krum, what did you do to acquaint yourself with the facts in this case?
A. Well, the first thing, if you don't mind me explaining this in the context of the Delaware analytical framework, the first step is to look at the pleadings and make a determination from

reading the pleadings whether they sufficiently plead facts that create a reasonable doubt about the independence or disinterestedness of directors.
So I looked at the pleadings to determine who the directors were and looked at what was pleaded and suggest that there were facts sufficient to question the reasonable doubt of the independence and disinterestedness of some of the directors.
With that in mind, the burden under Delaware's analysis then shifts to the defendants to establish that they were independent and/or disinterested and that any decisional process in which they engaged was fair and the result obtained from that process was fair.
In Delaware we refer to that as the entire fairness standard of review, and that's what I was opining about.
Now, that's dependent ultimately, as I think the Orchard case, which I cite in Kahn versus -- I'm trying to think of the name of the grocery store now, it's Dairy Mart, established, that a judge cannot -- in Delaware cannot do that based solely on documents in the record, that it requires trial, because credibility is important to

determining the extent to which someone is either independent or disinterested.
So what my report was trying to do was highlight facts that suggest that there is a dispute over independence or disinterestedness of one or more director and that could affect the process if a majority of disinterested, independent directors did not resolve the process and vote on the decision.
That's the essence of the report, with the understanding that the ultimate trier of fact, whether it's a jury or a judge in Nevada, would have to make that determination.
Q. With respect to the process that you just described --
A. Yes.
Q. -- the first was looking at the pleadings.
A. Yes.
Q. And I take it that in looking at the pleadings, you assumed that the allegations contained in the pleadings were true; correct?
A. Oh, yeah, that's correct.
Q. As you might on a motion to dismiss, in other words.

A. Very similar. Perhaps in Delaware not quite as strict as a motion to dismiss, but very similar.
Q. Okay. Now, you also made reference to a burden shifting taking place after the review --
A. Yes.
Q. -- and that you looked to whether there was a -- was it fundamental fairness --
A. No.
Q. -- in the transaction?
A. No. It's not a constitutional concept. It's whether or not the pleadings raise a reasonable doubt about the independence or disinterestedness of one or more fiduciaries -- usually, as in this case, directors, but it could also be officers -- that would deprive them of business judgment review and because in a control situation like this one, it would rise to entire fairness.
Q. Okay. Now, do you know if Nevada courts apply an entire fairness principle?
A. I do not.
Q. Do you know if Nevada courts apply any of the legal principles that you just described?

A. Well, business judgment.
Q. Okay. Beyond business judgment?
A. I don't know what Nevada's options in the standard of review are. I do know Delaware's.
Q. Okay.
A. And my report was to opine on Delaware; not Nevada.
Q. Okay. Beyond looking at the pleadings, did you do anything else to acquaint yourself with the facts or the allegations in this case?
A. Yeah. I looked at depositions. And ultimately I looked at -- post-report I looked at the motions for summary judgment and the motion to strike or whatever you -- however you characterize your colorful objections to my report.
Q. Now, were you asked to prepare an expert report in opposition to the motion for summary judgment?
A. No.
Q. Did you consider submitting one?
A. I haven't considered it, no.
Q. Okay.
A. I -- sorry.
Q. Okay. The depositions that you

looked at, did you look at all of the dep -- did you read the entire depositions?
A. I didn't read the entirety of every deposition. I skipped through parts that didn't seem to me to be focused on my report. I was only looking to questions and answers that described the relationships between the parties, the qualifications of the directors, the nature of the process in which they engaged, and with a more important focus on any facts that would raise a reasonable doubt and then ultimately perhaps a genuine issue of material fact about their independence or disinterestedness. That was -- that was my focus.
Q. Did anyone direct you to the particular questions and answers that you reviewed?
A. No.
Q. So is it correct then that you personally reviewed the deposition transcripts, you skimmed the portions that didn't seem relevant, and then you read the portions in more detail that did seem relevant to your analysis?
A. Yeah. By -- by way of example, I read all four of Mr. Kane's volumes because it seemed to me that he was a critical defendant in the

case. So I paid more attention to his deposition probably than the others.
Q. Okay.
A. I know I read every bit of those four volumes.
To be fair, I try to be conscious of what it costs to retain me as an expert and only do what's necessary.
Q. All right.
MR. SEARCY: Why don't we take our first break?
THE WITNESS: Oh, we were having so much fun.
THE VIDEOGRAPHER: Off the record at 11:21. This will end Disc No. 1.
- - -
(Whereupon there was a recess in the proceedings.)
- - -
THE VIDEOGRAPHER: The time now is 11:40. Back on the record, beginning of Disc No. 2.
BY MR. SEARCY:
Q. All right. Turning to Page 2 and 3 of your expert report, Justice Steele, there's a

section there titled "SUMMARY OF OPINIONS."
A. Yes.
Q. I want to take a look at a statement in your "SUMMARY OF OPINIONS." You say "Based on the facts as I understand them..." at the very first sentence.
A. Yes.
Q. And when you wrote that, "Based on the facts as I understand them...," does that mean the facts that you've obtained from plaintiff's counsel? Is that right?
MR. KRUM: Object to the characterization of the testimony.
THE WITNESS: Well, based on the documents that I obtained from plaintiff's counsel. To the extent your question suggests that based on the facts that he may have related to me orally, no. Based on what's in the pleadings and ultimately what's in the motions for summary judgment --
BY MR. SEARCY:
Q. But you --
A. -- and what was in the depositions.
Q. You made reference to the motions for

summary judgment.
A. Post-opinion.
Q. Post-opinion, okay.
A. To the extent my answer was inarticulate, suggesting that based on facts that were in the motion for summary judgment, that would be incorrect. I misspoke.
Q. What I'm particularly interested in is, though, you used the phrase "as I understand them" in characterizing the facts there.
A. It means on how -- meaning how they're pleaded.
Q. Right.
A. I don't -- I mean to say I don't conclude that inconsistent facts, one side is absolutely accurate and the other side who has inconsistent interpretation of the facts or the inferences drawn from them are incorrect and the other is correct. Just as pleaded, the facts that I had seen in the pleadings themselves and to some extent from the depositions, that's what I'm basing it on.
Q. So by use of the phrase "as I understand them" there, you're highlighting that you don't claim to have knowledge of what the actual

facts are; correct?
A. That is correct, yes.
Q. Okay. Then you go on to say: "...it is my opinion that a court applying Delaware law would conclude the following" in your summary; correct?
A. Yes.
Q. So if I understand your summary correctly, your opinion is providing a legal framework to analyze the facts as set forth in the pleadings; is that right?
MR. KRUM: Object to the characterization of the testimony; asked and answered.
You can answer again.
THE WITNESS: It's correct that I'm trying to set out the analytical framework that Delaware would apply.
BY MR. SEARCY:
Q. And that's an analytical legal framework that a Delaware court might apply; correct?
A. Yes.
Q. Okay. And you're not offering any opinion as to whether a Nevada court would even

apply Delaware law in this case; correct?
A. That's correct.
Q. And you're certainly not providing any opinion as to what a Nevada court would do or should do in this case?
A. More importantly, I'm definitely not impertinent enough to suggest what the Nevada court should do, nor am I suggesting they would follow this pattern that's used in Delaware. Just that this opinion is designed to be helpful to the court should the court choose to look at it and understand how the analysis would occur in Delaware. That -- that's -- that's all. That was all I was asked to do. That's all I intended to do.
Q. Unless a Nevada court decides that it should apply Delaware law, then your opinion wouldn't have any relevance; is that right?
MR. KRUM: Objection; foundation.
THE WITNESS: No. I don't think the opinion would have no relevance. I think not knowing how developed Nevada law may be on the precise issues here and offering no opinion about whether that's good, bad, or indifferent, it is possible that a Nevada judge could look at the way Delaware does it

and conclude that that is a meaningful and thoughtful way to apply the analysis in Nevada. And, on the other hand, or not. That's -- I'm not suggesting to her what she should do.
BY MR. SEARCY:
Q. And if the answer then is or not, if the court decides that Delaware law doesn't apply, doesn't need to apply, then the opinion wouldn't be relevant; correct?
A. Well, it's possible that --
MR. KRUM: Same objection.
THE WITNESS: I'm sorry.
MR. KRUM: Go ahead. Same objection.
THE WITNESS: That's a little too black and white. It may be that if Delaware law doesn't apply, meaning it doesn't have precedential value from the view of the judge, knowing what the analysis is may nonetheless be helpful to the judge in approaching the issues that are raised by the parties.
That's all this report is trying to do. It's trying to be helpful. It's not even trying to be instructive other than

this is the Delaware framework. It's not suggesting to the judge what she ought to do. It's saying hopefully this analytical framework and the opinions you find here are helpful to your analysis. That's -- that's the extent of it.
BY MR. SEARCY:
Q. And the assistance that you're offering is for the judge in this case; correct?
A. Uh-huh.
Q. Not for the finder of fact; correct?
A. Well --
MR. KRUM: Objection; asked and answered and mischaracterizes the testimony.
THE WITNESS: To some degree there's a mix here. I'm not altogether sure because, as we've agreed earlier, whether the finder of fact would be a jury here or whether it would be a judge.
But initially, at least under the Delaware analytical framework, even though we have no jury involved at all, the initial analytical framework is the judge makes a judgment based on the pleadings about whether there's a burden shift, and that's

whether there's a reasonable doubt about the independence or the disinterestedness of a majority of the directors who have taken an action to effectuate a transaction of kind.
To that extent the judge doesn't decide or the finder of fact doesn't decide at that stage what's a fact and what isn't a fact; just that there is a reasonable doubt about the independence and/or the disinterestedness.
And that has to be examined at trial where more than just what's on pieces of paper can be explored. The credibility of the witnesses and, most importantly, the context under which all of this occurred can be explored fully by the trier of the fact.
And then that determination is made about whether a majority of the acting fiduciaries were independent or disinterested.
BY MR. SEARCY:
Q. So after the trier -- just so I understand, you've described a framework whereby a motion to dismiss might be considered and then described a framework where a trier of fact would

consider witnesses and their credibility and context, I believe you said; correct?
A. Yeah, yeah.
Q. And you're not -- just to be clear, you're not offering any opinion about what the finder of fact should or should not find with respect to credibility or context or any of those other items; correct?
A. That -- that's correct. I'm simply saying that if a Delaware judge were to look at the pleadings here, there would be an issue raised about the disinterestedness or the independence of the majority of the directors who have taken an action as fiduciaries and that as a result it would go to the next stage. There would be the burden shift. They would under entire fairness defend their action by having the burden of establishing that indeed they were independent and disinterested, and that would end the case if the finder of fact reached that conclusion.
Q. And what you're describing, the framework you're describing, is the Delaware framework. I understand.
A. No. I appreciate it. Yes is the answer.

Q. Okay. So then moving down your "SUMMARY OF OPINIONS," on (i).a, (i).b, (ii), each is prefaced with "if a finder of fact finds that a majority of directors were entitled...," "if entire fairness applies...," (ii), "if a finder of fact...," do you see where I'm referring to?
A. Yes.
Q. And those are all -- all statements that are made where you're not trying to -- to set forth what the facts are in this case; correct?
MR. KRUM: Objection; vague and ambiguous depending on what it means, asked and answered.
BY MR. SEARCY:
Q. Let me -- let me restate the question.
You're making an assumption there about what the finder of facts might find; correct?
MR. KRUM: Objection; asked and answered, mischaracterizes the testimony.
BY MR. SEARCY:
Q. You may answer.
A. Yes. I'm suggesting that if the finder of fact reaches the following conclusion and there are facts to support that. But there are

facts that are inconsistent with. So the finder of fact has to reach that conclusion. I cannot. No expert should resolve inconsistent facts that have a bearing on a material issue, in my view, and I'm not trying to do that here.

Q. And I understand. I just want to make clear that you're -- you're making hypothetical assumptions for the purposes of each of these opinions that are summarized on Page 3; correct?

MR. KRUM: Objection; mischaracterizes the testimony.

THE WITNESS: No. I wouldn't call them hypothetical. There is a factual basis for the fact-finder to reach that conclusion. I'm only saying I'm not attempting to suggest to the fact-finder what that conclusion should be.

BY MR. SEARCY:

Q. You're just assuming that the fact-finder would find a particular way; correct?

MR. KRUM: Same objection.

THE WITNESS: I'm assuming they could.

BY MR. SEARCY:

Q. Okay. And then assuming that they

A. I understand it.

Q. I'll clarify it to make it clear.

A. Okay.

Q. Your rebuttal opinion is only offering an analytical framework under Delaware law; correct?

A. That's correct.

Q. It's not offering anything having to do with Nevada law; correct?

A. Correct.

Q. It's not making any findings of fact; correct?

A. Correct.

Q. Now, there's a footnote that's on -- it's Footnote 2 on your rebuttal opinion. Do you see that?

A. Yes.

Q. Okay. With respect to Footnote 2, did you draft Footnote 2?

A. I did not.

Q. Okay. That had been drafted by your associate?

A. Yes.

Q. At the end of Footnote 2 it states: "I understand that the defendants in this action

could, then you provide your analytical framework from Delaware law; correct?

A. Yes.

Q. Okay. Let me give you the next exhibit.

THE COURT REPORTER: 445.

THE WITNESS: Thank you.

- - -

(Whereupon the document was marked for identification purposes as Exhibit 445.)

- - -

BY MR. SEARCY:

Q. Do you recognize this exhibit?

A. I do.

Q. This is your supplemental -- I'm sorry -- your rebuttal opinion; correct?

A. That's how it characterizes itself, yes.

Q. Okay. And in terms of the opinions provided in your rebuttal opinion, they don't differ, correct, in terms of providing an opinion on an analytical framework under Delaware law?

Let me restate that question --

A. Oh, I understand it.

Q. -- because it was very poorly --

have filed a motion in limine because the Steele Report stated that the opinions based therein were based on what a court that applied Delaware law would find."

A. Yes.

Q. And you say: "That phraseology was intended to refer to my years of experience in Delaware's well-versed body of law"; correct?

A. Yes.

Q. And then it states: "The Delaware law on which I relied is law that informs any and all Nevada statutes and cases applicable to the matters discussed herein." What did you mean by that last sentence?

A. I mean that the information that's contained in both the original report and the rebuttal may help the Nevada judge in the analysis by informing them of how things work in Delaware. It was not intended to mean the converse, which your question implies, which informs means that it has precedential value which a Nevada court will follow. That's not what I said.

Q. That's -- that's what I was seeking to clarify.

A. Well, I -- I -- I thought so.

Q. Right. So to be clear, you're not suggesting with your Footnote 2 that Delaware law has precedential value with respect to Nevada statutes that you're aware of?
A. No, I'm not suggesting that.
Q. And are you aware of any Delaware law that has been treated as precedential by Nevada courts?
A. I -- I haven't -- no.
Q. So with respect to Footnote 2, that last sentence is merely to suggest that a Nevada judge might find the opinion of yourself about what Delaware law says to be helpful; correct?
A. Correct.
Q. Let's turn back to your expert report, your initial expert report.
On Page 4 there's a segment called "FACTUAL BACKGROUND."
A. Yes.
Q. Do you see that?
A. Yes.
Q. Did you draft any portion of the "FACTUAL BACKGROUND" in the expert report?
A. I reviewed it. I didn't draft it.
Q. Okay.

A. I made edits and I obviously read it.
Q. Okay. Do you know who undertook the initial drafting of the "FACTUAL BACKGROUND"?
A. Diva Bole.
Q. Do you know if she had the assistance of plaintiff's counsel in putting this together?
A. I do not.
Q. Okay.
A. I have no basis to believe she did.
Q. But do you know one way or the other?
A. With certainty? No.
Q. Let me show you on Page 5 of the expert report --
A. Yes.
Q. -- there is a paragraph that states -- it starts with "Although it angered his sisters and some...members of the board..." Do you see that?
A. Yes.
Q. And then there's a citation, Footnote 11, do you see that, to Margaret Cotter's deposition testimony?
A. Yes.
Q. Do you recall if you reviewed Ms. Cotter's deposition testimony?

A. I read her deposition, but I don't have distinct recollections at this stage of quotes from it or questions asked.
Q. Do you recall if the cited portion of the testimony says anything about Ms. Cotter or some of the members of the board being angered?
A. If -- if you mean specifically Margaret Cotter's deposition, I don't have a distinct recollection.
Q. Let me show you her deposition, Volume 1.
MR. SEARCY: Mark that as the next exhibit.
THE COURT REPORTER: Exhibit 446.
MR. RHOW: What was 444?
THE COURT REPORTER: The handwritten notes.
MR. RHOW: Great. And then 445 was?
THE COURT REPORTER: The second report, the rebuttal report.
MR. RHOW: That's why I was confused. 444 is which exhibit?
THE COURT REPORTER: The handwritten notes.
MR. RHOW: The handwritten notes,

okay.
MR. KRUM: What happened to the index?
MR. SEARCY: Your guess is as good as mine. This is what happens when we're paralegals; right?
MR. KRUM: This is somebody's effort to impair my ability to search the text.
Well, anyway, it's not mine to do. Go ahead.

BY MR. SEARCY:

Q. If you'll turn to -- take a look at Pages 81 and 82 and then 145 and 146, which are the cited portions of the deposition.
A. Yes.
Q. Do you see anything in those cited portions of the deposition about the Cotter sisters or members of the board becoming angry?
A. No.
Q. Okay. So to the extent that that statement is included in that paragraph, it's certainly not supported by the deposition testimony that's cited in Footnote 11; correct?
A. It's not supported by 81 and 82, no. And it suggests that what it's referring to is after

the dash, that Margaret Cotter sought the position, and the depositions of everyone involved were replete with discussions about the extent to which she was qualified for the position and who supported her for that position, who did not, and it was an integral part, as I understand the depositions, of the interfamilial dispute which so concerned Ed Kane. So that footnote I think is consistent with at least the information after the dash.

Q. And when you say "the information after the dash," that's the -- the last phrase, the position MC sought with respect to the Company's New York City real estate?

A. Yeah. The under -- yes. The underlying facts are -- are rife with a dispute over whether she was qualified for the position, should have the position, whether someone with real estate development expertise should be there as opposed to management of theaters. And it -- it -- it runs throughout all the depositions.

Now, maybe "angered" is a stronger word than can be supported by the use of that particular word, but it's certainly the basis of the -- of considerable contention, as I read it, in context throughout all the depositions.

Q. It's fair to say, though, that when you went through the drafts of the expert reports, you weren't cite-checking the deposition testimony --

A. That's correct.

Q. -- that was cited; correct?

A. That's correct. I used the associate much as -- much as I used a law clerk. They know their job. I can rely upon it until I learn differently, and I do rely upon it.

Q. For purposes of your expert report, did you also have the associate conduct the initial legal research?

A. No. We had discussions about the research. That came -- that came from me. What general principles of law applied and how we should approach the opinion, that came from me.

Q. But in terms of asking for particular cases that were consistent with those general principles of law, did you ask the associate to research those cases?

A. Yes.

MR. KRUM: Object.

THE WITNESS: Sorry.

MR. KRUM: That's okay.

BY MR. SEARCY:

Q. In preparing your expert report did you look at the terms of the employment agreement between Jim Cotter, Jr., and Reading?

A. No.

Q. Okay. Were you ever aware that Mr. Cotter, Jr., had an employment agreement with Reading --

A. It was --

Q. -- prior to submission of your expert report?

A. It was -- yes. It was referred to in the depositions.

Q. Did you ever ask to see that employment agreement?

A. No.

Q. Okay. Would the employment agreement have affected your analysis in this case?

A. My analysis of the standard of review that would apply, whether or not entire fairness would apply to the decision-making, and whether the process for his termination was arguably consistent or inconsistent with a breach of fiduciary duty? It would not.

Q. Why not?

A. Because from what I understood from the depositions, he was continuing to be employed as the CEO; and if he had a contract to terminate him as of a date certain, it was after the date he was terminated. You can infer nothing else from the -- from the depositions.

Q. Let me see if I can understand your testimony somewhat about the -- the CEO contract. When you said he was continuing to be employed as a CEO, do you mean continuing to be employed under the contract?

A. No. I didn't take the contract into consideration other than the references to it that I read in the deposition suggested that he had a year of benefits if he were terminated under the contract.

Q. If the contract stated that Mr. Cotter, Jr., could be terminated without cause, would that have impacted your analysis?

A. It would not have impacted my analysis on whether the process for his termination constituted a breach of fiduciary duty. It's an issue when you initiate a process to terminate somebody, that process -- if you owe a fiduciary duty to the corporation and to the minority

stockholders as well as the controlling stockholders, then the process should be entirely fair. Mr. Cotter himself was a stockholder.

So it wouldn't have had any impact on my analysis of independence, of disinterestedness, and of the process for termination. There was no pretension by -- on anybody's account that I could read in the depositions that he was being terminated under a terminable at will provision of the contract or terminated with or without cause.

Q. If there was an expression at a meeting that Mr. Cotter, Jr., was being terminated without cause under the agreement, would that impact your analysis?

A. It --

MR. KRUM: Asked and answered.

THE WITNESS: If there was never any process developed, by committee or otherwise, for considering his termination and there weren't the trappings of a fulsome process with a vote from -- by disinterested -- by a majority of disinterested and independent directors, I wouldn't have had a -- I wouldn't have had a fiduciary duty issue.

But they initiated the process as a transaction and then that implicates their fiduciary duties. They didn't act as officers monitoring a contract.

BY MR. SEARCY:

Q. Well, let me make sure that I can unpack some of these concepts.

If it had been the case that Mr. Cotter, Jr., had been terminated without there being any process, under his employment agreement which provides assuming for purposes of this question that he can be terminated without -- let me start again because I've already messed up my question.

Is it your opinion that if Mr. Cotter, Jr., had a contract that provided that he could be terminated without cause, that if the directors then simply fired him without undertaking any process, then there would be no issues of fiduciary duty that would arise from that?

MR. KRUM: Objection.

THE WITNESS: If --

MR. KRUM: Wait a minute. It contradicts the testimony, incomplete hypothetical.

Go ahead.

THE WITNESS: There would be a different analysis which would not involve process, which would be important in determining that his termination were entirely fair.

BY MR. SEARCY:

Q. And how would that analysis be different?

MR. KRUM: Same objections.

THE WITNESS: They would be acting more administratively than they would be in their role as formulators of a committee process to be followed up by a full board agenda where there was an agenda item and they were acting as fiduciaries.

BY MR. SEARCY:

Q. Is the -- the hiring and firing of executives something that you would characterize as an administrative duty?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: Yeah. Under -- under Delaware law directors have the power to hire and fire executives, that's correct.

BY MR. SEARCY:

Q. And under Delaware law, when directors hire and fire executives, that doesn't necessarily raise issues of fiduciary duty; is that correct?

A. Not necessarily. It depends -- everything in Delaware depends on context. The context that was arranged here implicated fiduciary duties by the process that they instigated. That's really the best response.

Q. Well, for purposes of your opinion, it sounds like the issue that you're looking at is the process that was undertaken by the directors in their decision to terminate Mr. Cotter, Jr; correct?

A. Yes, it's always an issue of process.

Q. But if no process had been undertaken, then in your understanding under Delaware law, then likely there would be no issue of fiduciary duty with respect to the termination of Mr. Cotter, Jr.; correct?

MR. KRUM: Objection; mischaracterizes --

THE WITNESS: It --

MR. KRUM: -- mischaracterizes the testimony, asked and answered.

THE WITNESS: Unless the action was a sham, it has to be examined in the context of what and why they were trying to achieve the termination of Cotter, Jr., I'll call him, for lack, JJC, however --
BY MR. SEARCY:
Q. Sure.
A. -- however he's referred to in the depositions, I think often as JJC. But, in any event, it depends upon the context.
Q. With respect to your analysis in this case, did you try to obtain any information about any accomplishments that Mr. Cotter, Jr., had while he was the CEO?
A. Other than reading the depositions and the positions that the different directors took on whether at a given point in time he was doing a good job or he wasn't doing a good job or whether the family feud was interfering with his ability to do a good job and the references to -- I don't remember the exact words, but something like disruption of the sea sweep, all of these references, there are good and bad statements made about the quality of the work that he was doing depending on --

Q. Do you --
A. -- depending on who was speaking.
Q. Okay. Do you recall any of the good statements about the quality of the work that he was doing?
A. Well, I understand Mr. Kane thought he was doing a good job up to a certain point. The real -- the real contextual issue here is the extent to which the family feud interfered with the exercise of fiduciary duty by the directors, were they trying to solve the family feud here, focused on that, were they ever focused on the implications for the minority stockholders on the -- on the actions -- with the actions they took. That -- that's what I was looking at because that's what a Delaware judge is concerned about.
The fiduciary duty is owed not just to the controlling stockholders and the corporation itself but also to the minority stockholders. There's not a word of concern in any of the depositions or your other expert reports about the effect on the minority stockholders.
Q. Turning back to the -- the question that I asked you, though, with respect to Mr. Cotter, Jr.'s, performance as CEO, did you

review or consider any information that had to do with any of his accomplishments as a CEO?
MR. KRUM: Asked and answered. Go ahead.
THE WITNESS: The only review that I did of Mr. Cotter's performance was to read the depositions where there were various views at different points in time commenting on the quality or lack thereof of his performance as CEO.
BY MR. SEARCY:
Q. As you sit here, are you able to identify any of his accomplishments as a CEO?
A. No.
Q. So with respect to implications to minority shareholders, are you able to identify any accomplishments or benefits that would be lost to minority -- minority shareholders but through termination of Mr. Cotter, Jr.?
A. No. My focus would be more on the process that replaced him and with whom he was replaced.
Q. With respect to Mr. Cotter, Jr.'s, termination, did you look at the bylaws of RDI?
A. No.

Q. And did you undertake any consideration as to what the bylaws said about the discretion of the board of directors in hiring or firing a CEO?
A. Not having read them, I couldn't have done.
Q. Fair point.
Would those bylaws have impacted your analysis at all if you had -- if you had reviewed them?
A. Not the narrow scope of my analysis, which was on the process they used, no.
Q. So, in other words, your review wasn't about whether or not the board had the right and the ability to terminate Mr. Cotter, Jr., but just about the process that was used in terminating him; is that correct?
A. Yes. And let me explain that answer. Under Delaware law the fact that you have the authority to act doesn't end the inquiry, particularly in entire fairness review. Our law is well-established that despite being authorized either by the charter or the bylaws to take certain action, when you take the action, it must be taken equitably.

And the considerations within the entire fairness review is whether or not that hindsight review of what took place was entirely fair, both as to the nature of the process and the result.

So I would not have been impressed by the fact that there was a bylaw authorizing them to terminate officers because it's generally understood under Delaware law you can.

Q. Is it --

A. Or the directors can. I didn't mean you. I apologize.

Q. Right. No. I understand. Thank you.

Now, just returning to your -- your process point again for a moment --

A. Sure.

Q. -- if -- is it your -- is it your testimony, is it your opinion, that under Delaware law, if no process had been undertaken, then there would be no entire fairness analysis or even business judgment analysis that would have to be undertaken at all in this case?

A. No, because even if a contract provided, hypothetically, that he could be

terminated at will or terminated without cause, however you want to characterize it, if the people making that decision who ultimately selected someone from the controller to replace him who had -- who has an ongoing familial dispute, it would be analyzed to determine whether that process was entirely fair to the corporation and all of the stockholders, the minority as well as the controlling stockholders.

If the decision were made solely by, let's say, an independent, disinterested chairman of the board that's authorized by the contract and the bylaws, it may be a different issue. That's why I keep repeating that it's entirely contextual. There are no bright-line rules in Delaware.

Q. In your understanding of Delaware law, are you aware of any case where a corporation has been found to have been injured or damaged by the termination of a CEO?

A. Not off the top of my head, no.

Q. And I believe you've cited to a case called Carlson in your expert report; isn't that right?

A. Uh-huh.

Q. And in the Carlson case, the court

there found that the termination of a CEO did not give rise to any damages; correct?

A. The case says that, yeah, in its context. And nothing in my report assessed or attempted to assess a damage remedy, except for reinstatement.

Q. Are you aware of any Delaware case where a terminated CEO has been reinstated?

A. No.

Q. And in the opinion that you provide in your report, is it your opinion that Delaware law would provide for the reinstatement of a CEO who's been terminated?

A. If the termination resulted from a breach of fiduciary duty and after, in the case of a controller context, as we have here, after entire fairness review, what Delaware law would say is that the chancellor or the vice chancellor, whoever was sitting, one of the vice chancellors, has the authority from English common law to craft a remedy and there are no limits on the remedy that can be crafted except that that court cannot award -- award punitive damages.

So the object in equity is to craft a remedy. There is the phrase that's often repeated

"every wrong has a remedy." And you're supposed, when you sit on that court, to fashion the appropriate one. That is an alternative, void the act and order the reinstatement.

Q. So your opinion on reinstatement is based on general equitable principles as applied by Delaware law?

A. Yes.

Q. Is that correct?

A. That's correct.

Q. But in terms of case precedent, you're not aware of any Delaware court ever ordering the reinstatement of a terminated CEO; correct?

A. That's correct. Sadly, there's -- despite the -- what's sometimes referred to as the rich body of Delaware law, every context doesn't have a precedent.

Q. Are you aware of cases that hold the converse, that a terminated employee should not be reinstated?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: I have no idea how to answer that because I don't know what the context would have been. Do I know of a

case under these circumstances that are in issue if -- depending on how the facts are resolved ultimately that has ever resulted under Delaware law as a reinstatement of a terminated CEO? I cannot point to a particular case. It's a -- it's an extraordinarily unusual fact situation.

BY MR. SEARCY:

Q. In terms of the process that was used to terminate Mr. Cotter, Jr., in your opinion, what are the deficiencies in the process that was used?

A. Well, the vote, as I recall it, was not a majority of independent and disinterested directors. The leadup to the event that caused the termination had been preceded by a committee that was with Mr. Storey acting as an ombudsman to help resolve issues within the family to improve performance. It had its suggested final review date of June 30th, as I remember.

There was an accelerated process to review the performance and to put on the agenda for a directors meeting the status, as I recall the phraseology, of the CEO, meaning Mr. Cotter.

There are ample suggestions of facts from which the inferences can be drawn, alleged

facts depending on what's ultimately concluded to be true, that there had been people already made up their mind and that the purpose of that agenda item was to terminate him. It wasn't to explore alternatives.

There was no succession plan in place. But, most importantly, the ties, both financial in Mr. Adams' case and familial in Mr. Kane's case, deprived the recommended vote of a majority of disinterested, independent directors.

Q. All right. Let's, if we can, unpack that a little bit.

You made mention of there not being a majority of independent directors. For purposes of your expert analysis, you assumed that Mr. Kane and Mr. Adams were not independent; is that right?

A. Yeah. My expert opinion suggests that there are facts in the record which could result in a fact-finder determining that Mr. Adams was not disinterested and Mr. Kane was not independent.

Q. But you personally didn't come to any factual conclusions about that; correct? You -- instead you assumed the facts?

A. That's correct. As I've tried to

explain, at least under the Delaware analytical system, it's not a determination that's made until after trial, that as a matter of fact the court concludes that one was not independent and the other was interested and not disinterested.

Q. Now, you mentioned familial ties of Mr. Kane.

A. Yeah.

Q. Mr. Kane has those familial ties with Mr. Cotter, Jr., as well; correct?

A. Yes.

Q. Okay. And Mr. Cotter, Jr., has referred to him as Uncle Ed; correct?

A. Yes, there are references to that, for sure.

Q. Mr. Kane was a friend of Mr. Cotter, Sr., for many years; correct?

A. 50, as I recall. He went to law school with him, if I have my facts correct.

Q. Other than those familial ties, are you aware of any other familial ties that you believe might show that he's not independent?

A. Well, the way in which the process took place, Mr. Kane's, in my assessments, focus on trying to remedy the feud within the family, to

characterize it, the disputes within the family, to reconcile the family, inferentially largely out of his respect for Mr. Cotter, Sr., and his long-standing friendship, it's clear that a reasonable judge could conclude that he was more interested in resolving the dispute within the family and reconciling the family than he was addressing the impact of this family and its members continuing to be -- despite their controlling shares, continuing to be operational officers within the corporation than he was with the impact of this continuing process of family feuding on the minority stockholders, meaning the value of their shares.

There's no analysis or discussion of analysis about that impact. He's all driven by what Mr. Cotter, Sr., would have wanted and his distress at the family's inability to work together.

Q. In preparing your expert report, did you see any testimony by Mr. Cotter, Sr., that -- I'm sorry; let me strike -- let me try that again.

In preparing your expert report, did you see any testimony by Mr. Cotter, Jr., that his inability to get along with his sisters was impacting the company?

MR. KRUM: Objection; vague.

THE WITNESS: I'm not sure what you mean by the testimony from him. There's testimony rife through all the depositions that the sea sweep was in distress because of their inability to get along and their -- their disagreements, people within the sea sweep taking sides, that's throughout the depositions.
BY MR. SEARCY:
Q. And one way to resolve that conflict between Mr. Cotter, Jr., on one side, and his sisters, on the other, would be to terminate one or all of them; correct?
A. Yes; and -- yes, there are references to that in -- by some of the directors, in particular I think the two independent and disinterested directors.
Q. And in terms -- you made reference to that consideration by the disinterested directors. Now, in your opinion is there anything in and of itself about terminating one or all of the Cotter family that would give rise to a breach of fiduciary duty?
MR. KRUM: Objection; vague, incomplete hypothetical.

Go ahead.
THE WITNESS: No, I don't -- I don't think there's anything that would suggest if all three were terminated, it would be a breach of fiduciary duty if a process was in place and that was decided by disinterested, independent directors.
In fact, I recall the discussion that one of the alternatives might be -- and Delaware law would support this -- that all of the directors resign. When forced with a breach of their fiduciary duty or resignation, resignation is the alternative.
BY MR. SEARCY:
Q. So you've identified Mr. Kane's efforts to resolve the family feud between Mr. Cotter, Jr., and the Cotter sisters as an indication of his familial interest; is that right?
A. Yes.
Q. Wouldn't resolution of that feud also assist in the performance of the company?
A. It could. That's why it's important to hear him testify and his credibility about his motivation. What the issue that's raised by his efforts and his, I think it's fair to characterize,

evident passion in that regard when you read his deposition is should that be his focus as a fiduciary, preserving the family's interest, or should he be looking at the broader picture of the minority stockholders, the corporation itself, as well as the interest of the controlling stockholders, and that's what the ultimate finder of fact will have to resolve. I can't -- I can't opine on that.
All I can say is it's an issue that would be of significant concern to a Delaware judge in determining, once it's raised by the pleadings under entire fairness, whether he can demonstrate that his attention to the family concerns was consistent with attention to the minority stockholders and corporation itself benefit.
Q. Other than his friendship with Jim Cotter, Sr., and other than his efforts to resolve the family feud between Jim Cotter, Jr., and his sisters, can you point to anything else that indicates that Mr. Kane --
A. Just --
Q. -- might not be independent?
A. The interfamilial interaction, not just the Memorial Day weekend when Jim Cotter came,

but the phone calls and everything else, can't be read out of context. It can't be the predominant set of facts, but it can't be ignored either. Delaware law makes it clear that mere friendship is not a disqualifier. So you have to read it in context.
But that's additional -- those are additional facts which one might conclude is something extraordinary for an independent director. But independent of anything else, it wouldn't be significant. But drawn in with everything else in context, it is significant.
Q. Now, you just mentioned a visit by Jim Cotter, Jr., to Mr. Kane.
A. Yeah.
Q. Do you see that as being potentially significant in considering Mr. Kane's independence in terms of terminating Jim Cotter, Jr.?
A. Not necessarily with the act of termination, but it's an indication of his concern about the family. And the finder of fact will have to weigh that significance in context with whether it meets his duty as a fiduciary to the minority stockholders and the corporation itself. What's overriding what here? Is he focused on the object

of his exercise of his fiduciary responsibility or is he swayed by his concern about the family? You -- you can't reach that conclusion just on pleaded facts and depositions.

Q. Other than Mr. Kane and Mr. Adams, did you reach any conclusions or opinions about whether any of the other directors in this case are independent?

A. Well, I think it's clear, Ellen and Margaret Cotter are not independent.

Q. Anyone else?

A. No.

Q. Okay. Now, in terms of Mr. McEachern, you don't have any opinion on whether or not --

A. No.

Q. -- he's independent?

A. And, remember, when I say "opinion," I mean have I seen pleaded facts that would suggest either a lack of independence or disinterestedness or the ab -- interestedness, I should say.

Q. Right.

A. Sorry; I misspoke. The answer to Gould and to McEachern -- how do you pronounce his last name?

Q. McEachern.

A. -- McEachern -- God, I'm part Scott, I should get that right -- and Storey, no.

Q. Okay. With respect to Judy Codding or Michael Wrotniak, have you formed any opinion as to whether they're independent?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: Again, I haven't formed an independent -- I haven't formed an opinion that they are independent or not. All I can say there are the circumstances of their relationship relative to their experience, training, and expertise to be a director of that company would raise an eyebrow in Delaware and it would be exam -- examined carefully.

BY MR. SEARCY:

Q. But as you sit here and having reviewed the materials that you have reviewed, you don't have an opinion one way or the other in terms of whether Mr. Codding -- I'm sorry -- Ms. Codding or Mr. Wrotniak are independent; correct?

MR. KRUM: Asked and answered.

THE WITNESS: I can't resolve that.

I -- I only know what the pleadings and the depositions suggest. And it appears it would raise an issue in my mind as a Delaware judge because it seems despite a controller's ultimate decision and a vote on directors at the annual meeting, that it's sort of extraordinary to have people without significant credentials come on largely because they are related to the -- in some way to the Cotter family.

BY MR. SEARCY:

Q. Let me -- let me just make sure that I understand what your opinion is. Do you have an opinion one way or the other as to whether or not Mr. Wrotniak or Ms. Codding are independent?

A. No, I can't reach that conclusion. As I've stated over and over, that would have to be determined by the finder of fact.

Q. Are you offering any opinion in this case as to whether they are independent directors or not?

A. No.

MR. KRUM: Asked and answered.

THE WITNESS: The only opinion I've offered is that examining the pleadings and

the circumstances here raises a reasonable doubt about their independence and would have to be resolved by the finder of fact.

BY MR. SEARCY:

Q. Do you know what date Mr. Cotter was -- Mr. Cotter, Jr., was terminated on?

A. My -- exact date? It's in May of 2015.

Q. Okay.

A. 27 sticks in my mind, but I'm not positive.

Q. Do you know whether it might have been as late as June 12th?

A. It could have been.

Q. Okay. In your opinion, is there any breach of fiduciary duty by terminating Mr. Cotter, Jr., on June 12th as opposed to June 30th?

MR. KRUM: Objection; incomplete hypothetical.

THE WITNESS: I don't see the significance of that.

BY MR. SEARCY:

Q. Okay. You don't see the significance of it -- just so I can clarify, you don't see the significance of it from a fiduciary duty

perspective?
A. The process is the same whether it's June 12th or June 30th.
Q. Then it doesn't make any difference; correct?
A. Well, there was an -- there was an established -- at least in the minds of some of the witnesses -- and there's some testimony inconsistent with that and that's why I can't resolve it finally -- that he would be given until June 30th under the arrangement that had been made with Mr. Storey as the ombudsman and the two-person independent committee that was basically acting to supervise him in a -- in a way.
Then the executive committee comes into existence. The process that results in terminating him doesn't go to June 30. That's -- that's all I can recall. And so there's still the process implications, yeah.
Q. And let me -- let me just, if I can, narrow the issue here, though. In terms of the decision whether to fire him on June 12th or to fire him on June 30th, the difference in those dates doesn't have any significance from a fiduciary duty perspective in your understanding; correct?

MR. KRUM: Objection; vague and ambiguous, asked and answered, may contradict the testimony.
THE WITNESS: It's -- it's possible for the person reviewing the process to decide either way on that. They could decide that it was important that it didn't play out to June 30th and that the decision to change from the June 30th original plan, if that indeed she concludes was the original plan, was a breach of fiduciary duty.
So firing on June 12th would be different than firing by coming back to a meeting and saying we've exhausted all of our efforts acting as ombudsman, the difficulties continue, we have to make a decision about what to do about it, one of those alternatives is to terminate Mr. Cotter, Jr. That could -- that could influence a judge.
BY MR. SEARCY:
Q. If the board had concluded that it exhausted all of its efforts by June 12th, is there any breach there?

MR. KRUM: Same objections.
THE WITNESS: Well, it depends on how you resolve the facts. There was already put -- it had already been put in place a plan to go to June 30th. The circumstances that would cause them to move from June 30th to June 12th are important. Everything is context.
I -- I can't make that determination or opine on whether there's magic in June 12th or June 30th. It does affect the analysis of the process.
BY MR. SEARCY:
Q. And when you say there was a plan, I think you've testified to this earlier, there is disagreement as to whether or not there was a plan on whether to go to June 30th; correct?
A. There is.
Q. Okay. Do you know how many meetings the board of directors held before terminating Mr. Cotter, Jr.?
A. Well, that's difficult to say. From the start of time or within what time frame?
Q. With respect to deciding whether or not to terminate Mr. Cotter, Jr.

A. Do you mean meetings where that was a subject on the agenda?
Q. Correct.
A. No, I don't know how many there were.
Q. Okay.
A. The best I can tell from the deposition, there was the one.
Q. Okay. If there was more than one meeting where Mr. Cotter, Jr.'s, termination was discussed, would that impact your analysis?
MR. KRUM: Objection; incomplete hypothetical.
THE WITNESS: I don't know how to answer that. It depends on notice of the meeting; who appeared; who participated in the process; were they all independent, disinterested directors or were they Cotter directors as well as truly independent directors or those that were tainted in some way by their -- their interestedness and their lack of independence. There's too -- too many variables.
BY MR. SEARCY:
Q. You can't say one way or the other --
A. I cannot.

Q. -- as you sit here?
A. I cannot.
Q. If -- if all of the directors were present for multiple meetings where a discussion of Mr. Cotter, Jr., was on the agenda, would that impact your analysis?
MR. KRUM: Same objections.
THE WITNESS: Not really because I can appreciate the fact that there would be a discussion of a CEO's performance at a board meeting. Whether it focused on termination or not is the issue.
BY MR. SEARCY:
Q. In preparing your opinion did you review any of the meeting minutes from any of the board meetings where Mr. Cotter, Jr.'s, termination was discussed?
A. No.
Q. Okay. In review -- in preparing your opinion did you review any of the notes of any of the directors who participated in the meetings where Mr. Cotter, Jr.'s, termination was discussed?
MR. KRUM: Assumes facts.
THE WITNESS: No.
MR. SEARCY: Why don't we take our

lunch -- do you want to take a lunch break now, Mark?
MR. KRUM: Sure.
MR. SEARCY: Okay.
THE VIDEOGRAPHER: Off the record at 12:41. This will end Disc No. 2.
- - -
(Whereupon there was a luncheon recess in the proceedings.)
- - -
THE VIDEOGRAPHER: The time now is 1:54. Back on the record, beginning of Disc No. 3.
BY MR. SEARCY:
Q. Welcome back from lunch.
A. Good afternoon.
Q. Let me turn for a moment to the issue of executive committees.
In your understanding and experience executive committees are permitted under Delaware law; is that right?
A. Yes.
Q. Okay. And do you have any knowledge as to whether executive committees are permitted under Nevada law?

A. No.
Q. And you don't have any knowledge as to the statutes governing the -- the use of executive committee -- committees under Nevada law?
A. Not -- no, I have no -- no idea.
Q. You provided an opinion about the executive committee of Reading in this case; correct?
A. I -- I spoke to its formation, yes.
Q. And were you aware when you formulated your opinion that an executive committee existed before plaintiff was terminated?
A. That an executive committee?
Q. Yeah.
A. Yes, it did. There was one.
Q. Okay. And you are aware that plaintiff was the chairman of that executive committee?
A. I remember reading that in the deposition; yes.
Q. Are you aware of any change to the delegation of authority that was given to the executive committee after plaintiff's termination?
A. No.
Q. And with respect to the executive

committee instituted at RDI, are you aware of any actions taken by that committee?
A. Any actions taken by them?
Q. Yeah.
A. I'm not sure I understand what you mean.
Q. Are you aware of any -- well, maybe we can break it down.
Are you aware of any -- anything that the executive committee ever did?
A. Suddenly my -- my mind is not clear. I'm trying to -- are you talking about formal actions that they took?
Q. Correct.
A. I -- my focus was on how it was reformulated and populated in such a way that it did not have a majority of independent and disinterested directors.
Q. Well, let me have you turn to Page 29 of your report.
A. Yes.
Q. And this is your opinion on the creation of the executive committee; is that right?
A. Yes.
Q. Okay. And you're -- to the extent

that you express any concerns about the executive committee, in your opinion it's because of the exclusion of directors; is that right?
A. Yes.
MR. KRUM: Object.
THE WITNESS: Sorry. Yes.
BY MR. SEARCY:
Q. Not about any action that any --
A. No.
Q. -- of the members of this committee ever took?
A. No.
Q. Okay. Were you aware that Bill Gould was asked to be a member of the executive committee?
A. I don't recall that.
Q. Okay. You never saw any testimony about that?
A. I may have. I just -- it didn't stick in my mind.
Q. Okay. And if he -- in your opinion, if he were asked to be a member of the executive committee, then he certainly wasn't being excluded from it; correct?
MR. KRUM: Objection; assumes facts, incomplete hypothetical.

THE WITNESS: If he were asked and he declined for his own personal reasons, then it would be very difficult to argue that he was excluded.
BY MR. SEARCY:
Q. Okay. Other than Mr. Gould, is there anyone else you believe may have been excluded from the executive committee?
A. Well, Mr. Storey was not on the executive committee.
Q. Anyone else?
A. Not -- not that I recall.
Q. And Mr. Storey, in your understanding, has resigned from RDI; correct?
A. He's no longer there, yes. I don't know -- I don't recall the circumstances.
Q. Okay. In formulating your opinion about RDI's executive committees, did you consider RDI's bylaws?
A. No.
Q. Did you examine what the bylaws have to say about the formation of an executive committee?
A. No. But for the same reason I explained earlier.

Q. You didn't consider them to be relevant?
A. It's -- it's relevant that you have the authority to form an executive committee. What's more important is did you implement that authority in a way that was equitable and one that didn't exclude directors who had equal responsibility when an executive committee assumes virtually all of the duties of the regular board.
That's when the factual question comes up about whether or not it was fairly organized in a way to either promote efficiency or to exclude certain directors from the ultimate decision-making process, and that's a contextual, factual decision that has to be made by a finder of fact.
Q. Okay. And in the context of what you've just described, just to be clear, you didn't review Mr. Gould's testimony about being asked to be on the board; correct?
A. I didn't recall it.
Q. Okay. And you didn't look at what the bylaws of RDI provided for?
A. I did not because it would make no difference.

Q. Okay. And you didn't look to see what actions, if any, the executive committee had ever taken; is that right?
A. In that form? No.
Q. Okay. When you say "in that form"?
A. As repopulated.
Q. Okay. Did you ever take a look to see what actions the executive committee took when Jim Cotter, Jr., was chair of the executive committee?
A. I -- I did not.
Q. So to be clear then, you didn't look to see what actions the executive committee took either before or after Mr. Cotter, Jr.'s, termination; correct?
A. Well, the question becomes whether it was the executive committee or the full board that made the appointments that came after the repopulation, so to speak, or the reconstitution of the executive committee.
Q. Are you talking about the executive -- well, let me backtrack.
When you're talking about the appointments, which appointments are you referring to?

A. The CEO and the title that was given to Margaret Cotter.
Q. All right. With respect to the CEO and the title given to Margaret Cotter --
A. The succession is what I'm talking about.
Q. Yeah -- neither of those actions were taken by the executive committee; correct?
A. Not to my knowledge. That's why I didn't explore it.
Q. Okay. Well, when you say that's why you didn't explore it, can you explain what you mean?
A. I didn't have any actual actions of the executive committee to touch upon other than the fact it was constituted in such a way that it had the same powers as the board and it didn't have a majority of independent directors.
Q. Okay.
A. But I'm not speaking to any particular action it took.
Q. Okay. Well, I just want to clarify, when you brought up the appointment of the CEO, when you brought up the appointment of Margaret Cotter, neither of those were actions that were taken by the

executive committee in your understanding; correct?
A. Yes.
Q. Okay. Has, to your knowledge, the executive committee had any involvement in either of those actions?
A. As an executive committee, no.
Q. And do you know who constitutes the executive committee at RDI?
A. Right now?
Q. Yeah.
A. No.
Q. Okay. Let me ask you about an expression of interest letter sent by a fellow named Paul Heth to the company. Does that sound familiar to you?
A. I don't remember the name Heth, but I remember an expression of interest letter.
Q. Okay. Have you reviewed the expression of interest letter submitted or -- I'm sorry -- signed by Mr. Heth?
A. No.
Q. Okay. With respect to the expression of interest, have you reviewed anything other than plaintiff's Amended Complaint?
A. No.

Q. Now, as you sit here, you don't have any knowledge of what the terms of Mr. Heth's letter provided for; correct?
A. I do not.
Q. Okay. And with respect to any discussion undertaken by the board concerning Mr. Heth's letter, you don't have any knowledge other than what's set forth in the Complaint; is that right?
A. Just from the pleadings.
Q. Okay. Now, when you say "the pleadings," you mean the Amended Complaint; right?
A. Well, that's where the allegation occurs; yeah.
Q. You haven't looked at any underlying documents?
A. No.
MR. KRUM: That were produced on or about the 15th of September, I should note.
MR. SEARCY: All right.
BY MR. SEARCY:
Q. With counsel's speaking objection in mind, have you reviewed any documents since then?
A. No. At the point in time of my opinion, I had some conversation at some point with

Mr. Krum saying that there had been developments since then. But I -- it wasn't the focus of my opinion and it wasn't a focus of my attention as a result.
Q. In formulating your opinion, did you look at all at Nevada Revised Statute 78.138 4.(d)?
A. I did not.
Q. Do you have any knowledge as to whether the board responded to Mr. Heth's letter?
A. From what I read in the materials that were available to me, the board rejected any further inquiries. But now I understand there have been further solicitation by a prospective buyer and there -- there's some action that might be taken as a result of that. But I -- I'm not familiar with it.
Q. Okay. Do you have any opinion on it, on the currently undergoing discussions?
A. Well, I don't know what they are so I couldn't have an opinion on them. But I -- if there's more than what I saw, then that's a good thing because, as you know from my report, the concern I had at least from a Delaware perspective was while there's the famous phrase "just say no," it assumes a good-faith investigation, which doesn't

require necessarily lawyers and financial advisors, but it does require a business plan to be reviewed and thoughtful, good-faith entertaining of the prospects of the -- of the inquiry. And that was -- that was my express concern.

Q. Now, let me make -- let me make sure I understand your -- your formulation of Delaware law.

A. Sure.

Q. Under Delaware law the members of the board of directors were not required to seek out an independent investment banker; correct?

MR. KRUM: Object to the incomplete hypothetical.

THE WITNESS: It's correct the law does not mandate that they do so.

BY MR. SEARCY:

Q. Okay. Under Delaware law -- well, let me ask you first: Do you know whether under Nevada law directors are entitled to rely on financial information presented to them by the CEO and chairman of the board?

A. I don't know under Nevada law whether they are or not.

Q. Are you aware that a valuation was

presented to the board by the CEO --

A. I know --

Q. -- in connection with the unsolicited offer?

A. I'm sorry.

THE WITNESS: And I apologize to the court reporter.

THE COURT REPORTER: Thank you.

THE WITNESS: I know that there was a presentation made. The depositions reflect that by the then CEO Ellen Cotter.

I don't know what was presented. I do know it was presented in the absence of a business plan which was supposed to be produced but didn't exist apparently. But I don't know the quality of the information or the source of it.

BY MR. SEARCY:

Q. Is there a law or statute that you're referencing under Delaware law that would require a written business plan be in place?

A. No. Delaware law, as I've said before, is highly contextual, doesn't require lockstep check-the-box steps, no.

Q. So when you referred to the lack of a

business plan, you weren't referring to a requirement under Delaware law; is that right?

A. That's correct. It would just be one fact in an analysis of whether there was a good-faith response.

Or I should say a response made in good faith.

Q. Were you shown the presentation made to the board by Ellen Cotter?

A. I was not.

Q. Okay. So do you have any opinion as you sit here as to --

A. No. I wouldn't have made a factual judgment on its quality or its significance or what it should have been to the board.

Q. In preparing your expert opinion were you ever shown a document called "The Mission, Vision, and Strategy, 2015 Performance Results, 2016 Budget and Strategy"?

A. I was not.

Q. Okay. In your role as a legal expert would you be able to offer an opinion one way or the other as to whether a particular document is a business plan or not?

A. No.

Q. So if I showed you "The Mission, Vision, and Strategy" document, you wouldn't be able to opine one way or the other as to whether that was a business plan?

A. Well, I have seen business plans. If you showed me one specific to this corporation, could I give you an opinion based on my experience and expertise on whether it is a bona fide business plan? The answer is no.

Q. Have you sent any bills to plaintiff in this case or plaintiff's counsel?

A. My office probably has.

Q. All right.

A. I don't -- it may sound strange to you as a practicing lawyer, but I don't pay much attention to billing.

MR. RHOW: You're lucky. That's all I pay attention to.

THE WITNESS: That comes -- all comes from being temporary.

BY MR. SEARCY:

Q. Do you know if those bills were collected for production in this case?

A. I have no idea. I don't even know that there was a request -- a request for production

of the bills.
Q. Now, in terms of the documents that were produced by you in this case, were there any documents that you withheld?
A. No.
Q. Okay. No documents withheld on the ground of work product?
A. No.
Q. Okay. On Page 26 of your expert report, if you would take a look at that.
A. Yes.
Q. The last sentence in the very first paragraph there that begins with "Neither Kane's nor Adams' ties to EC and MC were disclosed to the Company's stockholders."
A. I'm sorry; I couldn't hear you.
Q. Sure. I'll speak up. I apologize.
A. No. It's my fault. I was reading while you were trying to point me to the place you want me to read.
Q. If you look at that last sentence of the first partial paragraph, it's the concluding sentence of the first -- first paragraph there --
A. Yes.
Q. -- about Kane's and Adams' ties --

A. Yes.
Q. -- did you review any filings by the company in rendering your opinion that neither Kane's nor Adams' ties were disclosed to the company's stockholders?
A. Just the one footnote, 190.
Q. You didn't review any other disclosures?
A. No.
Q. Okay. Did you review any SEC filings filed -- signed by plaintiff?
A. No.
Q. So you didn't see any SEC filings signed by plaintiff where he certified that Kane and Adams were independent?
A. I read about it --
MR. KRUM: Object --
THE WITNESS: -- in the depositions.
MR. KRUM: Objection.
THE WITNESS: But I didn't review the actual filing.
MR. KRUM: Vague and big as to "independent."
BY MR. SEARCY:
Q. Would it have changed your opinion

one way or the other?
A. No.
Q. Why not?
A. Because I was not approaching this from listing standards or from what representations were made to the SEC about independence or disinterestedness. I was approaching it solely from the analytical framework that a Delaware court might apply in this situation.
Q. So that in terms of the disclosures to the company's stockholders that's referenced there, how does that factor into the analytical framework?
A. It's a question of whether or not the -- it's an action that would result in stockholder -- a need for stockholder approval or not. It's -- it's a question of the duty of what is called disclosure. If you make a disclosure, it should be accurate. That's all.
Q. And to your knowledge, when plaintiff certified that Kane and Adams were independent, was he inaccurate?
MR. KRUM: Same objection.
THE WITNESS: I don't know what standard he was using so I can't answer

that. I suspect he wasn't using the Delaware legal standard. He may have been using simply the NASDAQ listing requirements. I don't know, just as I don't know that -- until the finder of fact makes the decision, whether there should have been a disclosure, and I don't opine there should or shouldn't have been about Kane or Adam either -- Adams either.
BY MR. SEARCY:
Q. Okay. Earlier I think you mentioned in connection with the termination of Jim Cotter, Jr., that the board had put a plan in place to give him until June 30th; is that right?
A. There are facts that -- yes, I did say that, and there are facts in the depositions that suggested that.
Q. Do you know what that plan was?
A. Only to the extent that it was a plan to continuing the -- to continue the ombudsman review by Mr. Storey and the two-person committee, as I recall, at the time of Gould and Storey that were charged with trying to improve his stewardship of the corporation; and there was at least the view on the part of Mr. Storey that that review would

continue until June 30. As I recall the deposition, that fact was disputed by Mr. Kane.
Q. And others; correct?
A. Mr. Kane's is what I remember --
Q. Okay.
A. -- because I spent so much time reading Mr. Kane's depositions.
Q. Other than continuing the ombudsman role until June 30, do you remember any other aspect of the plan?
A. No.
Q. Do you know if there was any other aspect of the plan?
A. No.
Q. Okay. And in your -- in your view, in your opinion, was continuing the ombudsman role until June 30 itself sufficient to satisfy fiduciary duties?
A. It would still --
MR. KRUM: Objection; incomplete hypothetical.
THE WITNESS: It would still depend upon the entire context. It would be more beneficial to the view that things had played out with an idea of the interest of

the minority stockholders in the corporation itself in mind as well as those of the controllers.
Ending it earlier, before that had completely played out, raises the specter of the controlling stockholders who sought to benefit if Mr. Cotter, Jr., were terminated to be influencing the decision of the fiduciaries. And, again, it's the lack of focus on the minority stockholders that's troubling throughout the entire process.
BY MR. SEARCY:
Q. With respect to the minority stockholders, in your opinion how would continuing Mr. Storey as ombudsman assist the minority stockholders?
A. It would demonstrate that the fiduciaries were letting the situation play out to the very end to see if even those who did not believe that Mr. Cotter, Jr., was doing the job of CEO as they would have him do it, it would at least give them the option to let it play out and see if it -- if he was able to improve his performance.
And whether or not the CEO's performance is favorable is clearly important to the

minority stockholders. The question is whether the decision was influenced by the controlling stockholders or whether it was an independent, objective decision made by directors who were both independent and disinterested.
Q. Other --
A. It calls -- it calls into question a review of the -- and an examination of their reasoning for structuring a process why they did and changing a process that at least some of them believed was in place.
Q. Other than giving until -- Mr. Cotter, Jr., until June 30th to improve his performance, would there be any other benefit to minority shareholders?
A. Well, the benefits would be the confidence that the directors, who owe them a fiduciary duty, were carrying out those duties with the interest of the corporation and all of the shareholders in mind and not just the interests of the controlling stockholders and the feuding family.
Q. Anything else?
A. That's it.
Q. Okay. So to summarize, it would give Mr. Cotter, Jr., until June 30th to improve his

performance and it would potentially improve confidence in the minority shareholders; correct?
MR. KRUM: Object to the characterization of the testimony.
THE WITNESS: It could be the first. I don't know the answer to that, the extent to which another two weeks or so --
BY MR. SEARCY:
Q. Right.
A. -- would have allowed him to improve his performance to the satisfaction of an independent disinterested fiduciary. But it's very important that the fiduciaries demonstrate to the minority stockholders, particularly in a controlled situation, that they have all of the stockholders' interests in mind and they're not being guided by a bias or the controlling stockholders or concerned that the controlling stockholders may remove them from office at the next annual meeting if they don't do -- if they don't act consistently with the controlling stockholders' wishes. All minority stockholders are concerned about that despite the fact that they know they're buying into a controlled company.
Q. And when you say controlling

stockholders may remove them from office at the next annual meeting, are you referring to about officers being removed?
A. No, no. I'm talking about not reelecting the director.
Q. Okay.
A. That's an omnipresent concern under Delaware law, that the directors aren't slavishly following the controlling stockholders because they're concerned about their director position.
Q. All right. With respect to Mr. Cotter, Jr., he's actually still a director; right?
A. Yeah.
Q. Okay. So he hasn't been removed from that position, to your understanding; correct?
A. To my understanding, no.
Q. Okay. Are you aware of any minority stockholder of RDI who was ever asked -- strike that.
Are you aware of any minority stockholder of RDI who is currently seeking to have Mr. Cotter, Jr., reinstated as CEO?
A. I am not.
Q. Okay. And just to -- just to follow

up on this, other than Mr. Storey continuing his ombudsman role until June 30th, is there any other aspect of the plan that you believed satisfied fiduciary duties?
MR. KRUM: Objection; vague and ambiguous, don't know what it means, asked and answered.
THE WITNESS: I am not sure what you mean by am I aware of any other aspect of the plan that satisfies --
BY MR. SEARCY:
Q. Well, I think you --
A. -- the fiduciary duties.
Q. You testified earlier that there was a plan that was put in place and I think your opinion was that that plan should have stayed in place with re -- with respect to the termination of Mr. Cotter, Jr., on June 30th.
MR. KRUM: I'm going to object to the characterization of the testimony. Is that a question you want him to respond?
MR. SEARCY: If he can.
THE WITNESS: Yeah. I'm not offering an opinion that it should or should not have stayed in place. I'm offering the opinion

that the process that cut it short raises questions about whether those who cut the process short, knowing that plan was already in place and there may still have been hope at least in the minds of two independent directors that it could work, at least should wait until June 30 to play out. It was interrupted, and the concern of anyone reviewing it would be why.
BY MR. SEARCY:
Q. So --
A. And if the burden shifts, as my opinion suggests it should, the defendant directors should demonstrate that it was fair to cut it off then.
Q. Hypothetically speaking, if the plan had stayed in place until June 30th --
A. Yeah.
Q. -- and I think I asked you this before, but I'll ask it again for clarity's sake -- would that plan -- even though there are directors who dispute that that plan was in place, would that plan have satisfied fiduciary duties?
A. Not alone, no. It would still be an inquiry into the process. It would be one factor

removed that looked unfavorable at the time to the directors who have been accused of breaching their fiduciary duty by the Complaint.
Q. So in your opinion Mr. Cotter, Jr., could have been fired on June 30th, after the completion of the plan, and that still might be a breach of fiduciary duties; is that right?
MR. KRUM: Objection; incomplete hypothetical, asked and answered.
THE WITNESS: Depending on how the facts developed at a hearing about the context of the process and why people voted the way they did and an exploration of their objectivity by testing their independence and their economic interest aligned with the Cotter directors, it might have been.
BY MR. SEARCY:
Q. Let me ask you to turn to Page 29 of your expert report.
A. Okay.
Q. And this portion of the expert report concerns the CEO search and the decision to appoint Ellen Cotter --
A. Yes.
Q. -- as CEO; correct?

A. Yes. You're talking about Paragraph C. on Page 29?
Q. That's right, Section C.
And I think you reiterated a point in the first portion of that paragraph that you said earlier, that there is no case -- or you're aware of no case law that discusses the fiduciary duties and standards applicable to the appointment of officers; correct?
MR. KRUM: Objection. That misstates the testimony, incomplete hypothetical.
THE WITNESS: That's what the report says, yes, and that's what I think.
BY MR. SEARCY:
Q. You don't disagree with that statement.
A. No. Well, I hope not.
Q. And in providing your opinion you talk or you make mention of the CEO search committee?
A. Yes.
Q. Are you aware of who the members of the CEO search committee were?
A. I was. At this particular moment in life I don't remember their names.

Q. Okay. You're aware that Mr. Gould was a member of the CEO search committee; correct?
A. I don't independently recall that now.
Q. Okay.
A. But I don't dispute it.
Q. And you don't have any opinion on Mr. Gould and whether he's an independent or interested director?
A. I -- I didn't see facts alleged in the Complaint that would give me reason to -- to believe there was a reasonable doubt about his independence or his disinterestedness.
Q. And do you recall that Mr. McEachern was also a member of the CEO search committee?
A. As -- as I -- no, I don't recall. I don't dispute it.
Q. Okay. And Ellen Cotter was on the CEO search committee but recused herself. Do you recall that?
A. I do recall that.
Q. Okay. And Margaret Cotter was also on the committee. Do you recall that?
A. Yeah. I see that I had reported that and cited to Footnote 211 was EC, MC, McEachern, and

Gould.
Q. Yeah, there it is in the report, yes.
A. That just refreshed my recollection, if I'm allowed to do that.
Q. You are.
And do you have any reason to believe that either Mr. Gould or Mr. McEachern didn't carry out their fiduciary duties in performing their duties on the -- on the CEO search committee?
A. Well, I --
MR. KRUM: Objection; foundation.
THE WITNESS: To be consistent with what I testified to earlier, I'd start with the proposition that I didn't see information pleaded sufficient to raise a question that there was a reasonable doubt about their independence or their disinterestedness. I make no judgment about whether in fact someone breached their fiduciary duty.
BY MR. SEARCY:
Q. Okay. And in your review of the materials in this case did you see anything to indicate that Mr. Gould or Mr. McEachern acted in an interested way in conducting their services on the

CEO search committee?
MR. KRUM: Objection.
THE WITNESS: I'm not sure what you mean by that. Interestedness is a term of art for my culture.
BY MR. SEARCY:
Q. Okay. Let me see if I can ask it a better way.
In terms of Mr. Gould's service on the CEO search committee --
A. Right.
Q. -- did you see anything that indicated that he was acting in a way that was not independent?
A. No.
MR. KRUM: Same objection.
BY MR. SEARCY:
Q. In respect to Mr. McEachern's service on the CEO search committee, did you see anything that indicated that he wasn't acting in an independent fashion?
MR. KRUM: Same objection.
THE WITNESS: No.
BY MR. SEARCY:
Q. Okay. If you'll turn to Page 31 of

your expert report.
A. (Witness complies.)
Q. On the second paragraph, the -- the last sentence, it's actually the first full paragraph but second paragraph on the page, where it starts out: "Moreover, a finder of fact" --
A. Yes.
Q. -- "could find that these actions constituted intentional misconduct..."
A. Yes.
Q. Is that a reference to intentional misconduct under Nevada law?
A. Yes.
Q. Okay.
A. It -- I -- I don't know with certainty what the case law in Nevada has stated about how one defines in context intentional misconduct. I'm taking it at its dictionary meaning, which to me, since it doesn't parrot violation of the law, which is in the statute, that it must mean someone intentionally breached their duty of loyalty knowing, when they did so, they were doing so.
Q. Well, let me unpack a couple items on that. I think you testified previously that the

exculpatory statute in Nevada is exculpatory also with respect to alleged breaches of duties of loyalty; correct?
A. Yes.
Q. Okay. In providing your opinion on intentional misconduct on Page 31, just to be clear, you didn't consult the Nevada statute?
A. I wouldn't -- well, I was aware of the statute's reference to the exculpation for breach of the duty of loyalty and two exceptions, intentional misconduct and violation of the law. So I was aware and consulted the statute to that degree.
And what I represent here is while I don't know if there is Nevada case law, taken out of specific context, like there often is in Delaware, where the term "intentional misconduct" is interpreted, so I gave it the ordinary meaning that I think a judge would give it, which is a knowing, willful, dereliction of duty.
And I interpret it to be an intentional breach of the duty of loyalty would be an exception to exculpation, which, after all, at least in Delaware, only means exculpation from money damages; not from other remedies that could be

sought and obtained as a result of a breach of fiduciary duty. It simply means the directors can't be held personally liable for their breach of fiduciary duty in monetary terms.
Q. I want to focus on the Nevada law aspect --
A. Sure.
Q. -- here fro -- for our purposes, because I think you said on Page 31, where you make reference to intentional misconduct, you were -- you were doing that with respect to Nevada law; correct?
A. I -- I had that phrase in mind. But when I say with respect to Nevada law, in no way am I suggesting that my interpretation of intentional misconduct is my formulation of Nevada law.
It's -- I'm just taking two dictionary words, putting them together, and interpreting them consistent with my, I guess now, 46 years of practice and 25 years on the bench, they must have some meaning and that's the meaning that I give them.
Q. All right. Now, with respect to your reference to the Nevada statute, I believe you said when you prepared this sentence, were you referring to it by memory, you didn't go --

A. Yes.
Q. Okay. You didn't go and look it up, you just remembered.
A. Yes. That's a fair comment. That's correct.
Q. And in formulating this opinion about intentional misconduct, is it also true that you didn't consult with any Nevada case law?
A. I did not, no.
Q. Looking to the sentence above, is it correct that the intentional misconduct that you're opining about here concerns what you describe as manipulation of the search for a new CEO?
A. Yes.
Q. And the -- first of all, is there any other area in all of these expert reports where you make reference to any intentional misconduct by indi -- the individual defendants?
A. No.
MR. KRUM: Objection. These documents speak for themselves.
BY MR. SEARCY:
Q. And you're not offering any opinion on any other area of conduct as to whether that was intentional misconduct by the individual defendants;

correct?
A. Correct.
Q. It's strictly limited to what we're looking at on Page 31.
A. Correct.
Q. Okay. Now, what you identify as potentially intentional misconduct is what exactly?
A. Well, if this is viewed through the prism of entire fairness, then the defendants will have to establish that the process was fair.
It's very difficult to reach a conclusion without trial about whether, once there is a process in place for hiring a CEO, to have it disrupted and suddenly the person that becomes the primary candidate is one of the controlling stockholders, without raising the concerns of at least the thoughtful judge in Delaware about why did the process play out the way it did in favor of a controlling stockholder when the board had taken pains to hire experts, to craft qualifications for the person they were seeking as the CEO, and then suddenly the process breaks down and the ideal candidate just happens to be one of the beneficiaries of a 70% trust or a trust holding 70% of the voting shares. I mean, that's just too

extraordinary a coincidence not to be looked into.
I don't know what the result should be and my opinion is not suggesting what the result should be. It all depends upon a test of the facts that are developed in context and looking and listening to witnesses who testify about their motivation and their actions to be able to judge their credibility. I'm in no position to do that.
But it's an extraordinary set of circumstances that at least in my jurisdiction would be of concern to a judge sitting in equity understanding that the ultimate fiduciary is a member of the bench looking out after all of the interests, the shareholders, the controlling shareholders -- I should say the minority stockholders, the controlling stockholders, and the corporation itself.
Q. Let me ask you this question hypothetically: At the time that the CEO search was conducted, you are aware that Ellen Cotter was the interim CEO; correct?
A. Yes.
Q. If the board of directors had simply appointed her as the CEO without undertaking any process, would that have raised any issue under

Delaware law?
MR. KRUM: Objection; incomplete hypothetical.
THE WITNESS: It would have raised the issue first, they would have had the authority to do that. So the question would be whether there were facts to establish that that was to the detriment of the corporation or the minority stockholders because it appeared to favor the controlling stockholder and whether or not the vote that was taken to make that happen was one that was carried by a majority of independent, disinterested directors.
In the absence of a majority of independent, disinterested directors making that decision, it would have raised issues.
BY MR. SEARCY:
Q. Okay. If there was a -- let me ask you now -- and again it's a hypothetical -- if a majority of disinterested, independent directors voted to simply make Ellen Cotter CEO without undertaking any process, would that have raised any issue under Delaware law?
MR. KRUM: Same objection.

THE WITNESS: It would have raised the same issue I just articulated.
BY MR. SEARCY:
Q. What --
A. There would have been a different context. There would have been no veil presented to the minority stockholders suggesting that there was a formal process. There wouldn't have been one in place that was disrupted. So it would have a bearing on what the outcome would be. But the issue would still be there.
Q. Well, let me -- let me see if we can break this down a little bit, and maybe you can help me with this hypothetical.
For purposes of appointing a CEO, Delaware law doesn't require any process; correct?
A. That's correct.
Q. Okay. And in this instance, if a majority of independent directors on the board simply appointed Ellen Cotter as CEO after she had been interim CEO without undertaking any process, that wouldn't raise any issues under Delaware law; correct?
A. You qualified that by saying a majority of independent, disinterested directors;

right?
Q. I did.
A. Yes.
Q. My statement was correct?
A. Yeah, that would be correct.
Q. Okay. And with respect to now taking it down to the CEO search committee, if a majority of independent and disinterested directors on the CEO search committee decided to recommend Ellen Cotter to the full board, that wouldn't raise any issues under Delaware law; correct?
A. If it was a majority, it would not.
Q. Okay. Now, let me just follow up with one more question. Under Delaware law, is there any provision in Delaware law that would require a CEO search committee to complete the use of an executive -- strike that. Let me see if I can ask this in a way that's actually in English.
A. I know -- I know where you're going.
Q. Okay.
A. Don't worry about how you phrase it. I know where you're going.
Q. Okay.
MR. KRUM: Okay. Well, it may make a difference in how the testimony ultimately

is used, however.
MR. RHOW: Just tell us what's in your mind right now. Go for it.
THE WITNESS: I'm just trying to be helpful; that's all.
BY MR. SEARCY:
Q. Yeah, I appreciate that.
Now, your understanding is that there was a -- a recruiting firm, an executive recruiting firm, that was used here?
A. Yeah; Korn Ferry, if I recall.
Q. And Korn Ferry started a search process?
A. Yes.
Q. Okay. Under Delaware law is there anything that requires that a CEO search committee complete the usage of a recruiting firm for a search process?
A. That would not --
MR. KRUM: Objection; incomplete hypothetical.
Go ahead.
THE WITNESS: There is no stricture, no mandate, no case law that says that's required.

BY MR. SEARCY:
Q. On Page 31 of your expert report, towards the bottom there's a reference to the compensation committee --
A. Yes.
Q. -- that was asked to revise executive compensation.
A. Yes.
Q. Do you know what steps the compensation committee took in undertaking their review?
A. No.
Q. Do you know if they looked at any compensation studies?
A. There -- there are references in the depositions to old and new valuations based upon comparable businesses and there's a discussion about whether some older ones actually were comparable businesses and they -- they took another look at businesses' valuation process for -- for compensation that they believed were more closer in kind to Reading.
Q. And did you -- did you look at any of the compensation studies that the comp committee looked at?

A. I didn't look at the studies, but I knew that there were studies that they considered.
Q. But you don't have any opinion as to the validity or invalidity of any of the studies, do you?
A. No.
Q. Okay. And you don't have any reason to believe that the committee didn't review those studies; correct?
A. I -- I've seen no facts that suggested that they did not. I've seen facts that suggested they probably did. But I don't know.
MR. SEARCY: All right. Why don't we take a quick break? I'm going to be trying to wrap this up on my end.
MR. KRUM: Okay.
THE VIDEOGRAPHER: Off the record at 2:48. This will end Disc No. 3.
- - -
(Whereupon there was a recess in the proceedings.)
- - -
THE VIDEOGRAPHER: Back on the record at 2:57, beginning of Disc No. 4.
MR. SEARCY: All right. I have no

further questions at this time. I reserve all rights in the event that there are any issues with outstanding document requests, but I have no further questions for now.
BY MR. RHOW:
Q. Your Honor, Justice Steele, nice to meet you. My name is Ekwan Rhow. I represent Bill Gould and only Bill Gould and so I have some questions for you --
A. Sure.
Q. -- about your opinions.
First of all, in terms of your background, clearly you are -- you've been a judge for many years, but have you ever served on the board of a company?
A. On the board of a regional hospital; yes.
Q. Was that a publicly traded company?
A. It was not.
Q. All right. So in your career you've never served on -- as a board member of a publicly traded company; correct?
A. That -- that's correct; only non -- nonprofits.
Q. All right. The judge in this case,

her name is Judge Elizabeth Gonzalez. Do you have any connection with her?
A. Not of which I'm aware.
Q. Never worked on committees with her?
I'm not implying you have, by the way. I'm really asking it open-ended.
A. And -- and you -- you cause me pause because my activity over the last 25 years with so many judicial organizations makes me wonder because I have served on committees, particularly those focused on the formulation of business courts in various states, and it could well be that she may have been with me or me with her on a committee at some point discussing business courts.
Q. And that's fine. I'm not -- that's not -- the question is: Do you recall --
A. I do not recall.
Q. -- or do you have any connections --
A. No.
Q. -- with Judge Gonzalez?
A. No, none of which I'm aware of.
Q. And that's all that you're required to testify to.
Now, as I told you, I represent Bill Gould, not the rest of the directors. And my first

question is: Did you read Mr. Gould's deposition?
A. Yes.
Q. And I want to be clear, I'm not implying otherwise. Did you read it or did your associate read it?
A. Both.
Q. All right. And you said in your testimony with Mr. Searcy that in some parts of the depositions you would skim it and other parts you read more carefully.
A. Right.
Q. And what happened with -- with your review of Mr. Gould's deposition?
A. I skimmed the entire deposition.
Q. Okay. So there were no parts of Mr. Gould's deposition that you read carefully?
A. That's correct.
Q. And I take it the fact that you skimmed through it meant that for purposes of your opinions you didn't view his testimony to be important.
A. Well, I think his testimony is important. I think all of the directors' testimony is important. I looked at the pleading.
Having looked at the pleading and

then skimming his deposition, I reached the conclusion that I could find insufficient facts to suggest to me there was a reasonable doubt about his independence or his disinterestedness. So his deposition as a result became less important to me.
Q. But separate and apart from disinterestedness or a lack of independence, were you or are you offering any opinion as to whether Mr. Gould might have breached a fiduciary duty?
A. I am not.
Q. All right. And so that -- that's what I wanted to get to next.
In terms of your report -- and I first thought it was an oversight, but now from your testimony, I'm beginning to think it was intentional -- on Page 2, if you look at 441, you define "defendants" to be the various individuals stated there, but it doesn't include Mr. Gould.
A. It does not.
Q. And that was on purpose.
A. Yes.
Q. All right. And then in terms of each of the opinions that you provided in this report, those opinions only apply to the defendants as you defined them and they do not apply to Mr. Gould.

A. That's correct.
Q. All right. This could be shorter than I thought.
A. I knew I was answering that question correctly.
Q. I thought -- I honestly did think it might have been an oversight, but I'm glad you corrected that for me.
Now, hang on.
And to be clear, and this is what I -- I think you did cover this with Mr. Searcy -- that based on your review of the Complaint, based on the various depositions you reviewed, you saw no evidence that supports the conclusion that, in fact, Mr. Gould was not independent and was interested?
A. Yeah. And -- and let --
Q. Is that true?
A. Well, the way you phrased it causes me difficulty in answering it because what I've tried to do both in the report and here today is develop the Delaware two-step analysis.
In the first step, if there are no facts sufficiently pleaded to suggest a lack of independence and interest -- in -- interestedness, then you get -- don't go to the next inquiry and

reach any decision about whether there was a breach of fiduciary duty because they get the benefit of the business judgment rule.
So there's no reason for me to carry the analysis of Mr. Gould any farther than that. So I reached no opinion about whether he breached his fiduciary duty or not. I just say the pleadings don't support the second step.
Q. Okay. And so -- and when you say "the pleadings," what you did is you accepted each of the pleadings -- I'm sorry -- you accepted the allegations of the pleadings as true in forming your opinion about Mr. Gould.
MR. KRUM: Well, objection; mischaracterizes the testimony.
THE WITNESS: I -- I don't accept the pleadings as true or false. It's sufficiency to give rise to whether or not there is a reasonable doubt about an individual's independence or disinterestedness. That's all I say.
BY MR. RHOW:
Q. Okay. All right. Now, one of the things that was mentioned earlier was this concept of preventing familial disputes. I don't know if

you recall that testimony.
A. Yes.
Q. If a -- if a director believes that a familial dispute is disrupting operations, is that a valid basis on which that director votes on a particular issue?
MR. KRUM: Objection; incomplete hypothetical, depending upon what's there, it's asked and answered.
THE WITNESS: I'm not sure I understand the question, to be honest.
BY MR. RHOW:
Q. Assuming that a director believes that a familial dispute is disrupting operations --
A. Right, okay.
Q. -- would that be something a board member can consider in deciding how to vote on a particular issue?
A. Yes.
Q. Do you believe that a familial dispute -- strike that.
Do you believe that resolving a familial dispute that is disrupting operations is something that is in the interest of all shareholders?

MR. KRUM: Same objection.
THE WITNESS: In context it could be. Equally so it may not be.
BY MR. RHOW:
Q. It depends on the facts.
A. It depends on -- the fiduciary's focus should always be on the corporation and all of the stockholders; not finding a cure solely in solving familial disputes within a controller block.
Q. There are situations, however, where a majority's -- strike that.
There are situations where the controlling shareholders' interests are not different than the minority shareholders' interests.
A. There can be, sure.
Q. And so in this situation here are you assuming that there was a conflict?
A. There is evidence to support a bias toward concerns about the family over concerns about the entire stockholder body.
Q. All right. Did you review the deposition of an entity called T2?
A. No.
Q. Do you know who T2 is?
A. No.

Q. Do you know the identities of any of the minority shareholders?
A. No, although you could argue that Cotter, Jr., is a minority stockholder.
Q. And you did review Cotter, Jr.'s --
A. Yeah.
Q. -- deposition.
A. Yeah. So with that qualification. It depends on whether you want to define him as one or not because we don't know what the result's going to be of the trust dispute.
Q. Okay.
A. At least I don't think so as of the time of my reading of the documents.
Q. Another question about the interest that a board member is supposed to be looking after or -- or the variables that a board member has to consider. Is board unity a valid consideration for a board member when voting?
MR. KRUM: Objection; vague.
THE WITNESS: If the -- if the context suggests to the thoughtful board member that board unity is in the best interest of the corporation and all of the stockholders, it certainly can be. It's not

an invalid consideration ab initio.
BY MR. RHOW:
Q. All right. I'm jumping around because I'm moving around in the outline here.
You had mentioned reasonable doubt a couple times.
A. Who?
Q. You had mentioned reasonable doubt?
A. Yes.
Q. Now, was that -- is that on purpose?
A. I'm sorry; I thought -- I really didn't think it was somebody's name. I just didn't hear you clearly. God, what a name.
Q. In expressing some of your opinions, you said if there's a reasonable doubt about X, Y, and Z.
A. Yeah.
Q. Is that the standard you're using for your opinions?
A. That's what the Delaware -- yes. To the extent the Delaware case law says when one is reviewing the pleadings to determine whether or not there is sufficient evidence to move to a standard of a review other than business judgment, it is whether the facts as pleaded create a reasonable

doubt about -- I say "about" rather than "as to," as most lawyers -- an individual director's independence or disinterestedness. That's where that phrase comes into play.
Q. And to -- what you just said, is that something you consider at the pleading stage?
A. Yes.
Q. Subsequent to the pleading stage is that same standard of proof used?
A. And then it -- then you go to the materiality standard. By way of example, you examine, okay, there was a reasonable doubt on the facts as pleaded about whether an individual director had an economic interest so aligned with controllers that it would dominate his or her decision-making process and -- and so burden them that they couldn't be objective.
Now, then there's a materiality standard. You look at, well, okay, there's an economic association there, how -- actual -- how material would that really be to the director in order to determine whether or not there is interestedness.
Do you follow me?
Q. I do to a certain extent. It seems

to me -- and maybe I'm -- you're the expert for sure on Delaware law over me. But what I'm asking is really what's the evidentiary standard, because it seems like on a -- on a pleading attack you're applying a reasonable doubt standard. On motions subsequent to a pleading attack --
A. Okay.
Q. -- what is the evidentiary standard?
A. Well, if -- if you've shifted the burden to entire fairness, then it's preponderance of the evidence that it's entirely fair or it's not.
Q. And so here you chose a reasonable doubt standard because you were analyzing the pleadings.
A. Because that's the first step that the Delaware case law teaches you when you're determining whether there should be a burden shift or not.
Then when there's a determination made about whether the defendants have carried their burden, that takes place at trial where credibility can brought -- be brought into play, because credibility can't be obviously brought into play in pl -- in motion practice.
Q. Okay. In a situation where there

is -- in a situation where there is, in fact -- I'm going back now -- in a situation where there is a conflict between the interests of the majority shareholder and the minority shareholder, what should the board director do?

MR. KRUM: Incomplete hypothetical.

THE WITNESS: Let me try to -- that's a kind of shift in analysis that I'm not sure is in play here. A director owes fiduciary duties to the entire stockholder block and to the corporation itself.

The -- the test is whether that director is capable of objectively exercising that process. That director is perfectly free to vote his or her conscience so long as they're independent and disinterested as they see the facts, whether it favors the controller or whether it favors the minority.

The importance is that the process for reaching that decision be fair and that the result be fair, and that's tested after the burden shift, if there is one.

So I -- every director will face decision-making processes at sometime during

his or her directorship where if you're a director for a controlled corporation, they might have to vote against the interest of the controller -- controlling stockholder block or against the minority stockholders.

But, look, the test is are they doing it in good conscience, in good faith, are they doing it objectively because they can act objectively.

They -- the court will not substitute its judgment for an independent, disinterested director who votes after a process where there's facts that satisfy gathering all the information reasonably necessary that one would want before making the decision that are material to that decision and then minutes that reflect contemplative time consistent with the complexity of the problem and then a robust discussion in the board room with other directors who participate in the decision, whether it's a majority consisting solely of independent and disinterested directors or a full board.

BY MR. RHOW:

Q. Right. And --

A. I know that's a long answer, but I couldn't give a shorter one and really fully, I think, respond to your question.

Q. Because there's a lot of different variables that might exist in that situation.

A. Yeah. It's all about context. It always is.

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

A. Oh, I agree with that.

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

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

Q. And there's nothing wrong --

A. But that's the question.

Q. Whether --

A. Whether they're independent and disinterested.

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

issue of breach of fiduciary duty.

A. Correct.

MR. KRUM: Objection; incomplete hypothetical.

BY MR. RHOW:

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

A. Right.

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

A. That's my recollection, yes.

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

MR. KRUM: Objection; incomplete hypothetical.

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

BY MR. RHOW:

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

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

Q. And so that the work of those direct -- two directors, assuming they vote the same way, is protected by the business judgment rule.
A. It would be.
MR. KRUM: Same objection.
BY MR. RHOW:
Q. It would be.
A. Yeah. Yes. Sorry.
Q. And so in that situation I just posited where you have two independent directors, both deciding that it's time to present a candidate, that would be perfectly fine.
MR. KRUM: Same objection.
THE WITNESS: Well, if they're -- yes, if they're independent and disinterested.
BY MR. RHOW:
Q. Which, as far as you know, Doug McEachern and Bill Gould were.
A. That's correct.
Q. This is a small point. Page 6 of your report -- and we're back on 441 -- I'm looking at the first sentence of the last paragraph. And, again, I apologize for jumping around. I'm really trying to shorten things.

A. No. That's all right. At least you're jumping around in my report. I ought to be able to find it.
Q. And what it reads, for the record, is it says: "In September 2014, a committee, comprising of McEachern, Storey, and the Cotters, was formed in order to resolve issues between the Cotters."
You don't believe that the formation of the committee --
MR. KRUM: Mark Ferrario?
MR. FERRARIO: Yeah.
MR. KRUM: You're making noise coming through the phone.
MR. FERRARIO: Sorry, guys.
BY MR. RHOW:
Q. Your Honor, so you don't have any issue with the fact that the committee, this committee, was formed specifically to resolve issues between the Cotters.
A. No.
Q. That's something that was good for the company.
A. It could have been.
Q. Do you believe it was?

A. Well, I don't know the answer to that factually.
Q. Fair enough.
The ombudsman process that was set up, that's something that you agree could have been good for the company.
A. I agree it could have been.
Q. And why is that?
A. Because there was difficulty that was perceived and there was rational action taken to deal with it.
Q. The difficulty being the familial dispute.
A. That's correct.
Q. And resolving that dispute would be something that could be in the best interest of the company.
MR. KRUM: Objection; incomplete hypothetical.
THE WITNESS: Yeah. I'm not sure what resolving the dispute -- I think it would have a lot to do with how the dispute was resolved. But it could be good for the company, yeah. It certainly wasn't a breach of fiduciary duty to attempt to resolve it.

BY MR. RHOW:
Q. I think you had said earlier -- and I have the term "extraordinary" in my notes -- that you thought it was perhaps extraordinary that the CEO search process started but then changed. I don't want to put words in your mouth. Do you recall that testimony?
A. Yeah. The extraordinary nature of it was that it suddenly resulted in a controlling stockholder being the CEO.
Q. What is your foundation for saying that's an extraordinary situation?
A. My -- just my own experience in looking at cases, that if -- if you are the judge who is sitting there trying to determine whether or not a controller has directors in this case under her thumb doing her bidding resulting from a process that does not appear facially to be one that has been put together in the best interest of the corporation and all of the stockholders, yet you have a process in mind that could get an independent CEO, you end up with a controlling stockholder?
That will always raise the hackles and suspicions of a Delaware judge about whether or not this was an independent, objective,

disinterested decision-making process that was fair to the corporation and all of the stockholders.
Q. And, again, I'm not trying to cut too fine a line, but in the cases you're talking about, were those CEO search committee situations?
A. Well, it -- no.
Q. And I'm not saying -- I'm not implying that's necessarily dispositive. I'm just -- I'm really asking --
A. No.
Q. -- foundationally, were any of those a situation where a CEO search committee was set up?
A. No.
Q. All right. Were any of those situations where -- that -- that involved a family member of a controlling group attempting to become the CEO?
A. If you -- if you want to count Lord Black and The Jerusalem Post and The Sun Times, that was certainly the leader of a family who was trying to exert his will over the other stockholders and it was -- his actions were voided.
Q. This is a case that was before you?
A. On appeal, yeah; not on trial.
Q. Do you recall if any of that or --

that -- did that situation involve an interim CEO trying to become CEO?
A. No.
Q. All right. On Page 15 of, I'm back to your report, 441, and I'm looking at the last sentence of the first paragraph, and for the record it says: "The reasons the CEO Search Committee chose EC" -- Ellen Cotter -- "as CEO included the fact that she was well known to the Board, provided continuity, and had major shareholdings in the Company." Do you see that?
A. Yes.
Q. The fact that she was well known, is that an invalid criteria for a CEO?
MR. KRUM: Objection; vague, incomplete hypothetical.
THE WITNESS: No. As I -- as I stated earlier, there are no check-the-box guidelines from Delaware courts about what are valid and invalid considerations. In context the court will look with hindsight on whether the process and the ultimate result were fairly determined.
BY MR. RHOW:
Q. All right. And so I take it for the

other two characteristics, those two are not disqualifying for a CEO.
MR. KRUM: Same objections.
THE WITNESS: They're not disqualifying, but the last one certainly raises issues. How -- how do you measure in terms of the abilities of the CEO to lead those qualities when one of the factors is major shareholdings in the company and you've got comments in depositions and you've got expert reports that talk in terms of, well, they're the controller after all, at the end of the day they're going to make the decision.
That's what makes a Del -- would make a Delaware judge look twice at the situation. Having major shareholdings in the company doesn't speak to your ability to lead the company.
BY MR. RHOW:
Q. But --
A. It speaks to your interest in success, the company's success.
Q. And it doesn't disqualify you from --
A. That's corr -- you're absolutely

right about that. Again, it's all -- everything taken together in context.
Q. And you would agree that for a board of director considering these variables, each board member is allowed to weigh those variables differently.
A. That's correct.
MR. RHOW: Actually, now I need five minutes because I might be done as well.
MR. KRUM: Okay.
THE VIDEOGRAPHER: Off the record at 3:23.
- - -
(Whereupon there was a recess in the proceedings.)
- - -
THE VIDEOGRAPHER: Back on the record at 3:28.
BY MR. RHOW:
Q. Just some -- some final closeout questions.
So between the testimony you've given today, the expert reports you've submitted in this case, does that constitute all the opinions that you intend to give in this case?

A. To my knowledge, yes.
Q. Okay.
A. I haven't been asked to do anything more.
Q. And are you planning on doing any additional work?
A. I have no plans to do any additional work.
Q. And you haven't been asked to do any additional work.
A. I have not.
Q. Do you have a sense of the total amount that you've invoiced for the work you've done?
A. I -- I'd hate to say and be wrong. I'd say in the neighborhood of $25,000 including the associate, less than 50 for sure.
Q. Okay.
A. But I'm not -- I'm not positive. As ignorant as it sounds, I don't pay any attention to the billing process.
Q. That's good. That is a luxury to have, for sure.
MR. RHOW: That's all I have. I don't know if --

MR. SEARCY: Mark Ferrario?
MR. FERRARIO: I just have a couple questions.
BY MR. FERRARIO:
Q. I just want to go to something that Ekwan touched on and it had to -- it related to the selection of Ellen as the CEO. As you were speaking in response to his questions, you mentioned something about evaluating the ability of a person to lead. Do you recall that testimony?
A. I'm not sure specifically what you're talking about, but generally yes.
Q. Do you recall -- if you're on a board of directors -- and I know you haven't been on a board other than this hospital board -- if you're on a board of directors, probably the most important decision you're going to make is hiring the CEO; correct?
A. There is certainly literature to support that, yes.
Q. Okay. And -- and actually this dovetails into something you said at the beginning of your testimony that -- when you mentioned you didn't -- you didn't know the name or you couldn't recall the name of your associate, you said

associates come and they go. Do you remember that?
A. Yes.
Q. And despite your best efforts in the interview process, sometimes you get an associate in and they just don't work out; right?
A. That's certainly correct.
Q. Sometimes you -- you get someone in that is a marginal player, they get in there and you find out when they're in the trenches, they're actually very good; right?
A. That's correct.
Q. And probably the best way to evaluate someone's ability to handle a position is to see how they perform. Would you agree with me on that?
MR. KRUM: Objection; incomplete hypothetical.
THE WITNESS: It's certainly an important consideration. I'm not sure I could go along with it's the best way. But it's certainly a very important one.
BY MR. FERRARIO:
Q. Why don't you tell me any other thing you think would be better in terms of evaluating how somebody could perform in a particular position than seeing how they actually do the job?

MR. KRUM: Same objections.
THE WITNESS: Well, what's missing, Mark, from your question is a time frame.
BY MR. FERRARIO:
Q. Let's say --
A. Wait. Let me finish, please.
Q. Okay.
A. And it depends on how long they're performing in a job. As -- as Mr. Kane's own deposition suggests, there was a time when he thought Cotter, Jr., was doing a good job. Then there became a time when he no longer thought so.
So, yes, I agree with you that if you have a long period of time to observe someone who's trained and who has experience and see performance, that performance is a very important measure of a CEO's ability and retention considerations. I don't disagree with that at all.
Q. And I wasn't even speaking to -- to Jim, Jr. I'm speaking to the board's decision to hire Ellen as the CEO. How long did they have to evaluate her performance in that position?
MR. KRUM: Same objection, incomplete hypothetical.
THE WITNESS: I don't have a specific

recollection, but it wasn't long.
BY MR. FERRARIO:
Q. Well, when you say "wasn't long," what do you mean?
A. She wasn't CEO long.
Q. How -- how long was she in that position before they hired her?
A. My recollection is not clear, but it was a year or less.
Q. Okay. You don't think that's long enough to evaluate somebody's ability to perform in a position?
MR. KRUM: Same objection.
THE WITNESS: It wouldn't have sufficed for the president and CEO of the hospital I served.
BY MR. FERRARIO:
Q. It wouldn't have?
A. No, it would not have.
Q. Okay. And why is that?
A. Because it wasn't -- there's so many variables and emergencies and crises that can occur, you need to be able to observe somebody over a substantial period of time to gauge their reactions, their preparation. A strategic plan is important

more than just for one year. Whether it's been fulfilled, setting the criteria for performance evaluation. All of that's important and has to be observed over a period of time, unless they've done something demonstrably egregious that would cause you to want to terminate them earlier.
But it's very difficult to say this is the CEO, this is the chairman of the board, this is the president, the chief executive officer, however you want to characterize it, over a period of time of a year or so.
Q. Do you know how long Ellen had been with the company?
A. I know it had been many years.
Q. Okay.
A. In a -- in a much reduced form of role.
Q. But when you say "much reduced," why don't you tell mean how much reduced?
A. Well, she wasn't the chief of all of the operations in effect as CEO. She had her own slice of the business that she was responsible for handling.
Q. Okay. And then she ran the company as interim CEO; right?

A. Yes.
Q. Okay. And then the board, after reviewing her performance and looking at candidates who had never worked for the company, chose to go with someone who they had seen in action, and you think that decision was improper?
A. I didn't reach that conclusion. I reached the conclusion that it would be examined for the fairness of the process and the fairness of the result and that in order to determine the motivation for people who confirmed her position as CEO, one would have to listen to them testify about their decision-making process and their reasons for voting the way they did; and that the fact that she was one of the controlling stockholders and the fact that there was at least one director there who was concerned about the family would raise questions in the mind of a judge, all of which can be resolved, but only after hearing the testimony.
I don't -- I reached no conclusion about whether it was the correct decision or not or whether it was a breach of fiduciary duty. I only say it raises the issues that need to be resolved by the trier of fact. That's all.
Q. Okay. And -- and you didn't go --

you didn't do a deep dive through the depositions to see what, you know, the directors were considering when they decided to hire Ellen.
A. I did not.
Q. Okay. And -- and I don't want you to take this question the wrong way. Okay? But I really don't know how else to ask it.
You have basically given us a report that from my perspective appears to be a memo on Delaware law as it may apply to the, as you said, unique facts of this case. That's essentially what you've done; correct?
MR. KRUM: Well, objection; mischaracterizes the day of testimony.
THE WITNESS: You can characterize it any way you want to. I'm not going to respond to that question.
BY MR. FERRARIO:
Q. Do you disagree --
A. That's a pejorative question.
Q. What?
A. That's a pejorative question.
Q. Well, it isn't, because I'm trying to figure out, I've looked at probably hundreds of expert reports during the course of my career and I

looked at your report and I listened to you today and you said you are opining on Delaware law to the extent it might apply here in the case we have in Nevada; correct?

MR. KRUM: Objection; mischaracterizes the testimony.

THE WITNESS: It is correct that I have tried to describe an analytical framework that would be used in Delaware with the hope that it might be helpful to the Nevada judge. It may or may not be.

BY MR. FERRARIO:

Q. Okay. And --

A. I wasn't asked to offer an opinion as a corporate government expert on what is the appropriate way to hire or terminate a CEO. That wasn't what I was asked to do.

Q. Okay. That's what we can get at. So your goal here would be to assist the Nevada judge were she to decide that Delaware law might apply.

MR. KRUM: No. Objection; misstates the day of testimony. Was your phone not working earlier, Mark?

MR. FERRARIO: No. I just -- I think I just paraphrased pretty accurately what he

said. I may not have. He can tell me if I'm wrong.

THE WITNESS: Well, I -- I -- I think you're off. I can either read back or try to have -- or ask to have read back -- I can't have it --

BY MR. FERRARIO:

Q. Well --

A. -- read back anymore. But what I tried to describe was to offer an example of how a Delaware court would approach it and the analytical framework that the Delaware judge would use in the event that might be helpful to the Nevada judge.

I'm not opining that Delaware law applies or that the Nevada judge should find that Delaware law applies. I'm simply trying to be helpful because I understand that from time to time Nevada, as many other jurisdictions, at least read Delaware cases, understand Delaware law, and will decide whether it's helpful in resolving their dispute. That's all I'm trying to do.

Q. Right. I think that's what I just said.

A. Well, then why are we arguing about it? That's what I said, and I have nothing more to

say about it.

Q. Your target audience is the judge and in the event she wants to use or thinks Delaware law would apply, you're trying to assist her at least with one person's view on how this case may play out under Delaware law.

MR. KRUM: Objection.

BY MR. FERRARIO:

Q. Isn't that accurate?

MR. KRUM: No. That mischaracterizes the testimony.

So if you want to -- if you want to repeat your prior testimony or if you want to refer to it or however else you see fit to answer.

MR. FERRARIO: I think -- I think I quoted him pretty accurately. The target audience for his report was the judge.

BY MR. FERRARIO:

Q. Correct, Judge Steele?

A. I think you can look at my answer to the previous questions and get it without me trying to restate it for a third or fourth time.

Q. Well, that's a straightforward question. Is your target audience of your report

Judge Gonzalez?

A. Yes.

Q. Okay. And it's to assist her in the event that she determines Delaware law should apply; correct?

MR. KRUM: No. That's not what he said and you know it's not what he said.

If you have anything to add to your prior answers, please do. And if you don't, just say so.

MR. FERRARIO: I believe that's what he said. If he disagrees, he can tell me that's not true.

THE WITNESS: I have answered that question several times.

MR. KRUM: Okay. Next question if you have any.

MR. FERRARIO: I -- I don't think he answered it, but I'm not sure it's worth pursuing.

BY MR. FERRARIO:

Q. Justice Steele, and, again, you mentioned that you had looked at some Nevada statutes. Did you look at 78.140?

A. I don't connect the number to any

particular statute; I'm sorry.
Q. Okay. Then that's fair. It's the statute that deals with Restrictions on Transactions Involving Interested Directors or Officers.
A. No, I didn't.
MR. KRUM: I object to the characterization. That's inaccurate.
MR. FERRARIO: I'm reading from the title, Mark.
MR. KRUM: Yeah. But it's still inaccurate. It's the Nevada -- it's the Nevada carveout from the common law rule. So you can read the title, but if you read the rule and put it in context -- go ahead, next question. I spoke too much. Next question.
MR. FERRARIO: Okay.
BY MR. FERRARIO:
Q. I just want to make it clear, you didn't look at that section; correct, Justice Steele?
A. I don't know what section you're talking about so I can't answer your question.
Q. It was 78.140 titled "Restrictions on Transactions Involving Interested Directors or

Officers; Compensation of Directors."
A. I -- I did not.
Q. Okay. Thank you.
Okay. Let me see here.
No. I think that's it. Thank you very much.
THE VIDEOGRAPHER: Any other questions? Concludes?
The time now is 3:41. This concludes the deposition, end of Disc 4 of 4.
- - -
(Witness excused.)
- - -
(Whereupon the videotaped deposition adjourned at 3:41 p.m.)
- - -

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

Executed on _____ , 20___, at _____, _____.

_____
MYRON STEELE

C E R T I F I C A T E

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

WITNESS my hand and official seal this 2nd day of November, 2016.

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Susan Marie Migatz
Notary Public

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR.,

Plaintiff,

vs.

MARGARET COTTER, et al.,

Defendant.

READING INTERNATIONAL, INC.,

Nominal Defendant.

CASE NO. A-15-719860-B

OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF RULING ON GOULD'S MOTION FOR SUMMARY JUDGMENT

Date: December 28, 2017
Time: 9:00 A.M.
Ctrm.: 10A

Assigned to Hon. Elizabeth Gonzalez, Dept. XI

Trial Date: January 2, 2018

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is nothing new about William Gould in Plaintiff's Motion for Reconsideration. Plaintiff has already made all of the same arguments attacking Mr. Gould's entitlement to the business judgment rule in four supplemental oppositions filed on December 1, 2017, and he made those same arguments again at the December 11, 2017 hearing. Plaintiff still does not—and cannot—demonstrate that Mr. Gould lacked independence or disinterestedness. Mr. Gould did not have a direct financial or close personal relationship with any of the Cotter siblings or personally benefit from any of the challenged decisions and Plaintiff does not claim otherwise. As a result, the Court properly concluded that Mr. Gould was entitled to the protection of the business judgment rule and granted summary judgment in his favor. Plaintiff's Motion for Reconsideration should be denied.

II. ARGUMENT

A. Plaintiff was afforded an adequate opportunity to be heard on Mr. Gould's Motion for Summary Judgment, and he makes no new arguments in his Motion for Reconsideration.

Plaintiff's argument that he did not have an adequate opportunity to defend himself because Mr. Gould's motion for summary judgment was set for January 8, 2018, and "not fully briefed" rings hollow.[1] Plaintiff first filed an opposition brief to Mr. Gould's summary judgement motion in October 2016. He then filed another *four supplemental briefs* opposing Mr. Gould's motion for summary judgment on December 1, 2017. The four supplemental briefs included a brief addressing the

[1] Plaintiff raised this argument during the December 11, 2017 hearing and the Court properly rejected it then. Ex. A (12.11.17 Hrg. Tr.) at p. 56-57. Plaintiff concedes that Mr. Gould properly moved for summary judgment as to all claims against him. Mot. for Reconsideration at 4.

specific grounds on which summary judgment was granted—Mr. Gould's independence and disinterestedness and entitlement to the business judgment rule. See Suppl. Opp. to MSAs 1 & 2 and Gould's Motion for Summary Judgment at 5-7, 9-10. In that brief (and the other supplemental oppositions), Plaintiff made the *very same arguments* regarding Mr. Gould's independence that he does in the Motion for Reconsideration—that Mr. Gould's actions or lack of action in his capacity as a board member was sufficient to demonstrate a lack of independence. *Id.*[2] In fact, Plaintiff expressly concedes that he already made all of the arguments about Gould that appear in his motion for reconsideration, when he states "[r]ather than attempt to recite the record evidence contained in Plaintiff's oppositions to the various motions addressing matters to which Gould was a party, Plaintiff respectfully refers to [sic] Court to the motions." Mot. for Reconsideration at 23. ***Plaintiff does not point to any new facts or arguments that Plaintiff was unable to raise before the Court granted summary judgment***. And the Court made clear that it *considered* those briefed arguments in deciding to grant summary judgment in favor of Mr. Gould. Ex. A (12.11.17 Hrg. Tr. at 56:13-15; 22-23) ("I included Mr. Gould because you briefed it relate[d] to all of the motions for summary judgment . . . I used it because it was included in your opposition, the supplement to those motions.").

Plaintiff was afforded yet another opportunity to be heard on this matter at the December 11, 2017 hearing. Plaintiff again raised the same arguments—namely, that a lack of independence could be demonstrated merely by review of Mr. Gould's actions as a board member—that he does in the Motion for Reconsideration. Ex. A (12.11.17 Hrg. Tr. at 57:22-59:25).

The Court correctly rejected these arguments. As the Court noted at the

[2] Gould addressed the merits of this argument in more detail in his Supplemental Reply in Support of Summary Judgment, and he incorporates that brief herein by reference.

hearing, to show a lack of independence and/or disinterestedness for purposes of rebutting the business judgment rule, Plaintiff must demonstrate that there is a direct financial relationship or very close personal relationship with the people who are interested in the transaction. *Id.* at 34:24-35:4. And here, Plaintiff does not contend that Mr. Gould had any financial relationship to any of the Cotter siblings or that Mr. Gould had a close personal relationship with any of the Cotter siblings. Mot. for Reconsideration at 23-24. That is why his own paid expert witness, a former justice on the Delaware Supreme Court, testified that there was no evidence that called into question Mr. Gould's independence or disinterestedness. *See* Gould's Supplemental Reply in Support of Summary Judgment at 3-4 (responding to Plaintiff's Supplemental Oppositions). As a result, Plaintiff's expert agreed with the Court and opined that Mr. Gould was entitled to the protections of the business judgment rule. *Id.* [3]

Simply put, the Court was correct to grant summary judgment in favor of Mr. Gould on the basis that he was entitled to the protections of the business judgment rule, and there is no basis to disturb the Court's decision. Plaintiff's Motion for Reconsideration should be denied.

III. CONCLUSION

For the reasons stated above, and in Gould's Motion for Summary Judgment, Reply in Support of Summary Judgment, and Supplemental Reply in Support of Summary Judgment, Plaintiff's Motion for Reconsideration should be denied.

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[3] To the extent that Plaintiff argues, based on Delaware law alone, that there are other ways to rebut the business judgment presumption and that he has done so with respect to Mr. Gould here, he fundamentally misunderstands and misapplies those cases, as evidenced by the fact that his own expert witness, a former justice on the Delaware Supreme Court who served on the Delaware Supreme Court when those cases were decided, opined that there was no evidence that Mr. Gould lacked independence and disinterestedness and that Mr. Gould was entitled to the protection of the business judgment rule.

December 26, 2017

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

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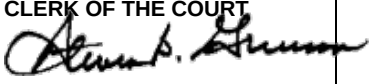

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES J. COTTER, JR., Plaintiff, vs. MARGARET COTTER, et al., Defendant. READING INTERNATIONAL, INC., Nominal Defendant.	CASE NO. A-15-719860-B **DECLARATION OF SHOSHANA E. BANNETT IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF RULING ON GOULD'S MOTION FOR SUMMARY JUDGMENT** Date: December 28, 2017 Time: 9:00 A.M. Ctrm.: 10A Assigned to Hon. Elizabeth Gonzalez, Dept. XI Trial Date: January 2, 2018

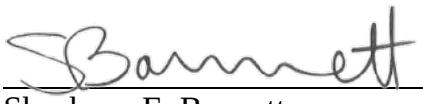
DECLARATION OF SHOSHANA E. BANNETT

I, Shoshana E. Bannett, declare as follows:

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

2. Attached as **Exhibit A** is a true and correct copy of the transcript from the December 11, 2017 hearing in this matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this Declaration on December 26, 2017, at Los Angeles, California.



Shoshana E. Bannett

EXHIBIT A

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS IN LIMINE AND PRETRIAL CONFERENCE

MONDAY, DECEMBER 11, 2017

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

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

APPEARANCES:

FOR THE PLAINTIFF:	MARK G. KRUM, ESQ. STEVE L. MORRIS, ESQ. AKKE LEVIN, ESQ.
FOR THE DEFENDANTS:	H. STANLEY JOHNSON, ESQ. MARSHALL M. SEARCY, ESQ. CHRISTOPHER TAYBACK, ESQ. JAMES L. EDWARDS, ESQ. MARK E. FERRARIO, ESQ. KARA B. HENDRICKS, ESQ. EKWAN RHOW, ESQ.

LAS VEGAS, NEVADA, MONDAY, DECEMBER 11, 2017, 10:24 A.M.

(Court was called to order)

MR. FERRARIO: Ms. Hendricks has something to take up with you.

MS. HENDRICKS: I just have a question.

THE COURT: On what?

MS. HENDRICKS: On how many drives we each need.

THE COURT: Wait. That's not me. Wait. Don't go there yet.

MS. HENDRICKS: Okay.

THE COURT: Who are you looking for?

MR. MORRIS: I'm so unaccustomed to being on the plaintiff's side.

(Pause in the proceedings)

THE COURT: All right. So moving on. Good morning. We were talking about the pro bono awards at the 8:00 o'clock session this morning, and Mr. Ferrario didn't get one this year, so I was giving him a hard time because nobody from his firm did a lot of work. But apparently they did. It just didn't get reported because it was done with a different agency.

Right, Ms. Hendricks?

MS. HENDRICKS: Yes. We're getting that fixed right now.

THE COURT: Okay. So before we start on your

motions I need to hit some practical problems. As those lawyers who practice here in the Eighth all the time know, as the chief judge I do not have a courtroom. That occurred because when the Complex Litigation Center was investigated for purposes of conducting the CityCenter trial we determined that it had a structural issue and some electrical issues. As a result, we did not renew the lease --

When was that, Mr. Ferrario?

MR. FERRARIO: It was 2013.

THE COURT: In 2013 we did not renew the lease, and since that time we have been down one courtroom. The person who gets screwed is the chief judge. So since 2013 we have had the chief judge be a floater. Unfortunately for you guys, I'm the first judge who kept my docket, because Business Court cases have a lot of history and it's not one of those things you can get rid of and assume somebody else is going to be able to be familiar with it fairly quickly.

So the down side for all of you is that I don't have a courtroom. Which is why sometimes we borrow Judge Togliatti's courtroom when you guys see me, sometimes in this courtroom. And you've been in the two Family Court courtrooms a couple of times here. I also have judges who lend me their courtrooms on a regular basis on the third floor, and sometimes I have courtrooms in other places in the building I borrow.

Recently I learned that I am going to be able on behalf of the court to acquire the seventeenth floor that used to be occupied by the Supreme Court and to build a new Complex Litigation Center, because since 2013 every time we have a complex trial we build out a courtroom, it costs a quarter of a million dollars, and then when we're done with it we take it back down to put it back in regular shape. And so finally the County has realized that's probably not an effective use of the funds, and so we're going to build out the seventeenth floor as a complex litigation, jury, and criminal caseload accommodated. Unfortunately, that's a construction project, and it is in process. And when I say in process it means they're still in the bid evaluation process and it has to now go to something called long-term planning at County management, which means that some day there'll be a courtroom there. In the meantime --

MR. MORRIS: So our trial will start when the construction is complete on 17?

THE COURT: No, no. You're going to start. I just don't know where we're going to be, Mr. Morris. This is the reason for the speech, because Mr. Ferrario says nobody believes me that I don't have a courtroom. I don't have a courtroom. So I will have a courtroom when I end being chief judge. I'll go back to being a regular judge and I'll have a courtroom, and then the new chief won't have a courtroom

unless we finish building out the seventeenth floor by then.

So right now the reason I'm telling you that is it impacts your trial. The trial I am currently in is a bench trial, so it's not a jury trial and we have moved from courtroom to courtroom during our 10 days we've been in proceedings so far. So we've not been in the same courtroom every day. But that's sort of the life of being in this department at the moment. That's the history.

Now let's go to the electronic exhibit part of our problem. Brandi is the head of the Clerk's Office, Mike is the head of IT, so they are the two people who are here to make sure that they are able to interact with you -- and then I'll let them leave while I hear your motions -- about the electronic exhibit protocol. Because when we use the electronic exhibit protocol there's two ways that we have to deal with it, from an IT standpoint and from the Clerk's Office standpoint. So instead of us hauling all the paper volumes from courtroom to courtroom, depending on where we're going to be, the clerk won't have to do that. They will have the drives, as Ms. Hendricks mentioned earlier, for that purpose so that Dulce will then -- after IT has cleared the drives Dulce will then work with the drives, and then we usually keep one that is called golden that we don't mess with, and we have one that's a working drive. But I'll let Mike explain that and Brandi explain it, because not all of

you have been through the electronic exhibit protocol in the past.

Mike, you're up.

MR. DOAN: So this is a jury trial, so a high level. We expect three drives, a working copy, a golden copy, and then a blank for the jury that everything that gets accepted or submitted in a group will be over on that drive.

Depending on the number is drives is just based on the space. So if your teams, whoever's putting these drives together -- we have problems if you get a million exhibits on one drive or even 600,000 on one drive. Not so much even the space, it's just navigating through those files. And so as long as your team can navigate and view the files, that's okay for us. We don't have like a set number. We just ask that the drives be twice as big as the amount of the exhibits, because in theory everything could get accepted, and therefore everything would be stamped and there'd be duplicate on the drive.

THE COURT: And when it's stamped there's a program that goes through and it puts a stamp on each page of the electronic exhibit that says it's admitted so that we have your original proposed copy and then your admitted copy. The one drawback for lawyers is if you decide you want to admit a partial version if an exhibit, we cannot do that with electronic exhibits. We need you to submit a replacement

electronic exhibit that includes only the pages that you are offering. That will then have an exhibit marker placed upon it. But I can't with the electronic exhibits admit pages 6 through 10 of the 25-page document.

So, Mike, what did I miss?

MR. DOAN: That's it.

THE COURT: Okay, Brandi. You're up.

MS. WENDELL: Have you already given them the ranges? Do we have --

THE COURT: No, we have not done ranges yet.

MS. WENDELL: Okay. The protocol is pretty basic. Your paralegals or your IT people that are going to be working on those might have questions. Usually -- a lot of times on all the other trials Litigation Services was used. They're very familiar with this program. I'm not advocating for them or anything, but if anybody's contracted with them, they're pretty familiar with how to do it. It's really important that you pay attention to the naming convention. Make sure there are no letters in it. It has to be strictly numbers and then .pdf. The last time there was a question about whether .tifs worked, and Mike was able to verify that .tifs are -- we're able to use those. But color photos can be done as long as there's a little border up at the top for the stamping program to mark all of the information.

Another thing that we have found useful, it's not in

the protocol, but at least a couple weeks before the trial starts we do like a dry run, because your exhibit list, the templates that Dulce went ahead and emailed to you, you cannot change that, the formatting. It's critical because Mike's team will do a validation, and it validates the exhibit numbers to what is on the drive, each exhibit. And it'll identify if there's something that's missed or skipped that's on the list but it's not actually on the drive. And a lot of times there's been some formatting problems when people try to get creative. So, you know, just a little advice that we found from trial and error that that is an important piece.

What else?

MR. DOAN: That's the biggest thing, is if you can get with us -- and we'll make ourselves available as soon as you're available to do like an initial run before you start all printing and doing all these other things just so everything can be tested for format so there's not a lot of time wasted.

MS. WENDELL: The clerk must have -- the exhibit list must be printed out.

THE COURT: Not in 2 font, Ms. Hendricks.

MS. HENDRICKS: [Inaudible] that was not our office's fault, Your Honor.

MS. WENDELL: That should be in a binder so that the clerk as you're actually offering and admitting the evidence

during the trial, she'll be working on that. Later that day she'll be doing the electronic stuff or we'll have a second clerk that'll be helping her. Antoinette is court clerk supervisor, and so she's here to make sure that, you know, if we have any questions that have to be answered.

A lot of times -- oh. Last trial somebody asked if because the exhibit list itself was going to be like 14 of those big binders, they asked if they could print on the front and the back. That was in Judge Kishner's big trial. We let them do it, and -- but the trial settled, so it wasn't an issue.

THE COURT: It's not a good idea.

MS. WENDELL: It's not ideal, so --

THE COURT: Please don't do a front and back.

MS. WENDELL: Anybody have any idea how many exhibits you're looking at?

THE COURT: We're going to start with them and do our ranges first. But we're not quite there yet.

So if anybody has questions or your staffs have questions, would you like contact information to reach out to either Antoinette, Brandi, or Mike?

MR. TAYBACK: Yes.

MS. HENDRICKS: That would be great, Your Honor.

THE COURT: So tell them or give them business cards.

MS. WENDELL: Okay.

MR. FERRARIO: If you all have cards, then that'd be easiest.

THE COURT: They're County employees. Does that mean they get cards?

MR. DOAN: Yeah.

THE COURT: Oh. Look at that.

MR. DOAN: You know, and it's best to have one point of contact so then we don't get confused.

MS. WENDELL: I'm putting my cards away now.

THE COURT: Who do you guys want to be the person that calls? Do they want to call Antoinette, they want to call you, want call Mike?

MS. WENDELL: Well, Antoinette is -- she's not Dulce's direct supervisor, but I can be the point of contact, and then I can go ahead and let you guys know. My email address and my phone number are both on here. If you could pass some of these out, that'd be great. And then I'll probably hand you off depending on the questions that come up. Most of them are going to be technical questions, but I'll try to help if I can.

THE COURT: All right. So do you have any more questions for the Clerk's Office, the IT folks, in the electronic exhibit protocol? You will notice because of what happened in CityCenter in paragraph 6 it now says the exhibit

list will be font size 12, Times New Roman. So we're very specific on what size, because the clerk's actually have to work with the paper copy. And so although you can blow up the Xcel spreadsheet and see it when it's 2 font, they can't. So we have to have it in a larger font.

Any more questions?

Okay. Mr. Krum, how many exhibits do you think you're going to have so I can set the exhibit ranges?

MR. KRUM: The answer is it's in the hundreds, not in the thousands. So if --

THE COURT: So if I give you 1 to 9999, you will be okay?

MR. KRUM: Yes.

THE COURT: All right. Who wants to have 10000 as their start? Mr. Searcy, how many have you got?

MR. SEARCY: I think our approximation is basically the same. It's in the hundreds, not the thousands. So if we had 10000 to --

THE COURT: 1999 [sic]?

MR. SEARCY: Yeah, that would be perfect.

THE COURT: I have to give you lots of extras, because if you're going to do partial exhibits, we need that space to be able to add those. So if you've got subparts of one exhibit, I need an exhibit number for each one of those. So I'm giving you more than you need.

Mr. Ferrario, how many do you need?

MR. FERRARIO: Your Honor, Your Honor, I would suspect our -- any exhibits we would introduce independent of what Mr. Krum and the other defendants would be nominal. So you can give us a very short range.

THE COURT: 20000 to 2499 [sic].

THE COURT: Who else wants exhibit lists that's not one of those three? Anybody else need --

MR. TAYBACK: Counsel for Mr. Gould is sitting behind me.

THE COURT: So Mr. Gould's counsel, you want about the same range Mr. Ferrario has, 25000 to 30000?

MR. RHOW: That's fine, Your Honor. Just for protocol --

THE COURT: Hold on. They've got to get your name, because otherwise I'm going to get really -- I'm going to screw up.

MR. FERRARIO: Can you let Ekwan speak today? He's been here all -- he hasn't even got to argue one time, Your Honor.

THE COURT: All right, Mr. --

MR. RHOW: I'm actually in this case. Ekwan Rhow, Your Honor. Thank you.

THE COURT: Okay.

MR. RHOW: We can have a separate range for sure,

but is there any problem with incorporating Mr. Gould's exhibits into the exhibits for Mr. Searcy that he presents?

THE COURT: There is absolutely no problem with your exhibits being within their exhibit range, but I need to give you a separate range for your own in case you all don't reach an agreement.

MR. RHOW: I see.

THE COURT: So my exhibit ranges based on what I've heard today is 1 to 9999 for the plaintiffs, 10000 to 1999 [sic] for the Quinn Emanuel folks and their associated, which includes Mr. Edwards; right? Okay. And 20000 to 2499 [sic] for Mr. Ferrario and his team. And, Mr. Krum, we gave you 25000 to 2999 [sic] for Mr. Gould.

Do we anticipate there is anyone else who's going to need more numbers? Anybody else who's going to show up randomly in the case?

All right. Any other stuff I need to do on your part?

MS. WENDELL: No. Based on that, that's very good news. The goal will be for all counsel to prepare your exhibits and then everybody put them one drive. The only reason why we do different drives is because if there's like 10,000 exhibits on one, like Mike said, so if there's any way possible -- and you all have to use the same exhibit list template. Now, if that's a problem to do that, then if your

exhibits are on your own hard drive, then your exhibit list must be what is on that drive. So if two of you get together or three of you get together, everything that's on that drive must be one exhibit list, because it cross-checks and makes sure it validates.

THE COURT: So it's okay for the plaintiffs to have one drive and an exhibit list of 1 through 9999 -- or up to that number, and the defendants to decide jointly they're just going to use the 10000 to 1999 [sic], have one drive, and one exhibit list?

MS. WENDELL: That is okay. But based on the size, you know, we're -- I think that, you know, it's better to always have one --

THE COURT: Yeah. But you're asking for cooperation?

MS. WENDELL: Yes.

THE COURT: Just because you worked for Commissioner Biggar for however many years and you could make them cooperate doesn't make I can as a trial judge.

All right. So anybody else have more stuff?

Yeah. Your history will never die.

MS. WENDELL: I know. It's going to follow me out of here in February.

THE COURT: All right. Anybody else have any more questions for my IT team or my Clerk's Office team so that

they can leave and not have to sit here through your motion practice?

Dulce wants you to set the dry run date today. We have a holiday coming up, and you have asked me to let you go the second week. I'm going to be able to accommodate that request. I found some victim to go the first week.

MR. FERRARIO: So we start on the 8th now?

THE COURT: Plan is for you to start on the 8th. So when do you want your dry run to be with your staff to bring over the lists and the drives? It doesn't have to be you guys. It can be your paralegals.

MR. FERRARIO: But you said you want enough time in case there's glitches. So --

MS. WENDELL: If there's a glitch, then you'll need time to fix it.

MR. FERRARIO: So at least the week before -- we need it two weeks before; right?

THE COURT: Two weeks before is the week of Christmas, so we'll be here the 26th through the 29th working that week.

MR. FERRARIO: And then you guys will be here to do that?

MR. DOAN: We'll make it work.

THE COURT: Some of them will be here.

MR. FERRARIO: I think it has to be that week in

case there's a problem. Because then the following week is short, and then we're right up on trial and won't be able to correct any of the stuff.

MR. KRUM: So why don't we say the 29th?

THE COURT: You guys all okay with the 29th? What time do you want to meet?

MR. KRUM: I think we need to talk to the people who are going to do it.

THE COURT: Okay. I would recommend the morning. And the reason I recommend the morning is typically on the weekend of New Year's Eve they try and get everybody out of downtown by about 2:00 o'clock because of all the things that happen in the streets here on that weekend.

MR. KRUM: Understood.

THE COURT: So -- and we will tell you what courtroom we are able to find. I'm pretty sure on that day I could get a courtroom on this floor. And if you guys want a morning, if you can accommodate that, we'll do that. Otherwise --

MR. FERRARIO: I'm going to tell you, Judge, [inaudible] people are going to be in this trial, I think if you could convince Judge Sturman to let you have this for the length of the trial, that would [inaudible].

THE COURT: She has a trial that I had to vacate when her mom became ill that I think she's going to try and

restart in January. I will know better when she actually gets back to town. But we will talk to her. Her courtroom and Judge Johnson's courtrooms are equipped differently than the other courtrooms, so they are a little bit bigger.

MR. FERRARIO: Yes. This would accommodate [inaudible].

THE COURT: I was thinking of putting you in Potter's courtroom and having a special corner for you.

MR. KRUM: Your Honor, I've just been reminded that it was presumptuous of me to speak for others.

THE COURT: You want to talk to the staff members to see who's taking the week off?

MR. KRUM: Here's the question. And I'm now taking Mr. Ferrario's line. Would it be possible for us to start the following week so we could make --

THE COURT: No. We won't get done. If we do that, we won't get done in time for me to do my February stuff. It's a five-week stack. It starts on the 2nd of January. So if you need to talk to your teams and see if being here on January 2nd at 8:00 o'clock in the morning is a preference for them instead of the 29th, which gives you -- you lose the weekend, but you're here the rest of the time. It gives you almost two weeks to straighten it out.

MR. KRUM: Okay.

THE COURT: And that's okay with me. Even though

Mike would say he needs two weeks before, January 2nd is okay with me.

MR. KRUM: Okay. We will check with our people.

THE COURT: Okay. So any other electronic exhibit lists?

So, Dulce, just mark them down that they are planning to visit with you on January 2nd. I'm fairly certain I can find a courtroom on January 2nd, but there's no guarantees on that day.

All right. 'Bye, guys. Thank you for being here. Antoinette, thank you for being here. I know it's going to be exciting again.

All right. That takes me to the motions. Do you have a preferred order you'd like to argue them in? I usually try and do the summary judgments and then go to the motions in limine.

MR. KRUM: That would be our suggestion, as well.

MR. TAYBACK: That makes sense, Your Honor. You can go numerical order is fine.

THE COURT: Whatever you want to do.

Can I have my calendar. I don't need -- well, I have notes all over the motions, so --

MR. FERRARIO: Are we on the clock?

THE COURT: You have until five till 12:00. So we've got an hour.

(Pause in the proceedings)

MR. TAYBACK: Mr. Krum was just suggesting that I raise the parties' -- both filed joint motions -- or filed motions to seal. We'd ask you to grant them.

THE COURT: Is there any objection to any of the motions to seal? They weren't all motions to seal. Some of them were motions to redact, and that was appropriate. The motions to seal I do have a question for Mr. Morris's office, and so I'll ask you -- hold on, if I can find the one I wrote the page on. Got a question. It was a process question, not a substance question, so let me hit it before we go to the next step.

When you sent me a courtesy copy and the courtesy copy had a sealed envelope in that did you also file the sealed version of the document that has like this sealed envelope that's with the Clerk's Office?

MS. LEVIN: I don't believe, Your Honor.

THE COURT: And we have to do it that way --

MS. LEVIN: Okay.

THE COURT: Because otherwise I can't even grant your motion now, because then it's going to get screwed up.

MS. LEVIN: I understand, Your Honor. And I think that this was based on our conversations with the clerk, who said you cannot submit it until you have the order. And we were saying, but that --

THE COURT: No. You submit it when you file the motion. When you file the motion with it, which is why you have to file them at the counter. You can't efile when you're filing under seal.

MS. LEVIN: Right.

THE COURT: And that's why it gets screwed up.

So I have some process concerns about the plaintiff's filings related to that, and I'm going to let you and Dulce talk about those after we finish the hearing to see, if we can.

I'm going to grant the motion, but it may be that you have to do something different to have a motion that actually goes with it to the Clerk's Office instead of an order. Because having the order will not accomplish what you want.

All right. So to the extent that you asked previously for a motion to seal and/or redact, it appears to be commercially sensitive information related to financial issues, and there's some other sensitive information that relates to individuals' personal information, so I'm going to grant the requests for sealing and redacting that have been submitted.

Okay. You're up. What motion do you want to start with?

MR. TAYBACK: It'll be Summary Judgment Motion

Number 1. And it also -- there's -- relates to Summary Judgment Motion Number 2. So I will argue them jointly. They were at least opposed jointly, and we replied jointly with respect to those two motions.

THE COURT: Okay.

MR. TAYBACK: I'm here on behalf of the director defendants Michael Wrotniak, Judy Codding, Douglas McEachern, Edward Kane, Guy Adams, Margaret Cotter, and Ellen Cotter. As Your Honor will recall and as addressed in the briefing, Your Honor said, and this is a truism, really, for any case, you've got to analyze claims defendant by defendant, in this case director by director, and transaction by transaction. And that's, you know, just basic, basic legal analysis.

On top of that, sort of as an overlay, another thing that I know Your Honor is well aware of is the recent law that clarifies -- I see you chuckling --

THE COURT: I don't know anything about the Wynn-Okada case. You don't know anything about it, because your firm wasn't involved at all, and Mr. Ferrario doesn't know anything, and Mr. Morris I'm sure was involved, too, because he's been involved in some of the appellate process in that case, too.

Right, Mr. Morris?

MR. MORRIS: Yes.

THE COURT: See, so we all know.

MR. TAYBACK: But all I need to know, all I need to know and all I really care about here and all that matters here is the language of the Supreme Court's opinion, because that's really what animates the business judgment rule in Nevada as we stand here now. And I think that combined with the recent clarifications by the legislature regarding the latitude afforded directors work together to set the bar very, very high. I'm sure Your Honor has read the opinion multiple times, applied it in that case, a case I'm not privy to, but it's --

THE COURT: I did. I granted partial summary judgment, which is on a writ.

MR. TAYBACK: And, as you well know --

THE COURT: Are we supposed to be calling somebody?

MR. FERRARIO: No.

THE COURT: I have a call-in number. I'm not in charge of doing this.

(Pause in the proceedings)

THE COURT: Hold on. Apparently someone thinks they're calling in.

MR. RHOW: It's okay, Your Honor. No need. I'm here.

THE COURT: Oh. It was you?

MR. RHOW: Not necessary.

THE COURT: Okay. Good. I'm glad we don't have to

call you.

Okay. Keep going. So I granted partial summary judgment, but I found some directors were not disinterested, so not all of the directors were covered by the summary judgment. I also in that case made a determination the business judgment rule only applies to officers and directors, it does not apply to the corporation itself. Just so you know.

MR. TAYBACK: And I'm aware of that only through having read the pleadings and having read now the court's opinion here. But the question is as it applies to this case. And as it applies to this case collectively that recent guidance and the guidance from the legislature make it clear that it's not really the province of a plaintiff or a court or jury to come in and say the business judgment rule should be overridden in order to second guess a particular decision made by a corporation's directors or its officers. And if you start at that premise, the idea that the applicable Nevada statutes here elevate -- give that sort of latitude to directors in the first instance and then you take it to sort of the next level of analysis, that is to say, even if one could rebut the presumption, even it's rebutted the standard then for imposing liability is even higher, because there remains still a two-prong test for which plaintiffs have to show a material disputed issue of fact to proceed to trial.

Both an individual director on a particular transaction breached their fiduciary duty and, secondly, that that individual director did so with fraud, knowing -- as a knowing violation of the law or engaged in intentional misconduct.

THE COURT: Well, you understand that finding is only needed to make a determination as to whether the individual officer or director is insulated from -- for personal liability purposes, as opposed to derivative liability, which would be funded through the corporation.

MR. TAYBACK: Correct.

THE COURT: Okay.

MR. TAYBACK: Though they are seeking personal liability. Their complaint makes that clear.

THE COURT: I understand they are. But your motion seemed to take the position that unless I found fraud they need to be dismissed. And that's not how it works.

MR. TAYBACK: Well, but they do need to rebut the presumption with respect to the business judgment rule.

THE COURT: That's a different issue, Counsel.

MR. TAYBACK: It is a different issue. And it's a multiple-hurdle test.

THE COURT: Yes.

MR. TAYBACK: And with respect to that second hurdle even the issue comes down to Your Honor's adjudicating their claim for personal liability, then that's also part of the

motion.

But you don't need to get there, because they have not established the evidence necessary to rebut the initial presumption. And that's clear because when you look at what governs the decision here by these individual directors on termination, which I'm going to take that transaction because that's the subject of our first motion for summary judgment, if you look at that, what governs that decision are the bylaws. And the bylaws which we've submitted are amply clear that the board was given complete discretion, that officers, including the CEO, serve at the pleasure of the board and can be terminated with or without cause at any time.

With the bylaws being the operative rules of the road, so to speak, and the law being what it is with respect to the deference afforded boards and individual board members, plaintiff's efforts to try to get around the idea that that presumption should be applied here are based on generalized allegations of disinterestedness. But you don't see specific evidence in the record anywhere that any of the three directors who voted to terminate Mr. Cotter, Jr. --

THE COURT: And you're including Mr. Adams in that, are you?

MR. TAYBACK: I am including Mr. Adams in that.

THE COURT: Just checking. So what happens if I make a determination that Mr. Adams is not disinterested? You

then do not have a majority of disinterested directors; correct?

MR. TAYBACK: If you made that finding that would be true. But it wouldn't change the liability, the claim against Mr. McEachern or Mr. Kane.

THE COURT: You mean for personal liability?

MR. TAYBACK: I mean whether -- not whether or not you can say we need to revisit that action, but whether or not they were disinterested, whether they breached their fiduciary duty. That would be adjudicated in their favor even if you found against Mr. Adams on a particular transaction -- but I would say you should not find against Mr. Adams on this transaction. The evidence isn't that his -- that the decision to terminate had any connection to his -- the level of his income, the amount of his -- the amount of his income, the amount of his expenditures, his continuity on the board. There's no connectivity, which is required in order to find disinterestedness even if disinterestedness was the standard. Because I will say the standard in Nevada is not independence for -- unless it's a transaction in which the director is on both sides of the transaction or it's a change of control circumstance. The termination of a CEO is an operational matter where you don't get to the independence question unless and until you have established a basis, a legitimate basis in the law to show that the presumption should not apply.

In light of the law, in light of the bylaws, in light of the undisputed evidence with respect to Mr. Adams, Mr. Kane, Mr. Wrotniak, the Cotter sisters, and Ms. Codding -- and, of course, Mr. Wrotniak and Ms. Codding weren't even on the board at the time of this transaction -- the fact is that there's no basis upon which to allow plaintiff's claim to proceed.

The last point that I want to make with respect to Summary Judgment Motion Number 1 and 2 as it relates to that point is the plaintiff has tried to really muddy the law. And I think whatever you ultimately decide on this motion for summary judgment -- and I absolutely believe that these defendants are entitled to summary judgment on this record, but whatever you decide the parties will be well served by understanding Your Honor's view of the law. Because we do not see eye to eye with the plaintiffs on the law. They strive to import this Delaware entire fairness test.

THE COURT: I rejected that in Wynn, because that was the part that the Okada parties argued once the writ came back on [inaudible].

MR. TAYBACK: And notwithstanding that, I believe the plaintiffs are still advocating for it. It shows up in their papers.

THE COURT: I understand it's in their briefing.

MR. TAYBACK: And the law at least in Nevada with

respect to that is that it doesn't apply here. Independence for the same reasons is not required for the benefit of the business judgment rule where, as here --

THE COURT: You don't think the Shoen case says that independence is required for application of business judgment rule?

MR. TAYBACK: In Shoen to the extent it says that at all it says it in the context of demand futility. It's not the presumption that we're talking about here. And in fact that's -- I believe that's exactly what certainly the Wynn Supreme Court --

THE COURT: There's two Shoen cases; right?

MR. TAYBACK: Yes.

THE COURT: There's the first Shoen case and the second one that they gave a different name to.

MR. TAYBACK: Independence is not required unless you have a director who's on both sides of a transaction.

THE COURT: Okay.

MR. TAYBACK: I believe the law is amply clear on that.

THE COURT: Okay. I think their analysis is slightly broader than that, but okay.

MR. TAYBACK: Given the bylaws, given the fact that entire fairness does not apply, you cannot simply get past or rebut the presumption of the applicability of the business

judgment rule by saying a director is biased, a director has some family connection, a director has income that's attributable to the company. And that's really what this case comes down to. Where the facts here are frankly undisputed summary judgment is warranted.

That's it for Summary Judgment 1 and 2, Your Honor, unless you have any questions.

THE COURT: No. It's okay.

Mr. Krum, Mr. Morris?

MR. KRUM: Good morning, Your Honor. Thank you.

So I have some argument to make about what are pervasive misstatements of the law that were made with respect to Number 1, as well as the other ones. That said, if I'm listening, you're prepared to deny Number 1, just as you did previously, nothing has changed, including the law; and if that's the case, I'll just defer those comments till we get to something else.

THE COURT: Well, then let me ask you a question. Because when I read all these I have notes all over them, because some of them are interrelated and the disinterestedness issue is an issue that is involved in some of the motions in limine, as well as this.

Can you tell me what evidence, other than what is listed on page -- you had -- in your brief you had a list of all of the company activities that you believe show decisions

that were made by certain of the directors that showed they were interested. Can you tell me, other than that list -- and I can't, of course, find it right now, but I'm looking for it -- is there any other information other than from Mr. Adams that you have that would provide a basis for the Court to determine that they are not disinterested?

MR. KRUM: I'm sorry. That who is not disinterested with respect --

THE COURT: Anyone except Mr. Adams and the two Ms. Cotters. The two Ms. Cotters I think is fairly easy. They didn't even move, from what I can tell. But, for instance, for Mr. Kane.

MR. KRUM: Certainly, Your Honor. In our -- first let me say I think the list to which you're referring is a list that I had understood the Court to request when we last argued summary judgment motions and was intended, Your Honor, to identify the particular matters which we contend give rise to or constitute breaches of fiduciary duty in and of themselves as well as together with other matters. And so --

THE COURT: I don't know that that's the reason you did it. I found it. It is on pages 5 and 6. I'm on the Supplemental Opposition to Motion for Summary Judgment Number 1 and 2 and Gould Motion for Summary Judgment, and there is a list that includes threats of termination if you don't get along with your sisters and resolve the probate case --

MR. KRUM: Yes.

THE COURT: -- exercise of the options, the termination, the method of the CEO search. All of those are company transactions. What I'm trying to find out is, other than for Mr. Adams, is there other evidence of a lack of disinterestedness that you have other than what is included in the list of activities that relate to their work as directors which are on pages 5 and 6 of that brief in the bullet points.

MR. KRUM: Let me answer it this way, Your Honor. 5 and 6 was our effort to do what I just said. And what that is, to try to be clear, is to identify particular activities that we thought would be the subject of, as is appropriate, either instructions or interrogatories to the jury with respect to these particular matters.

So let's take Number 1 bullet point, the first bullet point, the threat by Adams, Kane, and McEachern to terminate plaintiff if he did not resolve trust disputes with his sisters on terms satisfactory to them. That, Your Honor, from our perspective is separate from the termination which is the subject of Number 1. And on this --

THE COURT: I see that. But let me have you fall back, because I certainly understand those may be issues that you may want to submit interrogatories or just to include in jury instructions related to breaches of fiduciary duty by someone who survives this motion, who I don't grant it on

behalf of.

But my question is different. Other than these which you've argued in your brief are evidence of a lack of disinterestedness separate and apart from Mr. Adams, who you have other evidence that is presented related to a lack of disinterestedness, is there any evidence that has been attached to your various supplements and other motions related to a lack of disinterestedness for the other directors known as Mr. Kane, Mr. McEachern, Mr. Gould, Ms. Codding, and Mr. Wrotniak?

MR. KRUM: The answer is yes, Your Honor. So I'm going to try to do it a couple ways.

THE COURT: Tell me where to go. Because I looked through this whole pile of about 2 foot of paper last night trying to find it, and the only one I could find specific allegations of a lack of disinterestedness, besides the two Cotter sisters, was Mr. Adams.

MR. KRUM: Okay. Well, so, for example, with respect to Mr. Kane in the response to MSJ Number 1 and 2 we introduced evidence that showed that Kane was of the view that he knew best what James Cotter, Sr., wanted in his trust documentation.

THE COURT: I see he understood what Mr. Cotter, Sr.'s plan was. How does that make him have a lack of disinterestedness?

MR. KRUM: Well, the answer, Your Honor, is he acted on that. That was the basis on which he decided to vote to terminate the plaintiff. He -- and, for example, the evidence includes an email from Mr. Adams to Mr. Kane in April or early May 2015 in which Mr. Adams says, "This was difficult. We had to pick sides in this family dispute. But we can take comfort that Sr. would have approved our decision." And so the point from our perspective, Your Honor, is Kane, in acting as a director, in fact acted to carry out what in his judgment were the personal interests of Sr. with respect to his trust planning. And on that basis he voted to terminate Mr. Cotter. There are emails from Mr. Kane to Mr. Cotter telling him, I don't know what the sisters' settlement is but I urge you to take it. Well, we think the evidence also shows that he knew what it was, that it entailed Mr. Cotter giving up control of the issues they've been litigating.

THE COURT: Under the Shoen analysis do you believe that that contact and that information is sufficient to show that Mr. Kane is not disinterested?

MR. KRUM: Well, the answer is, yes, we do, Your Honor. And I hasten to add that the way Shoen puts it is that disinterestedness and independence are a prerequisite to having standing to invoke the business judgment rule.

THE COURT: I'm aware of that. Which is why we're having this discussion. So -- but usually we have either a

direct financial relationship, even if it's not on both sides of the transaction, or we have a very close personal or familial relationship with the people who are subject to the transaction. And simply believing you understand Sr.'s plan -- estate plan does not, I don't think, rise to that same level to show a lack of disinterestedness; but I'm waiting for you to give me a spin on that argument I may not have thought of.

MR. KRUM: Sure, Your Honor. The answer is -- and I say this because I appreciate what the finder of fact -- what the Court has to do now and what the finder of fact has to do. The evidence has to be assessed collectively, not individually. And you understand that. We've cited cases for that. The other side disputes that. There's "The complaint of acts and omissions upon which plaintiff's claims are based must be viewed and assessed collectively, not separately in isolation." That's the Ebix case that we've cited. And there are other cases for that proposition. The point, Your Honor, is "assessing whether a director was independent and in a particular instance acted independently or whether the director was disinterested as required or whether -- and made the decision based entirely on the corporate merits, not influence by personal or extraneous considerations," that was CVV Technicolor, that's the test. And so, Your Honor, in Shoen, just to go back to that, "Independence can be

challenged by showing that the directors' execution of their duties is unduly influenced." If Kane made a decision based in any respect on his view that Sr. intended for one or both of the sisters to have something and Jr. was in the way of that, that, Your Honor, at a minimum survives summary judgment so the finder of fact can make a determination after considering all the evidence whether the director acted and decided in that particular instance entirely on the corporate merits. So what is --

THE COURT: Let's skip ahead, then. Mr. McEachern. What evidence of disinterestedness do you have for Mr. McEachern? And if you could tell me where in the briefing it is, I will look at it again. But, as I've said, other than Mr. Adams I did not see evidence of disinterestedness as opposed to allegations of breach of fiduciary duty.

MR. KRUM: Mr. McEachern attempted to extort Mr. Cotter. Along with Mr. Kane and Mr. Adams he told Mr. Cotter, you need to go resolve your disputes with your sisters and we're going to reconvene at 6:00 o'clock and if you don't you'll be terminated. Now, there's no dispute about that. We have in evidence the testimony --

THE COURT: I understand that that's one of your claims of breach of fiduciary duty. But I'm trying to determine if there was any additional evidence, other than those items that are those bullet points you put in the brief,

which are on pages 5 and 6 of your supplemental opposition, that goes to Mr. McEachern. And then I'm going to ask you the same question for Mr. Gould and Ms. Codding and Mr. Wrotniak.

MR. KRUM: Your Honor, as a threshold matter, the presumption can be rebutted by showing conduct in derogation of the presumption. It's not simply a interest or disinterested phenomenon, cite Shoen. Let me be clear. I don't want to talk past you. The other side argues there are only two circumstances in which interestedness matters. Well, that's belied by Shoen. It says, "Business judgment rule pertains only to directors whose conduct falls within its protections. Thus, it applies only in the context of a valid interested director transaction --" that's 138 -- 78.140, excuse me "-- or the valid exercise of business judgment by disinterested director in light of their fiduciary duties." And to be a valid exercise, Your Honor, it has to be made in the interest of the corporation.

So Mr. McEachern -- let me go through the list mentally. He attempted to extort Mr. Cotter to resolve the trust disputes in favor of the sisters, he voted to terminate -- he decided not to terminate after he understood an agreement had been reached to resolve those disputes. And when that didn't come to pass he voted to terminate. He, along with Mr. Gould, chose the wishes of the controlling shareholders. Rather than to complete the process he had set

up, they aborted the CEO search. So, Your Honor, that's squarely within the Shoen language of manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the person doing the controlling.

Now, I heard you. You view that as a fiduciary breach.

THE COURT: An allegation of a fiduciary duty breach.

MR. KRUM: Allegation of fiduciary duty breach, right. But that's -- if proven, that rebuts the presumption, and off we go.

I skipped over Mr. McEachern's role in involuntarily retiring Mr. Storey. Mr. McEachern, together with Mr. Adams and Mr. Kane, in October and November -- September or October I guess it was of 2015 comprised the ad hoc first time one time special nominating committee. That committee had two roles. One was to tell noncompliant director Timothy Storey that he wasn't going to be renominated, and they explained to him that the sisters, who controlled the vote, had told him they weren't going to vote to elect him so he could either resign and get a year's benefits of some sort or just be left off.

What else did that committee do? They approved Judy Codding and Michael Wrotniak. Did they undertake to search for candidates? No. Did they do anything that one would do

as a director of a nominating committee to identify and recruit directorial candidates? No. What did they do? They did what they were asked and told. Ellen Cotter gave them Judy Codding, good friend of Mary Ellen Cotter, the mother, with whom Ellen Cotter lives, and Michael Wrotniak, husband of Patricia Wrotniak, one of Margaret Cotter's few good friends. And they obviously did virtually nothing, because promptly after the company announced Ms. Codding had been added to board a shareholder brought to their attention there were lots of Google articles that raised questions about Ms. Codding's relationship with her prior employer and the prior employer's conduct.

So on the nominating issue, Your Honor, on the board stacking our view is that all evidences loyalty to the controlling shareholders. And that, Your Honor, would be somewhere in the range of lack of independence or disinterestedness.

THE COURT: So, Mr. Krum, if we're going to get through all the motions this morning I need you to wrap up. Because I think I have all the information I need on Motion for Summary Judgment Number 1.

MR. KRUM: Okay. Certainly, Your Honor.

So just to finish the bullet points which you brought to my attention, these directors, Kane, Adams, McEachern, they're all on record dating back to the fall of

2014 that, yes, we should find a position for Margaret Cotter at the company so she can have health insurance, but, no, she can't be running our real estate. Well -- that's in the emails we have in the evidence actually, Your Honor, the first time around. And there's some more from Mr. Gould or McEachern. We had some additional testimony that we added this time. And so what happens? Ellen Cotter is made CEO after the aborted CEO search, she says, I want Margaret to the have the senior executive position, for which she has no prior experience and no qualifications. And what do these people do as committee members and board members? They say, where do we sign.

So, Your Honor, it's an ongoing, recurring, pervasive lack of independence or disinterestedness. And the conclusion of that, Your Honor, of course, was by what they did in response to the offer -- and I've sort of wrapped up the whole thing without talking about the law I intended to discuss -- and that is they ascertained what the controlling shareholders wanted to do and they did it in an hour-and-twenty-five-minute telephonic board meeting.

I didn't discuss what I intended to discuss, but I tried to answer your questions.

THE COURT: I understand, Mr. Krum. But the briefing was very thorough, which is why I tried to hit the questions --

MR. KRUM: Understood.

THE COURT: -- because I had some questions after reading it.

So Motion for Partial Summary Judgment Number 1 is granted in part. It is granted with respect to Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak.

It is denied as to Margaret Cotter, Ellen Cotter, and Guy Adams because there are genuine issues of material fact related to the disinterestedness of each of those individuals. As a result, they cannot at this point rely upon the business judgment rule.

MR. TAYBACK: Your Honor, is there a ruling on the aspect of the motion that goes to inability to hold the individuals personally liable for this claim?

THE COURT: For the three that I didn't grant the business judgment?

MR. TAYBACK: Correct.

THE COURT: No, you do not get a ruling to that effect.

Did you want to go to your next motion for summary judgment?

MR. TAYBACK: Yes, Your Honor.

THE COURT: And I'm trying to be consistent with the decision I made in the Wynn based upon the facts that seem to

be slightly different on the conduct of directors. I've got this thing in my head that nobody understands but me, so I'm trying to draw that line by asking questions so I can figure out where that is. Mr. Ferrario knows nobody understands but me. And I can't say it in a way the Supreme Court will understand, because they don't understand it, except for Chris Pickering, and she won't be deciding your appeal.

MR. TAYBACK: Your Honor, we have a second motion. It's Motion Number 2. It's also woven through some of the other motions. For the sake of just clarity I'll address Motion Number 2 separately, and I'll only --

THE COURT: Briefly.

MR. TAYBACK: -- briefly. I'll only say this. Even if you go to the -- well, I've certainly said my piece already, and I think you can just incorporate what I've said previously on this point, that independence I do not believe is a legal prerequisite to the invocation of the business judgment rule. Even if you look at the Shoen case, which Your Honor has discussed, where it talks about interestedness and the word it uses "interestedness," the quote there is, "To show interestedness a shareholder must allege that --" it's talking about allegations in that case "-- allege that a majority of the board members would be, quote, 'materially affected' either to benefit or detriment by a decision of the board in a manner not shared by the corporation and the

stockholders." To the extent there is a question of independence, it's not the generalized allegations that I think pollute the claims here, the transaction-by-transaction claims that the plaintiff seems to be asserting. You can't just say independence is lacking because there's -- one of the directors favored one of the board members versus one of the others, favored the sisters versus the brother. You have to show that there's a material impact in the transaction itself that was being voted upon, and that's the contention that we're making with respect to independence and how plaintiff's claims, all of them against all of the individual defendants transaction by transaction should fail under a summary judgment standard.

With that I'll stop, and then I'll allow him to address it, and then I've got on Motion Number 3.

THE COURT: Okay. Mr. Krum, anything else on Motion Number 2?

MR. KRUM: Just briefly, Your Honor, because I think we have a fundamental -- I'm going to repeat myself in one respect -- misapprehension of law. This is not a check-the-box exercise.

THE COURT: No, it is not.

MR. KRUM: So in Shoen the court says, "Thus, as with the Aronson test, under the Brehm test, director independence can be implicated by particularly alleging that

the directors' execution of their duties is unduly influenced, manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the person doing the controlling."

Now, we know that's a demand case, but that doesn't change the law, it just changes the application of the law. And so the point isn't any more complicated than what it said elsewhere in Shoen, and that is "Directors' discretion must be free from the influence of other interested persons."

So Motion Number 2 is -- it's nonsensical, because that has to be assessed based on facts and based on the particular application. You just did it with respect to Number 1. And so it doesn't work that way. And the -- in Rails the court said, of which Shoen is cited with approval, "Directorial interest exists whenever divided loyalties are present." And we have this ongoing set of transactions that entail furthering and protecting the interests of the Cotter sisters. That, Your Honor, is a perfect example of circumstances that show divided loyalties. Thank you.

THE COURT: Thank you.

Motion for Summary Judgment Number 2 is granted in part. To the extent that you asked me to make a determination as to whether there has been a showing of a lack of disinterestedness there is a lack of disinterestedness for Margaret Cotter, Ellen Cotter, and Guy Adams.

With respect to the other directors who were involved in the motion there does not appear to be sufficient evidence presented to the Court to proceed with a claim of lack of disinterestedness.

Okay. That takes you to Number 3.

MR. TAYBACK: Your Honor, with respect to the Motion for Summary Judgment Number 3, which relates to what's called the patent vision expression of interest --

THE COURT: Yeah.

MR. TAYBACK: -- there are --

THE COURT: The unaccepted offer which may not have been a real offer.

MR. TAYBACK: Not may not have been. Was admitted by plaintiff --

THE COURT: Eh, you know.

MR. TAYBACK: Was admitted by the plaintiff was nonbinding expression of interest that could have been withdrawn or rejected at any point in time. Moreover, when you look -- that in and of itself disposes of the claim, because there are no damages that flow from that. There cannot be. And that Cook case, which is a Delaware case, but the Cook case really makes that clear.

THE COURT: I thought I wasn't supposed to look at Delaware law according to you. You know the legislature can't tell the court what it's allowed to look at.

MR. TAYBACK: And I did know that.

THE COURT: Okay.

MR. TAYBACK: I'm encouraging you to look at it.

THE COURT: I'm looking at all sorts of things, but I'm trying to interweave it into the legislative intent related to business judgment and the protections that we should give to officers and directors in Nevada.

MR. TAYBACK: Yeah. And I think what it is is it's factually analogous. It's factually analogous.

THE COURT: Right. I just had to give you a hard time. Anything else you want to tell me?

MR. TAYBACK: The only other thing that I would tell you is that when you look at what it is that the board members can look at with respect to the consideration of potential change of control overtures, call it expression of interest or anything else, it's nonexclusive. It says they may consider any of the relevant facts. And here the undisputed evidence is that they did consider a lot of relevant facts, including the views of the plaintiff, the views of the two Cotter sisters, including the presentations of the board. And they're entitled to rely upon that. And the reasonableness of the decision is not something that can be second guessed at this juncture based upon the showing that plaintiff has made.

THE COURT: Mr. Krum. Let's skip past a couple of those arguments and focus on a different issue. Other than as

evidence of breaches of fiduciary duty, do you have any claim of specific damages to the failure to accept the unsolicited offer?

MR. KRUM: Well, first, Your Honor, the notion that it's nonbinding and therefore it cannot result in damages is belied --

THE COURT: No. I asked you a very direct question.

MR. KRUM: I'm sorry.

THE COURT: Do you have damages that you have provided me evidentiary basis for strictly related to the failure of the company or the directors to accept the unsolicited offer?

MR. KRUM: Mr. Duarte Solis speaks to that in his expert opinion which was the subject of a motion in limine you denied in October of last year.

THE COURT: I know. But I'm asking you a question. Do you have specific evidence of damages related to the decision by the board not to accept the unsolicited offer?

MR. KRUM: No. The answer I have is the one I just gave, Your Honor.

THE COURT: All right. So that's the only answer you have. Okay. Anything else you want to tell me?

MR. KRUM: I just wanted to say again on law, different point, though, intentional misconduct, one of the ways that occurs is where the fiduciary acts with a purpose

other than advancing the best interests of the corporation. I think the evidence on this subject, Your Honor, the offer raises a question of fact, a disputed question of material fact as to whether that's what the directors did.

Another category of intentional misconduct is where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties. That is a pervasive and recurring phenomenon here, and I submit, Your Honor, with respect to the so-called offer that's what happened. So the point is, as I said before on the offer in particular, Your Honor, it sort of bookends this whole sequence of events, starting with the seizure of control. And you've read the papers, so I'll leave it at that.

THE COURT: Anything else?

MR. KRUM: No.

THE COURT: Okay. Because of the failure of damages related to an unenforceable, unsolicited, nonbinding offer, I am granting the motion.

However, that does not preclude the plaintiff from utilizing that factual basis for claims of a breach of fiduciary duty. Okay?

MR. TAYBACK: Or for other alleged -- to prove other alleged breaches you're saying it might be admissible as evidence.

THE COURT: Well, it may be additional evidence of breach of fiduciary duty. But they don't get to claim any damages from it, since they haven't established damages related to that because of the legal issues related to the nature of the offer.

So what is your next motion for summary judgment, if any? I think there were six.

MR. SEARCY: Your Honor, I'm addressing Motion for Summary Judgment Number 5. That relates to the CEO search. And --

THE COURT: Ready for me to say denied?

MR. SEARCY: If you'll let me --

THE COURT: You can talk, Mr. Searcy, but we're leaving here in 25 minutes whether you guys are done or not.

MR. SEARCY: All right. Well, if you're going to -- before you say denied then let me just address a few of the points in it. If you're going to say granted, then I'll certainly sit down.

THE COURT: I'm not going to say granted.

MR. SEARCY: The point, Your Honor, is that there's no dispute on the material facts here. There was a process that was undertaken by the board here to appoint a CEO. The board appointed a special committee, the special committee hired a search firm, that search firm went out and got information, they interviewed candidates, those candidates

were selected by the search firm Korn Ferry, and they were considered along with internal candidates. The board -- or the committee, rather, interviewed Ellen Cotter and decided that she was the best candidate, and the board agreed with that decision. And in the context of the law here you have a majority of disinterested directors who agreed with that decision. There's a presumption that all of this was conducted in good faith. There hasn't been a rebuttal of the presumption here, Your Honor, and, as a result, the motion should be granted.

Are there particular issues, though, that I can address for Your Honor?

THE COURT: Not that will cause you to be able to get me to change my mind on denied.

MR. SEARCY: Okay. Are there any that I can at least make an effort on, Your Honor?

THE COURT: Nope.

MR. SEARCY: Thank you, Your Honor.

THE COURT: All right. So that motion is denied.

Can we go to Number 6.

MR. SEARCY: Number 6 is mine, as well.

THE COURT: This has to do with the special bonus to Mr. Adams.

MR. SEARCY: That's correct, Your Honor. There are three main issues here. One has to do with the exercise of

options, and in that case there was an executive committee that considered those options. There's no doubt, no dispute that that was an existing plan, that the committee received advice from counsel, and approved of the -- approved of the exercise of the options.

THE COURT: Okay. Anything else?

MR. SEARCY: In addition to that -- and that's -- again, that is an exercise that is presumed to be done in good faith and especially here, where the statute provides that you can obtain information. And that's what the committee did.

In addition to that, Your Honor, there's the issue of the payment to Mr. Adams that you just raised. That again was approved by the board, approved by unanimous board who were disinterested in the subject and are entitled to business judgment on that subject.

And finally, with respect to Margaret Cotter's appointment it's certainly within the board's discretion to decide that someone who's worked for the company and been affiliated with the company for approximately 20 years or so has the qualifications to take on that job. And as Mr. Tayback said, hiring someone to fill a role is certainly -- that's an operational decision that's within the discretion of a board of directors, and certainly they're entitled to be able to exercise the business judgment when it comes to that, especially here. And with all of these decisions, Your Honor,

you're talking about a decision made by a majority of disinterested directors, directors that you've found to be disinterested.

THE COURT: Some directors I found to be disinterested.

MR. SEARCY: Well, for those directors, though, Your Honor, that you found to be disinterested, they constitute a majority of the decision makers here. And --

THE COURT: Well, they're protected. Those people are protected.

MR. SEARCY: And exercising their business judgment they approved these decisions.

THE COURT: Okay. Anything else?

MR. SEARCY: Thank you, Your Honor. That's it.

THE COURT: Denied.

So you had Number 4 I think we didn't get to. Was Number 4 reserved for this time, or had I ruled on it previously?

MR. TAYBACK: Your Honor, you --

MR. KRUM: You ruled on it previously.

THE COURT: Okay. So that takes me to your motions in limine. There were two that I think are important. One is Mr. Gould's motion in limine to exclude irrelevant and speculative evidence.

MR. RHOW: Your Honor, can I speak on this one?

THE COURT: It's your motion.

MR. RHOW: Thank you, Your Honor.

MR. FERRARIO: Hey, come on. This is his first time.

MR. RHOW: I feel honored to actually --

THE COURT: Here's my first question.

MR. RHOW: By the way, is it tentative to grant? I'd like to know that first.

THE COURT: My first question for you is one that I'm going to ask all the people in motions in limine. Did you have an opportunity to meet and confer with opposing counsel before you filed the motion to see if there were areas of agreement?

MR. RHOW: The answer is I don't think we did.

THE COURT: You know, we have a rule.

MR. SEARCY: I'm going to have to disagree with Mr. Rhow. We actually did meet and confer with Mr. Krum on the phone.

MR. RHOW: Oh. I'm sorry.

MR. SEARCY: Mr. Rhow wasn't part of the meet and confer, but his associate, Shoshana Bannett, was.

THE COURT: Oh. Okay. All right.

MR. RHOW: Okay. I had looked at -- I should have looked at Mr. Searcy.

THE COURT: Because usually -- usually I get a

declaration that tells me, we met and conferred on this date --

MR. RHOW: Correct.

THE COURT: -- so that I can then gauge whether somebody's being unreasonable or not. So it's your motion.

MR. RHOW: Thank you, Your Honor.

I think the motion was short and sweet on purpose. During the deposition of Mr. Cotter, Jr., and it lasted days and days and days, and throughout the questioning it was quite clear that he was testifying based on not what he saw, what he heard, what he observed; he was literally saying, here's what I think -- thought at the time, here's what I was thinking Mr. Gould was thinking and others were thinking and so therefore I believe the claim is sufficient because of my subjective belief as to what other directors were thinking. If that's going to be part of this trial, first, this trial's not going to be four weeks, it's going to be eight weeks; but, second, there's nothing in the law, there's nothing based on common sense that tells you that what the subjective beliefs of the plaintiff are none of that is relevant, none of that is relevant under the law, none that is relevant under common sense. So to streamline this case, if he's going to talk about what he saw, what he heard, certainly that's admissible. But if he's going to talk about what he believes, that's subjective and should not be part of this trial.

THE COURT: Thank you.

Ms. Levin, is this your motion?

MS. LEVIN: Yes, Your Honor.

As we said in our opposition, we believe this is an improper and premature motion just because Mr. Cotter obviously will be here at trial testifying.

THE COURT: So you want me to rule on the questions and answers as they're given. So if somebody asks him, well, did you talk to Mr. Adams about what he was going to do, he can then tell me what he said.

MS. LEVIN: Correct, Your Honor.

THE COURT: Well, what did you think he meant? That's speculation.

MS. LEVIN: Unless, of course, he's got a basis for his belief. And I think that some of the deposition testimony, those responses were invited by the very questions. So to the extent that he has a basis to believe -- you know, to state his belief I think that, again, it should be determined on the question by question.

THE COURT: Okay. So the motion is denied. It's premature. It's an issue that has to be handled at trial based upon the foundation that is laid related to the issue.

So -- and plus you won't be here. You won't be here; right?

MR. RHOW: I'm sorry?

THE COURT: You won't be here; right?

MR. RHOW: I don't know. I hope not. Is Your Honor saying I should not be here or that my client won't be here then?

THE COURT: That's what the business judgment ruling deals with; right? So I granted your client's business judgment rule motion. Well, you know, he may be a witness.

MR. KRUM: I'm sorry, Your Honor. Did I miss something?

THE COURT: What?

MR. KRUM: We haven't had that motion argued yet, Mr. Gould's motion.

THE COURT: I included Mr. Gould because you briefed it relate to all of the motions for summary judgment and I asked you questions about all the directors, except Mr. Adams.

MR. KRUM: I'm sorry. I didn't understand that, Your Honor. I didn't answer as to Mr. Gould.

THE COURT: Do you want to tell me an answer to Mr. Gould?

MR. KRUM: I do, because we have a hearing set for the 8th on his motion, which is why misunderstood that.

THE COURT: I used it because it was included in your opposition, the supplement to those motions.

MR. KRUM: That was confusion that we created, and I apologize. The reason we did that, Your Honor, is that we

didn't have an opportunity to prepare a Gould brief, but we didn't want to be accused of doing nothing. And some of the evidence in those motions in our view did relate to Gould, and we therefore put him on there.

That said, he filed two pieces of paper, they asked me if we could have the hearing today. I told them no, I wanted to respond. So -- but let me try to answer your question with respect to Mr. Gould. So we start, Your Honor, as we do, with the threat to terminate and the termination. And I respectfully submit --

THE COURT: I will tell you that on your Mr. Gould you've got the same list that we've already talked about. What I'm trying to find out is -- and I understand the threat is part of what you've alleged related to Mr. Gould along with the other six or seven bullet points that are on pages 5 and 6 of the opposition. Is there something else related to Mr. Gould, something like you have with Mr. Adams that would establish a lack of disinterestedness?

MR. KRUM: Let me answer, and then you'll decide.

THE COURT: Yeah. That's what I'm trying to pull out of you.

MR. KRUM: So, for example, with respect to the termination Mr. Cotter raised the question of Mr. Adams's independence before a vote was taken, and Mr. Gould asked Mr. Adams, well, can you tell us about that. And Mr. Adams got

mad and said in words or substance, no. And Mr. Gould said, okay. That, Your Honor, is a perfect example of a failure to act in the face of a known duty to act. We're not talking about someone who is unfamiliar with fiduciary obligations here. Mr. Gould is a corporate lawyer.

So we get to the -- we get to the executive committee, same meeting, June 12. Ellen Cotter says, I want to repopulate the executive committee, Mr. Gould, would you like to be on it. His testimony, his deposition testimony was that he declined because he knew that it would take a lot of time. Now, if he knew that it would take a lot of time, Your Honor, how is it that it didn't occur to him that this was what the sisters were doing in October of 2014 when they were trying to circumvent the board?

THE COURT: These are all on your list of bullet points.

MR. KRUM: Okay.

THE COURT: What I'm trying to find out is if there's anything that's not on the list of bullet points that are on pages 5 and 6 of your supplemental opposition that relate to Mr. Gould. Because when I made my ruling I was including Mr. Gould as someone because I specifically excluded Mr. Adams and the two Ms. Cotters.

MR. KRUM: Bear with me. I'm mentally working.

THE COURT: I'm watching you. I'm watching him

work.

MR. KRUM: So I don't think we had the executive committee there, but I just said that.

So then, Your Honor, the composition of the board. So Mr. Gould was not a member of the nominating committee. His testimony was that, on a Friday Ellen Cotter called me and asked me if she could come to my office and she and Craig Tompkins came to my office and showed me Judy Codding's resume and said we were going to have a board meeting on Monday to put Ms. Codding on the board. And Bill Gould said, this isn't sufficient time, I can't do my job. But he voted for her nonetheless. That, Your Honor, is the same thing that happens over and over and over again with Mr. Gould. That is, in the face of a known duty to act he chooses not to do so. That is intentional misconduct. Your Honor, you've denied the motion with respect to the CEO search. That is Mr. Gould. It is Mr. Gould and Mr. McEachern who are the ones who together with Margaret Cotter aborted the CEO search. Literally the last time they spoke to Korn Ferry was the day Ellen Cotter declared her candidacy. After the what did they do? They told Craig Tompkins to tell Korn Ferry to do no more work. And Mr. Gould, he was the one whose name was on a press release saying, Ellen Cotter was made CEO following a thorough search. She was not made CEO as a result of that search. She was made CEO in spite of that search.

THE COURT: Okay. So all of those are issues that I'm aware of considered when I had previously included Mr. Gould in the granting of the summary judgment related to the business judgment rule. The fact that I am denying certain issues related to other summary judgments does not diminish the fact that the directors that I found there was not evidence of a lack of disinterestedness have the protection the statute provides to them.

Okay. So let's go back to Mr. Cotter's Motion Number 3. This is related to the coach.

MS. LEVIN: Your Honor, this motion should be denied because the hiring of High Point, that's post hoc --

THE COURT: It's your motion. You wanted it granted.

MS. LEVIN: I'm sorry. You know, the Court -- I'm sorry. The Court should exclude the after-acquired evidence on the -- in the form of any testimony or documents relating to the hiring of High Point, because the breach of fiduciary duty claims, they are -- they concern what the directors did and knew at the time that they decided to fire the plaintiff. So we cited the Smith versus Van Gorkom case, which holds post hoc data is not relevant to the decision.

So at the time that they made this decision they did not have nor did they rely on the High Point evidence. So therefore the after-acquired evidence cannot be as a matter of

law relevant to their decision to terminate the plaintiff. That would amount to a retroactive assessment of his ability, which are not at issue. And I think that that's the -- you know, the --

THE COURT: The problem I have with that is part of what your client's position has been in this case is he is suitable to be acting as the CEO, and if there is information that is relevant to that suitability, that's where I have the problem on this. I certainly understand from a decision-making process that that information was not in the possession of anyone who was making the decisions at the time. But given the affirmative proposition by your client that he is suitable to CEO, I have concerns about granting the motion at this stage.

MS. LEVIN: Well -- okay. So -- but with respect to the decision which you can agree that they could not use that evidence to show that after the fact they made the right decision because of the after --

THE COURT: No. That's a problem if your client is saying he's suitable and therefore he should be able to be CEO. Because part of what he originally asked for was to make them make him be CEO.

MS. LEVIN: All right. And here at issue I believe it's the -- we're seeking to void the termination.

THE COURT: I know.

MS. LEVIN: So -- but I think that even -- and I think that in that respect if you were inclined to allow it on his suitability, the problem then becomes first of all the hiring of consultant doesn't necessary mean that somebody is unsuitable.

THE COURT: Absolutely. It may mean they're trying to get better.

MS. LEVIN: Exactly. And I was thinking -- when I read these facts I was thinking about the analogy. If you were a professional runner and you hire a runner coach --

THE COURT: Coach.

MS. LEVIN: -- doesn't mean that you're not a good runner. You may --

THE COURT: You want to be better.

MS. LEVIN: Exactly. So that was --

THE COURT: I understand.

MS. LEVIN: So and the other thing is that, you know, the opposition argues, well, but it looks like in his own assessment he wasn't good for it. And that, of course, again doesn't follow from that. And so then we get into the category of even if there's a remote relevance, Your Honor, then whatever that relevance is would be substantially outweighed by the unfair prejudicial effect that that would cause. Because, again, his assumed thoughts, then the jury could think like, well, you know, he thinks he's not qualified

because he hired a coach. So all in all I believe that it's unfairly prejudicial.

Just on the point of the unclean hands defense, again they are citing the Fetish, Las Vegas Fetish case. But, again, the unclean hands defense requires egregious misconduct and serious harm caused by it. And they haven't further substantiated that. So with that being said, our position is to exclude it for those reasons.

THE COURT: Thank you.

MS. LEVIN: Thank you.

THE COURT: Mr. Searcy --

MR. SEARCY: I'll address that.

THE COURT: -- I am inclined to deny the motion. But if the evidence is admitted at trial, to admit it with a limiting instruction that says that it only goes to suitability.

MR. SEARCY: And, Your Honor, I think that we're okay with that.

THE COURT: Okay.

MR. SEARCY: I just want to clarify that we can certainly ask Mr. Cotter about the Alderton documents --

THE COURT: You ask him about it, then I'm going to give the limiting instruction, and we'll probably give it five times or six times, and it'll be a written instruction, so it's part of it. And if the plaintiff doesn't want me to give

the limiting instruction because they believe that calls to much attention to it, they can, of course, waive that request.

MR. SEARCY: Thank you, Your Honor.

THE COURT: Okay. So think about whether you really want the limiting instruction, come up with your text for the limiting instruction, and then we'll talk about it when we have our final pretrial conference as to whether you think you really want it.

That takes me to the last motion in limine by Mr. Cotter, which relates to the ability of Mr. Ferrario to participate at trial, also known as Motion in Limine Number 2.

MR. KRUM: Thank you, Your Honor. I enjoy this very much, showing that perhaps I've spent too many years in the corporate governance jurisprudence. Three points, and it's not complicated. First, as a general rule a nominal defendant is not allowed to introduce evidence and defend the merits of claims against the director defendants.

Second, the handful of exceptions to that are exceptions where it's a serious fundamental corporate interest that is challenged by the derivative suit, a reorganization or restructuring, an effort to appoint a receiver. None of those exist here.

Third, if you disagree with us on all of that, there's a question of unfair prejudice and waste of time. And, you know, the individual defendants are represented by

capable counsel. They don't need a second lawyer carrying their water. And for a jury to have someone who represents the company asking questions that imply conclusions adverse to the plaintiff is, if not unfairly prejudicial, something beyond that.

So that's the argument in a nutshell, Your Honor. If you have any questions, I'd be happy to answer them.

THE COURT: Nope. Motion's denied.

All right. So let's go to your Motion in Limine Number 1 regarding advice of counsel. I forgot we need to hit that one. Ms. Levin.

And then we're going to go to the Chief Justice Steel that I'm not going to really hear, because I didn't give you permission to refile.

MS. LEVIN: Your Honor is familiar with the share options, so if I talk about the share option, I don't --

THE COURT: I am.

MS. LEVIN: Okay. Well --

THE COURT: And also with the drama related to the production and the creation and all the stuff about the advice of counsel issue.

MS. LEVIN: Okay. I'll just --

THE COURT: But I also am aware the Nevada Supreme Court has told us on a business judgment issue we cannot reach behind the advice of counsel except to make a determination as

to essentially process issues, how the attorney was hired, what the scope of the retention was, and those kind of issues, as opposed to the actual advice.

MS. LEVIN: That's true, Your Honor. And so our arguments are really twofold. Number one is that Adams and Kane, who were two of the three directors on the compensation committee, they testified, as the Court found in its October 27, 2016, hearing, that they relied solely on the substance of advice of counsel to determine whether the authorization decision to authorize the estate to invoke the option was proper. So, unlike in Wynn or in Comverge, on which the defendants rely, they did not rely on anything else. So if they are asked at trial to explain why they authorized the option, they must rely on that legal advice.

So the second point is that the defendants waived the attorney-client privilege by partially disclosing attorney-client privileged information. Now, they're saying -- or RDI says in the opposition that individual directors cannot waive the privilege.

THE COURT: That's the Jacobs versus Sands case.

MS. LEVIN: Exact, Your Honor. And I agree with that. But, of course, RDI can only act through its officers and directors.

THE COURT: That's the Jacobs versus Sands case.

MS. LEVIN: And the current officer -- and I think

in particular if you look at the Exhibit 4 that we attached to our motion, is that that email was produced by Ellen Cotter, who is a current CEO and is an officer and director, and she --

THE COURT: I understand.

MS. LEVIN: So, in other words --

THE COURT: And then Mr. Ferrario clawed it back.

MS. LEVIN: Right. So she produced it, and so there's a Supreme Court case that says, "The power to waive the corporate attorney-client privilege rests with the corporation's management and is usually -- and is normally exercised by its officers and directors." And that's what happened here.

So I think especially Exhibit 4, but even Exhibit 2 and 3, the 2 and 3 they raise the legal issues. 2 and 3 identify the legal issues of whether there was a reason why Ellen Cotter could not exercise the option and whether enough -- whether the trust documents did not pour over -- the share option didn't pour over into the trust. But Exhibit 4 specifically seeks legal advice from the company attorney and as to the legal rights of the estate to exercise the option in light of the proxy language. So that is -- under our statute is an attorney-client communication for the purpose of obtaining legal advice. So they partially disclosed that, so we believe there's a waiver issue. And under Wardleigh you

cannot use the attorney privilege both as a shield and a sword, which is what they're now doing, is because what they're going to say is, well, we partially disclosed but you cannot find out what it was. But even the very --

THE COURT: But that's the Nevada Supreme Court who's made that decision, not the rest of us. They were very clear that we're not allowed to get behind that.

MS. LEVIN: Correct. But one thing that the Wynn decision did not decide was the waiver issue. And that was in Footnote 3 of the decision.

THE COURT: I made that decision separately after that came back. But that's a case by case, and I haven't made that decision in this case. In fact, my belief is you guys have a writ pending on this issue still. Right?

MR. KRUM: I think the writ pending is on a different privilege issue, Your Honor.

THE COURT: Okay.

MS. HENDRICKS: Your Honor, the writ relating to this issue was filed by RDI, and the Supreme Court actually came back and said the facts were analogous to Wynn and it needed to make a decision, and that was shortly after you did make the decision when we were back before you on it.

THE COURT: Yeah. We had a hearing.

MS. HENDRICKS: And we had the supplemental briefing.

THE COURT: Yep. Okay. So anything else on this one?

MS. LEVIN: Only -- the only thing is that the partially disclosed privileged emails themselves show that the board had information that would cause reliance on advice to be improper. So that would --

THE COURT: Okay. So your motion's denied. Come up here. I'm going to give you these. These are your I believe documents you actually want sealed. Since I granted your motion, it was on the calendar today, hopefully you can work out with the Clerk's Office so they will actually take the sealed documents and put them so they're part of the record in some way.

MS. LEVIN: And I brought them with me, too.

THE COURT: Yeah. Good luck. You've got to do it at the counter.

MS. LEVIN: Okay. Thank you.

THE COURT: Okay. So I am declining to hear again the motion in limine on Chief Justice Steel. I've previously made a ruling on that. I've reviewed your brief, and there's nothing in it that causes me to change my mind.

I have already granted your motions to seal and redact. It was on calendar for today.

And now we need to set our final pretrial conference. I usually do it the week before.