IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., DERIVATIVELY ON BEHALF OF READING INTERNATIONAL, INC., Appellant, v. EDWARD KANE, DOUGLAS MCEACHERN, MARY ANN GOULD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM GOULD, JUDY CODDING, AND MICHAEL WROTNIAK, READING INTERNATIONAL, INC., A NEVADA CORPORATION, Respondents	Electronically Filed Nov 27 2019 02:58 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No.: 75053 Coordinated with Cases Nos: 76981, 77648, 77333

ANSWERING BRIEF OF RESPONDENT READING INTERNATIONAL, INC. FOR CASE NO. 77648

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Reading International, Inc., through its undersigned counsel, states that it is a publicly traded corporation.

The following law firms have represented Respondent Reading International, Inc.:

Greenberg Traurig, LLP.

Dated this 27th day of November 2019.

GREENBERG TRAURIG, LLP

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STATUTES AND RULES

Respondent Reading International, Inc. ("Reading," "RDI," or the "Company"), through its counsel of record, Greenberg Traurig, LLP, respectfully submits its Answering Brief.

INTRODUCTION

This is the third of four appeals stemming from Cotter, Jr.'s loss on all claims in the litigation wherein he, a former Reading CEO who had served less than a year before his dismissal, masqueraded as a derivative plaintiff in hopes of winning his own reinstatement. *All* of his claims were premised on the theory that his two sisters (who control the majority of the Company's voting shares) persuaded the other directors to vote on various internal governance issues to suit the sisters' personal interests, rather than the interests of the Company. To that end, Cotter, Jr. challenged a multitude of corporate decisions, claiming all such decisions had been motivated by the interests of his sisters, Ellen Cotter and Margaret Cotter, with the other five directors simply doing as the sisters directed. Cotter, Jr. contended that Reading suffered as a result, based on a temporary dip in share prices. Cotter, Jr. also contended that Reading had not performed as well as other companies in the same industries, and ultimately produced an expert report contending that Reading had lost between $110 and $150 million. Repeatedly, Cotter, Jr. contended that his sisters, who together controlled the majority of the

voting shares of the Company, undertook such actions in order to entrench themselves.[1]

Significantly, other than claiming that his sisters lacked sufficient experience to deserve their low industry-average compensation, Cotter, Jr. never claimed that the Company's assets were being pillaged or that his sisters were unfairly profiting from any transactions between the Company and themselves, or any third-party entities controlled by them. Instead, for three years, he continually challenged such board decisions, including decisions that terminated his employment; approved of a payment method for a stock option purchase[2]; appointed a new CEO; changed the membership of the Company's long-existing

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[1] Leaving aside the fact that none of the challenged board actions included anything that had any impact on the voting rights of stockholders, the absurdity of an entrenchment claim in these circumstances is demonstrated by NRS 78.140(2)(3), which provides that any purportedly interested transaction cannot be voided on the basis of such interest where a majority of the voting stockholders, *including any purportedly interested directors with voting shares*, approve of or ratify the challenged transaction with knowledge of the purported interest.

[2] This claim was *patently* groundless because the claim alleged that one type of stock had been paid with another type of stock; there was no allegation that the payment stock had a lessor value than the stock received in return. Under Nevada law, a purportedly interested transaction cannot be voided when the transaction is fair to the corporation. NRS 78.140 (2)(d). Payment made with equal value is patently fair.

Likewise, all claims that related to the compensation of the Directors, but which were challenged because of the purported lack of disinterest of those voting in favor, were groundless, because under Nevada law, the decision of the Board of Directors regarding Director compensation is presumed to be fair to the corporation, regardless of participation of interested directors. NRS 78.140(5).

board's executive committee; utilized said committee; chose a date for the annual stockholder meeting; and filled vacancies on the Board of Directors. These actions were, according to Cotter, Jr., all taken to allow his sisters to "seize control of Reading," and entrench their power. He further claimed that SEC disclosures were false, *not* because of any objectively untrue statements therein, but simply because the filings did not disclose what he contended were the "true" motivations behind the board decisions. *Significantly*, his suit was filed after he made threats to ruin the directors financially.

In short, while claiming to be acting on behalf of Reading as a stockholder, he initiated, and then maintained, the derivative stockholder suit process as a means of exercising vengeance upon Reading and its directors. In so doing, Cotter, Jr. forced Reading to incur many millions of dollars in attorney's fees and costs. And when Reading was finally some justice—albeit much less than it deserved—through an award of costs, Cotter, Jr. appealed that decision.

Cotter, Jr has failed to show that any abuse of discretion occurred in the award of costs. Accordingly, the judgment should be affirmed.

JURISDICTIONAL STATEMENT

Respondent Reading agrees with the jurisdictional statement provided by Appellant (Opening Brief, p. 1), except that the judgment entered on August 14,

2018 was a judgment in favor of, and not against, the last three director defendants. **XXXIV JA8401-8411**.[3]

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY AWARDED REASONABLE AND NECESSARY EXPERT WITNESS COSTS.

II. THE DISTRICT COURT PROPERLY AWARDED REASONABLE AND NECESSARY LITIGATION COSTS TO READING

STATEMENT OF RELEVANT FACTS[4]

Cotter Jr.'s Claims and Requested Relief

In the underlying action, Appellant Cotter, Jr., who had served for approximately 10 months as CEO of Reading before his termination, brought claims of breach of fiduciary duty against all other members of the Board of Director: Guy Adams, Judy Codding, Ellen Cotter, Margaret Cotter, William

[3] Where the documents cited herein were included in the Joint Appendix ("JA") filed by Appellant in support of this Case and Case No. 76981, citations have been made to the JA. Where documents were not included in the JA, but were included in the RDI Appendix ("RDI-A") filed with Case No. 77733, citations are to the RDI-A. If the Court instead would prefer a supplemental appendix in lieu of reference to the RDI-A, Reading will gladly comply.

[4] The facts presented here have been limited to those that are specifically relevant to the cost award. Reading has provided statements of the facts detailing the events in this litigation in greater detail in its Answering Brief in Case No. 75053 and its Opening Brief in Case No. 77733. Such statements are incorporated herein as though set forth in their entirety. Additionally, Reading joins in the Answering Briefs filed by Respondents Adams, Codding, Ellen Cotter, Margaret Cotter Gould, Kane, McEachern, and Wrotniak in their entirety, including in the Statements of Facts.

Gould, Edward Kane, Douglas McEachern, Tim Storey, and Michael Wrotniak ("Director Defendants")[5] and a claim of aiding and abetting breach of fiduciary duty against Ellen and Margaret Cotter. **I JA 0001; II JA263; III JA 519**. He sought his own reinstatement to his position as CEO, as well as other injunctive relief that, if granted, would have imposed obligations on RDI itself, rather than just on the Director Defendants. This requested relief included orders requiring *Reading* to take certain actions, such as reinstating Plaintiff to an executive position, terminating Reading's chosen CEO and President; imposition of specific qualifications for appointment to Reading's Board of Directors; interfering with Reading's contractual relationships, and prohibiting Reading from making use of certain Board committees, thereby, requiring a change in Reading's Bylaws. **I JA 0029-0030; I JA310-311; III JA 573-574.**

Reading Acts as a Party Throughout the Litigation

Because of the assault on its corporate autonomy, at all times throughout the litigation, RDI acted as a party defendant, including filing answers, filing or joining motions, and participating in discovery. **I JA 105, 127; II JA3976; XV JA3707-3806; XX JA4891; XXV JA6140, 6170; XXVII JA6600; LIII JA13077**. Cotter, Jr. directed discovery requests to Reading, and even moved to compel

[5] Storey was included in the Complaint and First Amended Complaint and was later dismissed. Codding and Wrotniak were added in the Second Amended Complaint. **I JA 0001; II JA263; III JA 519**.

production from RDI pursuant to NRCP 37-proceedings that are applicable only among parties. ***See, e.g.,* XXXI JA76222, 7569; LII JA12809**. Reading filed a writ petition and engaged in writ practice to protect its attorney client privilege arising from Cotter, Jr.'s document request, joined in a writ petition filed by the Independent Directors, and participated in the writ proceedings initiated by Cotter, Jr. *See* Supreme Court Case Nos. 71267, 72261, 72356, and 74759.

The Litigation in 2015

After Cotter, Jr.'s Complaint was filed, T2 Partners Management, LLP and other hedge fund stockholders in RDI (collectively, the "T2 Plaintiffs"), filed a Complaint in Intervention, which parroted the allegations made by Cotter, Jr. **I JA 109**.[6] The intervention was granted, and the T2 Plaintiffs thereafter participated in the litigation until mid-2016 when, with the District Court's approval as required under NRCP 23.1, the T2 Plaintiffs voluntarily dismissed their complaint. **I RDI-A 65**.

In August 2015, Cotter, Jr. brought a motion for a preliminary injunction, which sought to void the termination decision and Cotter, Jr.'s immediate reinstatement as President and CEO. **I RDI-A 33**. Cotter Jr. also sought expedited discovery, pursuant to which all of the Defendants, including RDI, produced documents in September and October of 2015. **I RDI-A 154**. After crying wolf

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and imposing the costs of expedited discovery, including expensive ESI discovery on the Defendants and RDI, Cotter Jr. thereafter proposed waiting until February to hold the hearing on his motion. **I RDI-A 160:9-12**. The District Court concluded that Cotter, Jr.'s conduct belied the need for immediate relief and vacated the request for preliminary injunction, although the Court stated that Cotter, Jr. could renew the request. **I RDI-A 177:10-17**. Cotter, Jr. never renewed his request for preliminary injunctive relief.

The Litigation in 2016 and 2017

Trial was originally scheduled to occur in November 2016. **II JA 313-316**. Discovery continued into 2016, with both Plaintiff and the T2 Plaintiffs having amended their original complaints. In July of 2016, the T2 Plaintiffs withdrew their complaint. **II RDI-A 279**. In a jointly filed motion, RDI, the Director Defendants, and the T2 Plaintiffs stated:

> The T2 Plaintiffs have reviewed a number of transactions and engaged in discussions with management in addition to participating in the litigation and have determined the Defendants have acted, and will continue to act in good faith to use best practices with regard to board governance, protection of stockholder rights, and maximizing value for all its stockholders. . . .
>
> Based upon T2 Plaintiffs' Counsel's evaluation as well as T2 Plaintiffs' own evaluation, T2 Plaintiffs have determined that the Settlement is in the best interests of Reading and its current stockholders and has agreed to settle the T2 Action upon the terms and subject to the conditions set forth in the Settlement and summarized herein.

II RDI-A 288-289. The District Court approved a settlement among these parties, with the terms of the settlement including mutual releases (but not requiring dismissal of Cotter, Jr.'s claims), with each party paying their own expenses and costs, and an agreed joint press release, that included the following relevant language:

> [A spokesman for the T2 Plaintiffs] stated that the Plaintiff Stockholders brought the Derivative Claims as a result of the allegations contained in a derivative action filed by Mr. James J. Cotter, Jr. on June 12, 2015, in the District Court of the State of Nevada for Clark County. As stockholders in the Company, [the Plaintiff Stockholders] wanted to ensure that the interests of all stockholders were being appropriately protected. In connection with the litigation, the Plaintiff Stockholders conducted extensive discovery on these matters, which included depositions of Guy Adams, Margaret Cotter, Ellen Cotter, William Gould, Edward Kane, Douglas McEachern, Tim Storey and James Cotter, Jr. Following their efforts on behalf of the stockholders, [the Plaintiff Stockholders] have concluded that the Reading Board of Directors has acted in the best interests of all stockholders and has been and remains committed to acting in the interests of all stockholders. Continuing with their derivative litigation would provide no further benefit.

I **RDI-A 343, VIII RDI-A 8309-8323**. Significantly, no obligation of any governance changes were imposed upon RDI.

Despite the clear exoneration of the Defendants expressed by the T2 Plaintiffs, whose *sole* interest in the proceedings were as stockholders of RDI, Cotter, Jr., still purporting to act on behalf of the Company, not only failed to fold his hand, but actually doubled down on his claims. He filed a Second Amended Complaint, challenging virtually every decision made by Reading's Board of

Directors since his termination. **III A 519-575**. Of particular relevance here, in a new claim, Cotter, Jr. contended that the Board of Directors had breached their fiduciary duties by failing to follow up on a non-binding expression of interest in purchasing RDI's shares filed by an entity known as Patton Vision (the "Patton Vision Inquiry").[7] ***Id.*** **at ¶¶ 154-167**. Even though the case had progressed to summary judgment motions as to the claims brought in the Complaint and the First Amended Complaint, Cotter, Jr. demanded discovery related to the Patton Vision Inquiry, including the ability to depose a 30(b)(6) witness for Reading. **XV JA 3701-3703**. The trial date was ultimately moved January 2018. **XX JA 4928-4931**.

In all, *not counting depositions concerned with the T2 claims that had copied Cotter, Jr's claims,* Cotter, Jr. noticed and took depositions of 17 witnesses. Several of those witnesses were deposed over the course of multiple days, resulting in multiple transcript volumes (Guy Adams, three volumes; Judy Codding, two volumes; Ellen Cotter, three volumes individually and one volume as PMK for Reading; Margaret Cotter, three volumes; Bill Ellis, two volumes; Bill Gould, three volumes; Ed Kane; five volumes; Doug McEachern, four volumes; Tim Storey, two volumes). **XXXIV JA8452-8453**. In addition, the Director Defendants collectively took a total of eight depositions, including depositions of Cotter, Jr,

[7] The deficiencies as to demand futility in this Second Amended Complaint are described in detail in RDI's Answering Brief in Appeal 75053.

and his five designated experts. ***Id.***

After discovery closed in 2017, a second round of summary judgment motions ensued. The District Court determined that there were "no genuine issues of material fact related to the disinterestedness and/or independence" of Directors Kane, McEachern, Gould, Codding, and Wrotniak, and, as such, entered judgment in their favor "on all claims asserted by Plaintiff." **XXV JA6065–6071**.[8] Cotter, Jr.'s motion for reconsideration of that ruling, and for stay of the trial, was denied. **XXV JA6179**.

As Cotter, Jr. concedes, the determination that these five directors were independent eliminated Cotter, Jr.'s claims as to all but two of the challenged corporate decisions, leaving only his challenge to the decision to terminate his employment and the decision to permit the Estate of William Cotter, Sr. to use nonvoting stock to pay for the exercise of options for voting type.

On December 29, 2017, the Reading's Board of Directors ratified those two corporation decisions, with the five directors found independent voting in favor, Directors Adams, E. Cotter, and M. Cotter, abstaining, and Cotter Jr. voting against. **XXV JA 6160-6161**

[8] Cotter, Jr. obtained Rule 54 certification, **XXV JA6182**, and appealed this order in Case No. 75053.

The Litigation in 2018

On January 3, 2019, fewer than five days after the entry of the written order determining that five of the Defendants were independent, Reading filed a Motion to Dismiss for lack of demand futility, based on that now determined independence. **XXV JA 6162**. The remaining Director Defendants filed a Motion for Summary Judgment on all remaining claims, based on the ratification. **XXV JA 6225**. The District Court denied the motions as *untimely* because, even though each was based on events that had occurred mere days before the filing, each had been filed after the deadline for dispositive motions. **XXV JA6281-6294**.

The trial on the remaining claims would then have proceeded on January 8, 2018, except that on Sunday January 7, 2018, Cotter, Jr. requested a continuance based on circumstances of which he had been aware for some time, and about which he refused to give complete details. **VII RDI-A 9616 (filed under seal); VII RDI-A 10667**. Trial was rescheduled for July 2018. **XXVII JA 6724-6726**.

Cotter, Jr. sought and received the opportunity to pursue still more discovery, including the depositions of the directors who had voted in favor of the ratification, as well as the production of documents that required still more costly e-discovery. **See XXXII 7881-7886** (detailing discovery obtained by Cotter, Jr. in the spring of 2018, and his persistent demands for still more). Additionally, while this discovery was occurring, it was learned that Cotter, Jr. would not have been

able to present certain of his designated expert witnesses if trial had proceeded in January, as he had failed to pay their fees. **VI RDI-A 9633-9773**. It was not until he was ordered to produce current billing statements of all experts who would testify at trial that Cotter, Jr. revealed that, at the trial now scheduled for July 2018, he would *not* present any expert on damages suffered by the Company. **VII RDI-A 9625:11-16; VIII RDI-A 10667, 10730**.

Ultimately, the District Court granted judgment in favor of the remaining director defendants. **XXXIV JA8389**. Reading's Motion to Dismiss on the basis of standing due to lack of demand futility was denied as moot. **XXXIV JA8424**.

The Costs Motion

Reading submitted a Memorandum of Costs, on behalf of itself, and on behalf of the Director Defendants, who it was statutorily required to indemnify. **XXXIV JA8426-XXXVI JA 8906**. The Memorandum included a list of 17 categories of costs incurred in the litigation,[9] and an explanation for each category of costs requested, as well as detailed declarations from lead counsel from each law firm in the defense team, verifying the amount and necessity of the costs

[9] The categories in the Memorandum were: 1) Filing fees; 2) Depo reporters' fees; 3) Expert witnesses; 4) Process serving; 5) Official reporter fees; 6) Photocopies; 7) Telephone calls; 8) Postage; 9) Depo travel costs; 10) Computerized legal research; 11) Couriers; 12) E-Discovery; 13) Counsel's travel expenses for Court proceedings and client meetings; 14) Reading director and officer travel expenses; 15) Parking; 16) Temporary office space for defense team; 17) Temporary office space for executive team; 18) Expenses for general counsel housing.

incurred such costs. Declaration of Ferrario (lead counsel for Reading), **XXXIV JA8450**; Declaration of Searcy (lead counsel for most Director Defendants) **XXXIV JA8519**. Additionally, an affidavit from Reading's general counsel was provided, verifying the costs Reading incurred for e-discovery. **XXXIV JA8508**. Exhibits to this declaration included the respective law firms' disbursement records, itemizing the costs and invoices for expert fees. **XXXIV JA 8447-XXXVI JA 8906**.

With respect to claimed expert costs, in addition to presenting the experts' invoices, Mr. Searcy explained that the four experts retained by the Respondents were "necessary to defend against Plaintiff's claims and to rebut Plaintiff's experts." **XXXIV JA 8520**. He described Plaintiff's experts and the topics each addressed, as well as the Respondents' experts and their qualifications. **XXXIV JA 8520-JA8525**. Plaintiff retained two damages experts, Dr. Duarte-Silva and Mr. Finnerty, and one expert each as to real estate compensation, corporate governance, and executive searches. Respondents initially retained three experts: Mr. Klausner, as to corporate governance; Mr. Roll, to opine as to the existence and cause of damages alleged to have resulted from the announcement of the termination of Cotter, Jr.; and Mr. Foster, to opine on the propriety of the Reading's Board's response to an expressed offer of interest in the Company's shares. These experts were each asked to prepare rebuttals to Plaintiff's experts as

well. An additional rebuttal expert was retained after receipt of Dr. Duarte's Silva's report: Dr. Strombom, who was asked to opine as to the accuracy of Dr. Duarte's-Silva's measure of damages. ***Id.*** Mr. Searcy also provided a comparison of the rates charged by Plaintiff's experts and Respondents' experts:

Expert Areas	Plaintiff's Expert and Rate	Defendants' Expert and Rate
Damages	Dr. Duarte-Silva @ $630/hour	Strombom @ $690/hour
Damages	Finnerty @ $1,070/hour	Roll @$1,200/hour
Damages		Foster @ $990/hour
Real Estate Executive Compensation	Nagy @ $650/hour	
Corporate Governance	Chief Justice Steele @ $1,075/hour	Klausner @ $950/hour
Executive Searches	Spitz @ $850/hour	

XXXIV JA 8524. The record shows that one of Plaintiff's two damages experts charged more per hour than two of Respondents' damages experts, and that Cotter, Jr.'s corporate governance expert charged more per hour than Respondents' similar expert.

Cotter, Jr. moved to Retax costs, and in its opposition to that Motion, Reading submitted additional evidence in support of its claimed costs, including vender invoices. **XXXVII JA 9111-XXXIX JA 9592**. After adjustments were made pursuant to the Motion to Retax, Reading requested costs totaling $2,883,044.37.

Following a hearing on the Motion to Retax, the District Court partially granted the Motion to Retax, awarded Reading only slightly more than half of the costs incurred, $1,554,319.73. **LIII JA13163-13167**. In addition to denying all costs incurred on behalf of William Gould, the District Court's order included the following relevant findings:

> 1. As the prevailing parties, and as the indemnifier for the Individual Defendants, Reading is entitled to reimbursement for its reasonable costs.
>
> * * *
>
> 5. The Court finds that as to Categories 1, 2, and 4-11, Reading has shown that the costs were necessarily, and reasonably incurred.
>
> 6. As to category 3, which stated costs incurred for expert expenses, the Court finds that it is appropriate to exceed the statutory limit of $1500, for the reasons stated in Reading's briefing. However, the Court reduced the compensable amounts to the following, which amounts are reasonable considering the circumstances of this case:
>
> Mr. Klaunser - $250,000
> Mr. Roll - $250,000
> Mr. Strombom - $152,000
> Mr. Foster - $101,000
>
> 7. As to category 12, which stated costs incurred for e-discovery, the Court finds that some of the amounts claimed therein would more properly have been designated as either expert costs or included with attorneys' fees. The Court [] reduces the compensable amount to $450,000, which amount is reasonable considering the circumstances of this case.
>
> 8. The Motion to Retax is granted as to the expenses set forth in Categories 13-17.

LIII JA13163-13167. Thus, the District Court reduced Reading's claim for expert fees by nearly 50%, from $1,403,751.94 to $752,000, reduced the claim for e-discovery costs by nearly half, and completely denied any costs for five categories of expenses. Despite have been released of liability for nearly half of the costs he had imposed on Reading, Cotter, Jr. challenges the Court's award.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's judgment, as no abuse of discretion has been shown. The District Court considered the appropriate factors. The Court properly awarded fees higher than $1500 for experts retained to give opinion testimony, given that the lack of testimony *at trial* was due to the grant of summary judgment. Additionally, the District Court properly considered the relevant factors to support an award of fees higher than $1500.

Cotter, Jr. also failed to show an abuse of discretion in the award to Reading of its own litigation costs. Reading was required to incur costs as a party, and properly defends its corporate interests against Cotter, Jr.'s attempts to curtail Reading's corporate autonomy. His contention that the e-discovery costs were unreasonable is not supported by evidence of the appropriate amounts. His claims that the computerized legal research costs were not properly documented is belied by the record.

An award of costs may be overturned only where an abuse of discretion is shown, but Cotter, Jr. failed to show any such abuse here. Accordingly, the judgment should be affirmed.

ARGUMENT

The District Court properly awarded reasonable costs to RDI and the Director Defendants. Prevailing parties are entitled to their costs as a matter of course in actions wherein damages in excess of $2500 are sought. NRS 18.020(3). "This award of costs is mandatory." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 832 (Nev. 1986). A district court's decision regarding the amount of an award of costs will not be overturned absent an abuse of discretion. *Village Builders 96 v. U.S. Laboratories*, 121 Nev. 261, 276 (Nev. 2005).

Cotter, Jr. challenges the fees awarded for expert expenses, contending that no more than $1500 per expert should have been permitted. He also contends that Reading should not have been awarded any of its own costs, and he challenges the amount of some of those costs, as well as the costs of e-discovery.

However, Cotter, Jr. has failed to show any abuse of discretion. The District Court considered the appropriate factors and its ruling is supported by substantial evidence. Accordingly, the Judgment should be affirmed.

I. THE DISTRICT COURT PROPERLY AWARDED REASONABLE AND NECESSARY EXPERT WITNESS COSTS.

Cotter, Jr. contends that the District Court awarded too much for expert fees.

He attacks the award on a variety of grounds, but, as shown below, mostly without the benefit of supporting authority. As this Court recently stated, the Court "need not consider claims that are not cogently argued or supported by relevant authority." *Busick v. Trainor*, No. 72966, at *7 n.2 (Nev. Mar. 28, 2019), citing *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288, n.38 (2006).

The Court's reasoning for the amounts awarded is explained, citing the applicable factors set forth in *Frazier v. Drake*, 357 P.3d 365, 377 (Nev. Ct. App. 2015). Cotter, Jr. has failed to show any abuse of discretion in the award, which actually reflects a substantial reduction from the expert costs actually incurred. Because the District Court's award of expert costs is supported by the evidence in the record, the Judgment should be affirmed.

A. The Court Had Grounds to Award More Than $1500 Per Expert.

Cotter, Jr. contends that because the expert witnesses did not testify at a *trial*, it was an abuse of discretion to award more than $1500 in fees for each one. However, his argument is unsupported by the authority he cites. In *PERS v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017), the expert in question had not been retained as an expert *witness* for the trial, but instead, was a non-testifying consultant. Thus, the meaning of the term "non-testifying expert," as used in *Gitter*, is an expert who is not retained for the purpose of testimony. In the two

unpublished cases cited by Cotter, Jr., *Busick v. Trainor*, No. 72966 (Nev. Mar. 28, 2019) and *Las Vegas Land Partners, LLC v. Nype*, No. 68819 (Nev. Nov. 14, 2017), the experts in question had not testified at trials that had occurred in the cases. Nothing in these decisions suggests that where a party retains experts to offer expert opinion testimony, but the experts do not testify at a trial because the case is resolved by summary judgment, cost recovery must be limited $1500 per expert.

To the contrary, this Court has expressly held that the reasons an expert does not testify are relevant to the issue of whether the presumptive limit may be exceeded. In *Logan v. Abe*, 350 P.3d 1139, 1144 (Nev. 2015), this Court found that an award of fees higher than $1500 for experts who did not testify was not error. In *Logan,* the experts in question had not been called to testify at the trial by the defendants because the plaintiffs chose not to call *their* expert. This last-minute change in the need for the expert testimony was deemed sufficient to warrant the higher fee. Significantly, nothing in *Gitter* indicates any intent to overrule *Logan*; to the contrary, *Logan* is twice cited with approval in *Gitter*. 393 P.3d at 680 and 681.

Here, there was no trial because Respondents prevailed on summary judgment, on issues for which expert testimony would not have been helpful. However, Respondents could not reasonably have been expected to make

assumptions about vindication on such a basis and forego trial preparation. By insisting that trial testimony is needed, Cotter, Jr. is essentially arguing that there can be no award of more than $1500 for expert costs where a case is decided by summary judgment, with an exception apparently only where expert testimony is used in the summary judgment briefing.[10] Not surprisingly, he offers no authority that supports this doctrine. Accordingly, based on the circumstances surrounding the reasons for the lack of trial testimony, the award of fees higher than $1500 per expert was well within the District Court's discretion.

B. The District Court's Findings with Respect to the Frazier Factors Are Supported by the Record.

Cotter, Jr. claims that the record does not support the District Court's conclusions following application of the factors set forth in *Frazier v. Drake,* 357 P.3d at, 377. Those factors include:

> [1][T]he importance of the expert's testimony to the party's case; [2]the degree to which the expert's opinion aided the trier of fact in deciding the case; [3]whether the expert's reports or testimony were repetitive of other expert witnesses; [4]the extent and nature of the work performed by the expert; [5] whether the expert had to conduct independent investigations or testing; [6]the amount of time the expert spent in court, preparing a report, and preparing for trial; [7] the expert's area of expertise; [8] the expert's education and training; [9] the fee actually charged to the party who retained the expert; [10]

[10] Cotter, Jr. appears unaware of the unlikelihood that any successful summary judgment motion could rely on expert opinion testimony, given that the use of such testimony could only be in support of a disputed *factual* issue. See NRCP 56(a) (requiring an absence of a dispute over material facts for summary judgment).

> the fees traditionally charged by the expert on related matters; [11] comparable experts' fees charged in similar cases; and, [12] if an expert is retained from outside the area where the trial is held, the fees and costs that would have been incurred to hire a comparable expert where the trial was held.

Id. at 377-78. The factors are not exhaustive, and not all will be applicable in all circumstances. *Id.* at 378. As can be seen, Factors 1 and 2 relate to the necessity of an expert relating to the issues to the case, although factor 2 is relevant only when there has been a trial. The remaining factors are all related to the reasonableness of the costs incurred, based on the experts' qualifications, the extent of the work required, and comparison of other expert's fees.

Here, the District Court's Order with respect to expert fees states:

> [T]he Court determines that an amount greater than $1,500 per expert is appropriate, because the circumstances surrounding each expert's testimony was of sufficient necessity to require the larger fee. Reviewing the factors set forth in *Frazier v. Drake*, 357 P.3d 365, 377 (Nev. Ct. App. 2015), as discussed in both the Memorandum of Costs and Opposition to the Motion to Retax, the Court finds that the expert testimony was very important to the Defendants' preparation of their defense, particularly in light of the Plaintiff's damages expert's opinion that damages were as high as $150 million, as well as Plaintiff's retention of a former Chief Judge of the Delaware Chancery Court as a corporate governance expert. While the matter here ultimately resolved without a trial, Defendants had to prepare their experts for a trial that had been scheduled to commence in January, and also were engaged in preparation in anticipation of the rescheduled trial. Had the matter gone to trial, and Plaintiff presented the testimony of his designated experts, the experts' testimony would most likely have been highly significant to the outcome of the case.
>
> Defendants' experts were each well known in their fields, with academic and professional accomplishments. The hourly fees charged

were reasonable comparable to similar experts, including those retained by Plaintiff, and in line with the fees ordinarily charged by experts in the respective fields.

Based on the above analysis, the Court determines that the fees incurred by Mr. Strombom and for Mr. Foster are compensable in their entirety, and the fees incurred for Mr. Klausner and Mr. Roll are compensable in reduced amounts. The compensable amounts are:

Mr. Klausner - $250,000
Mr. Roll - $250,000
Mr. Strombom - $152,000
Mr. Foster - $201,000

LIII JA 13164-13165. The District Court's findings touched upon both necessity and reasonableness. The District Court's reference to Reading's Memorandum of Costs and its Opposition to Motion to Retax indicates that the Judge considered the arguments and evidence presented with those briefs. ***See*** **XXXIV JA8426-XXXVI-JA8914 and XXXVII JA9111-LII JA121893**. Thus, the required consideration of the Frazier Factors occurred.

1. The Expert Witnesses Were Important to the Preparation of the Defense and Therefore Necessary.

The District Court's finding that the experts were "very important to the Defendants' preparation of their defense" is fully supported by the record. Counsel for the Individual Defendants provided a detailed explanation for each expert's purpose in the case, and the necessity for such an expert in his declaration. **XXXIV JA 8519-8524**. The subject matter addressed by each expert was justified based on the claims in the case, including those added in the Second Amended Complaint,

as well as by the need to rebut the opinions offered by Cotter, Jr.'s experts, including the claim for damages of $150 million purportedly arising from the Board's response to the expression of interest to purchase shares.

Cotter, Jr. contends that the timing of the Respondents' retention of their experts somehow shows that costs were unnecessary, claiming that the burden of proof meant that the Respondents should only have had rebuttal experts. This assertion is unsupported by any authority. Indeed, much of Cotter, Jr.'s challenges to the necessity of the experts is based on *hindsight*. Certainly, if Respondents had *known* that Cotter, Jr. would completely abandon his damages claims at the 11th hour, then they would not have perceived a need to retain *any* experts to counter the claim made in the Complaint that the disclosure of Cotter, Jr.'s termination led to a temporary dip in share price, or to rebut the Cotter, Jr's expert's opinion that reading had suffered $150 million in damages from failing to follow up on the nonbinding offer of interest in the purchase of shares. But as Cotter, Jr. himself acknowledges, Respondents did not know that Cotter, Jr.'s abandonment of his damages claim was certain until May 12, 2018. Cotter, Jr. does not cite any invoices for damages experts that detail work that occurred *after* that date.

Similarly, if Respondents had known they would receive summary judgment on the issue of independence, based on ratification, then opinion testimony as to purported breaches of fiduciary duty connected with Cotter, Jr.'s termination

would not have been necessary. However, necessity must be determined at the time the costs are incurred, not at the conclusion of the case. *Pavel v. Univ. of Or.*, Case No. 6:16-cv-00819-AA, at *4 (D. Or. Nov. 12, 2019) (noting that whether a deposition was necessary should be determined as of the time it was taken, and not based on whether the deposition testimony was used).

Also unavailing is Cotter, Jr.'s contention that the absence of citations to the experts' reports in the motions for summary judgment demonstrates their unimportance. Since expert testimony is, by its very nature, *opinion* testimony, which the fact finder is free to accept or not, it is difficult to imagine a *successful* summary judgment motion that would rely on expert testimony, especially on the topics of the expert opinion here, *i.e.*, breaches of fiduciary duty related to termination of an employee and the existence and amount of damages. Such testimony obviously introduces *factual* issues that are obviously disputed if expert testimony is obtained.

Cotter, Jr. also contends that the *Frazier* factor regarding the use of the expert evidence made by the trier of fact dictates against an award here because the summary judgment motions did not rely on the expert reports. This argument merely demonstrates Cotter, Jr.'s apparent lack of understanding of the concept of summary judgment. This factor is simply inapplicable because the District Court did not act as a trier of fact. Instead, the Judge determined that there was

insufficient evidence from which a reasonable trier of fact could find in favor of Cotter, Jr. Here again, the fact that Respondents were *ultimately* successful on a threshold issue does not retroactively transform their preparation of a defense "unnecessary."

2. The Fees Awarded by the Court Were Reasonable.

The Directors' counsel showed that the fees charged—even before the significant deduction by the District Court—were reasonable, by demonstrating the similar rates charged by Cotter, Jr.'s own experts. Cotter, Jr. contends that rates charged even by his own experts were unreasonable, but offered no evidence to the District Court showing that the rates of any of the experts involved in the unusually high in comparison to others in their respective fields. Accordingly, he offered nothing to refute the inference of reasonableness arising from the comparison to the amounts. Nor did Cotter, Jr. offer any authority to support his contention that expert costs should be limited to the time spent by the expert itself, and not include the billings for staff members who assist in the preparation of reports.

Cotter, Jr. offers no authority for his position that expert costs cannot include billings for their staff. Cotter, Jr. further contends that the hourly rates of an expert must—as a matter of law, no less—bear a "reasonable relationship to the $1500 total statutory limit" in NRS 18.005(5). But he offers no explanation of what that relationship would look like. Opening Brief, p. 38. At any rate, because the statute

expressly permits a higher award where the circumstances warrant, this theory is simply wrong.

Here, the record establishes that the experts drafted initial and/or rebuttal reports, which required review of extensive data, Company records, SEC filings, and ever-increasing quantities of deposition testimony, and additionally, with respect to the damages experts, stock market records and analyses, industry analyses, and business valuation data. The experts were each deposed, which required preparation time, as did the preparation for the two scheduled trials. Despite all of this necessary work, the District Court drastically cut the amounts claimed for Prof. Klausner and Mr. Roll, and thus, to the extent that Cotter, Jr.'s criticisms had any weight, he has *already* received the reductions he demands from this Court.

The amount of expert fees to be awarded lies within the discretion of the District Court. The record establishes the amounts Respondents actually incurred. The record shows that expert fees higher than $1500 were necessary in light of the issues in the case, as demonstrated by the experts fielded by Cotter, Jr. The record shows that the court considered the remaining applicable factors of *Frazier*, and concluded that the fees of Messrs. Strombom and Foster were reasonable as incurred. Clearly the Court felt that there was basis to find that portions of the fees incurred for Prof. Klausner and Mr. Roll were unreasonable, and accordingly,

recovery of those fees was capped at $250,000 each. Cotter, Jr. has not shown that the Court's conclusions are the product of an abuse of discretion.

Accordingly, the District Court's award of $752,000 for expert fees must be affirmed.

II. THE DISTRICT COURT PROPERLY AWARDED REASONABLE AND NECESSARY LITIGATION COSTS TO READING

Cotter, Jr. contends that the District court abused its discretion in awarding any costs to Reading, $581,000 in costs to Reading itself, of which amount $450,000 was the amount awarded for E-discovery costs incurred on behalf of all of the Respondents. No abuse of discretion has been shown.

A. Reading Is a Prevailing Party Entitled to Its Costs in This Litigation

Reading is a prevailing party in this litigation. While Cotter, Jr. did not allege causes of action against Reading, the relief Plaintiff requested against Reading would have included injunctive orders directing Reading to take certain actions, such as reinstating Plaintiff to an executive position; terminating Reading's chosen CEO and President; adhering to specific requirements for appointment to its Board of Directors; refraining from using committees as permitted in the Company's bylaws, and more. Such incursions into Reading's affairs required it to defend against Plaintiff's claims. *See Blish v. Thompson Auto. Arms Corp*, 30 Del. Ch. 538, 542 (Del. 1948) ("A corporation may defend a

stockholder's derivative action, although theoretically any recovery rebounds to benefit of corporation, if corporate interests are threatened by the suit…."); *National Bankers v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959) ("If the derivative action threatens rather than advances the corporate interests, the corporation may actually defend the action."); *Swenson v. Thibaut*, 39 N.C. App. 77, 100 (N.C. Ct. App. 1978) (noting that corporation may be required to defend against claims that seek to enjoin corporation action or interfere with internal corporate governance). Accordingly, Reading properly took an active role in the matter, which included filing answers to Plaintiff's complaints; making dispositive motions; responding to and promulgating discovery; and otherwise fully participating in this proceeding as a party.

Indeed, Cotter, Jr. was fully content to treat Reading as a party when he made his incessant discovery demands, directing written discovery to Reading and requiring Reading to present a Rule 30(b)(6) witness for deposition. Plaintiff's discovery requests and deposition questions continually sought to infringe upon Reading's evidentiary privileges, requiring vigilance from Reading's counsel to preserve its rights during depositions of the Individual Defendants, and with respect to document requests. Indeed, ultimately it was necessary for Reading to seek writ relief with respect to the privilege issues; while that petition for writ was denied, the Supreme Court noted that the issues raised therein had been decided in

a recent decision. *See Reading, Int'l, Inc v. Eighth Jud. Dist. Ct.*, Supreme Court Case No. 72356, Order dated September 28, 2017. Accordingly, the District Court reversed its prior ruling and ruled in favor of Reading on the privilege issue.

Significantly, Cotter, Jr. cites no Nevada authority that holds that a nominal party cannot recover costs. Given that Reading's participation in the proceedings was compelled—at times, *literally, through a motion to compel*—by Cotter Jr.'s invasion of Reading's corporate rights, there is no basis for precluding Reading from recovering the costs it was forced to incur.

1. Reading is a Prevailing Party.

The District Court denied RDI judgment in its favor on the basis that it was a nominal defendant. However, a party may be considered a prevailing party when it "succeeds on any significant issue in litigation which achieves some of the benefit" it requested in its pleadings. *Chowdhry v. NLVH, Inc*., 109 Nev. 478, 485-86 (Nev. 1993). Here, in its Answer to Cotter, Jr.'s complaint, RDI requested that Cotter, Jr.'s claims be dismissed with prejudice. **XX JA4914-4915**. Instead of dismissal, judgment had entered against Cotter, Jr. on all of his claims. Whether due to dismissal with prejudice, or judgment against Cotter, Jr. Reading is free of the burdens that judgment in favor of Cotter, Jr. would have imposed, rendering RDI a prevailing party.

2. Reading Is Entitled to Its Costs Regardless of the Existence of an Express Written Judgment in Its Favor.

Plaintiff is correct that the judgment entered in this matter did not contain language stating that it is a judgment in favor of Reading. However, Plaintiff is incorrect in asserting that costs may be awarded only to persons in whose favor judgment has entered. Instead, as relevant here, Nevada law provides:

> Costs must be allowed of course ***to the prevailing party against any adverse party <u>against whom</u> judgment is rendered . . .***

NRS 18.020 (emphasis added). This Court has recognized that this statute authorizes an award of fees against an adverse party where the district court's judgment simultaneously benefits the claiming party and disfavors the adverse party. *Copper Sands Homeowners Ass'n, Inc. v. Flamingo 94 Ltd. Liab.*, 335 P.3d 203, 206 (Nev. 2014).

In *Copper Sands,* a construction defect case, the trial court entered judgment against the Plaintiff HOA, dismissing its claims against the developer, and thereby essentially mooting the third party claims the developer had brought against the subcontractors, as such claims had been contingent on the Plaintiff HOA's claims. Even though the HOA had not brought claims against the subcontractors, the Court found that the subcontractors were adverse to the HOA, because the subcontractors' liability was contingent on the success of the HOA's claims against the developer. Because judgment had been entered against the HOA, a party

adverse to the subcontractors, an award of their costs was appropriate under NRS 18.020, even though that judgment was not expressly in favor of the subcontractors. This Court affirmed the trial court's reasoning.

Cotter, Jr.'s reliance on *N. Nev. Homes, LLC v. GL Constr., Inc.,* 422 P.3d 1234, 1237 (Nev. 2018) is also misplaced. The issue determined by the Court in that matter was whether, where one party's claims were resolved by settlement and the opposing party's counterclaims were resolved by a judgment, prevailing party status could be determined by setting off the settlement amount against the judgment amount. This point has no application here, where all causes of action in the case were resolved by the Court, and a judgment against Cotter, Jr. did issue.

Plaintiff also contends that NRS 18.110 limits awards of fees to individuals in whose favor judgment has been entered. However, while this statute imposes a requirement for a person in whose favor judgment has entered to file a memorandum of costs, as noted above, this Court has recognized that costs may be awarded to litigants despite the lack a specific judgment in favor of that litigant. *Copper Sands, supra.*

Furthermore, pursuant to NRS 18.050, "[e]xcept as limited by this section, in other actions in the district court, part or all of the prevailing party's costs may be allowed and may be apportioned between the parties, or on the same or adverse sides." Accordingly, the District Court had discretion to award costs to Reading.

Here, Reading's liability for the relief Cotter, Jr. sought that would enjoin certain actions by the Company was dependent upon his claims against the Individual Defendants. Accordingly, the ruling adverse to Cotter, Jr. benefitted Reading, as it was no longer at risk of liability for the relief Cotter, Jr. sought. Reading was thus properly awarded costs as a prevailing party.

B. Neutrality Was Neither Required nor Desirable Where Reading's Own Rights and Interests Were Threatened by the Complaint.

Cotter, Jr. contends that Reading's costs were unnecessarily incurred because Reading should have been precluded from raising a defense, and should have, instead, remained neutral. This theory does not apply to the circumstances here.

The concept that a corporation should be neutral when its directors are charged with wrongdoing is premised partially on the notion that the corporation is the ultimate beneficiary of the action, as it would be entitled to recover any financial benefit. The company is thus expected to trust that the derivative plaintiff has its best interests at heart. *See Swenson v. Thibaut*, 39 N.C. App. 77, 98-99 (N.C. Ct. App. 1978) ("as the action is brought in the right of the corporation and any recovery thereunder accrues to the benefit of the corporation and not to the nominal plaintiffs . . . it is apparent that the interests of the corporation are not necessarily adverse to those of the plaintiffs and may be identical to them.").

Cotter, Jr. has not cited any case that imposes neutrality on a corporation where the derivative action seeks to impose the reinstatement of a discharged CEO,

nor has Cotter, Jr. cited any authority so holding where the prospect of recovery is so broadly limited as it here. Today, and particularly in Nevada, financial recovery against directors is generally unlikely, given that liability can be premised only on conduct that "involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2).[11]

Here, there were no allegations that could satisfy the requirements of fraud or knowing violations of the law. For "intentional misconduct" to have been found as to any or each of the Director Defendants, Cotter, Jr. would have had to show that, with respect to the challenged decisions, each of the Director Defendants genuinely *believed* that Cotter, Jr.'s preferred outcome was the choice that best suited Reading, and yet, conscious of and despite such belief, each consciously chose a decision that was not best for Reading, to suit the purposes of the Cotter sisters. Thus, for example, Cotter, Jr. would have had to show that those directors who voted to terminate his employment actually believed he was doing a fine job as Reading's CEO, but despite such belief, each still voted to terminate him. Contrary to such a determination, Cotter Jr.'s own Complaint details many problems that occurred during his ten months in the position, including the extraordinary measure of appointing a director to serve as an Ombudsman "to

[11] While NRS 78.138 was amended during this litigation, the changes to subparagraph (7) did not alter the substance of this requirement.

work with [Cotter, Jr.]" as CEO. **I JA 13, ¶ 52**.

Furthermore, the purported seizure of control here consisted appointment to management positions by a Board of Directors mostly composed of the same members as the Board of Directors that had appointed Cotter, Jr. The only changes were the appointment of Judy Codding to replace the late Cotter, Sr., and Michael Wrotniak, to replace the retiring Tim Storey. In terms of controlling the stockholding voting, of the company, Ellen and Margaret already possessed the majority of voting control.

Moreover, Cotter, Jr. himself acknowledges that corporations are entitled to defend against derivative suits in specific circumstances where the corporation raises defenses "contesting the plaintiff's right or *decision* to bring suit." Opening Brief, p. 48, quoting, *Patrick v. Alacer Corp*., 167 Ca. App. 4th 995, 1005, 84 Cal. Rept. 3d 642, 652 (2008) (emphasis added). That is precisely the situation here.

Another justification offered for gagging a corporation's protests against rogue shareholder derivative actions is that allowing the corporation to defend a suit results in the corporation funding the directors' defense. *Patrick v. Alacer Corp.*, 167 Cal.App.4th 995, 1008 (Cal. Ct. App. 2008) (collecting cases). This reasoning obviously has no place where, as here, the corporation has the obligation to indemnify directors for the defense of such claims. NRS 78.7502, 78.521.

Significantly, in the cases on which Cotter, Jr. relies for his contention that

the corporation should maintain neutral, the complaints included allegations of significant misappropriation of corporation assets. In *Swenson*, the corporation in question had been placed into involuntary rehabilitation after, according to the derivative plaintiffs, it had been looted by the defendant directors for the purpose of benefiting other companies in which those directors held interest. *Swenson*, 37 N.C. App. at 83-85. In *Patrick*, the allegations included that the directors stole money, took bloated salaries, sold assets below value for personal gain, added friends and family to the payroll, forgave loans they owed to the company, and more. *Patrick,* 167 Cal.App.4th at 1001.

Here, in contrast, the Complaint alleges "harm" such as Cotter, Jr.'s discharge and the Cotter sisters purportedly obtaining job titles for which they were, in Cotter, Jr.'s opinion, unqualified. Other than allegations about bonuses paid while Cotter, Jr. was still CEO (and about which he took no effort to protect until he was himself termination and all of which were presumed fair under NRS 78.140(5)), there were no contentions that Company assets were being misused or diverted into the Defendants' pockets.

One of the early cases addressing whether a corporation may raise its own defense to derivative claims was *Otis Co. v. Pennsylvania R. Co.*, 57 F. Supp. 680 (E.D. Pa. 1944). In that case, the court stated:

> A hard and fast rule one way or the other, it seems to me, is undesirable in this type of case, and it would be especially inappropriate for a court of equity to apply either view without a thorough consideration of the equitable elements involved in the cases. Upon examination of the relatively few cases on this issue, it is revealed that while a court may have chosen one particular view rather than the other, the reason for its choice lay in the nature of the case before it. . . .
>
> Analytically the all-important question when the corporation seeks to defend is that of the nature of the complaint and the interest of the corporation in the controversy. When fraud is the complaint against the directors, the essence of the corporation's interest is, and ought to be, in having the truth of the charges determined and in recovering all funds of which it was deprived. . . .Similarly, ***when the cause of action is such as to endanger rather than advance corporate interests***, an answer setting forth affirmative defenses seems proper.

57 F. Supp. At 682 (emphasis added). Here, the relief sought endangered the Company's own rights and interests. Accordingly, the costs incurred by Reading were incurred pursuant to a proper pursuit of its own defense.

C. Reading Established Both the Necessity and Reasonableness of the E-Discovery and Legal Research Costs.

Cotter, Jr. has failed to show that any category of costs was unnecessary or unreasonable. In addition to the broad challenge to any award of costs discussed above, the determination of the reasonableness and necessity of costs is a matter within a district court's discretion and will not be overturned where the evidence supports the determination. *See, e.g*, *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1054 (Nev. 2015). A judge may find costs are reasonable and necessary based on an itemized list of such costs and a declaration from counsel stating, not

only that the costs were reasonable and necessary, but also providing the reasons the costs were necessary. *In re Dish Network Derivative Litig.,* 401 P.3d 1081, 1093 (Nev. 2017).

Here, Cotter, Jr. challenges the amounts awarded for two specific categories of costs: e-discovery and computerized legal research. However, he has failed to show any basis for finding an abuse of discretion as to these awards.

1. The Record Establishes That an Award of $450,000 for ESI Costs Is Reasonable.

The District Court awarded Reading $450,000, just slightly more than half of the actual costs incurred by Reading, for electronic discovery for this matter. Reading had initially claimed $902,016.77, but the District Court reduced that amount to $893,849.93. **XXXVII JA9136, n. 17**. Reading provided the affidavits of its counsel, and that of the Respondents, verifying that the costs were actually incurred for this matter and that the costs were necessary to provide documents requested for discovery by Reading and the Director Defendants. As relevant here, the declaration of Reading's General Counsel explained the need for the expenses as follows:

> Such expenses were incurred to allow Reading and the Director Defendants to comply with discovery requests made by Plaintiff in this matter. As the Court no doubt recalls, Plaintiff made extensive discovery requests to Reading, which required that data be harvested from the computers of Reading and the Director Defendants, and such data placed in searchable formats for review for responsiveness and privilege, and production. The costs stated here include the fees for the professional IT services provided by

> Navigant; no attorney review time, which would have been billed separately by the various defense team law firms, was included in this cost statement.

XXXIV JA 8508-8509, ¶5. Additionally, Reading's litigation counsel asserted:

> Use of E-Discovery services were necessary due to the document requests presented by Plaintiff, many of which required searches of Reading's computer servers, email exchanges, and the like. Similarly, scanning of documents was required to convert documents to searchable formats and to permit timely document production other parties. The E-discovery services and scanning of documents was necessary in order to permit Reading to comply with its discovery obligations

XXXIV JA 8454-8455, ¶14.

While Cotter, Jr. expresses the opinion that specific actions taken for e-discovery were "unnecessary," the record does not reflect any expert testimony as to what actions were, or were not, necessary to respond to the discovery requests. Thus, he apparently expects the Court to take his opinion as evidence. Moreover, Cotter, Jr. ignores the fact also ignores that fact that access to the Company's servers was also necessary for *numerous* discovery productions directed at the Director Defendants, in addition to those directed solely at Reading. A more detailed explanation of the e-discovery process was provided by Reading in its Opposition to Cotter, Jr.'s Motion to Retax. ***See*** **XXXVII JA9134-9136, and the exhibits cited therein, XLI JA 10130-XLIII JA 10774; XLIV JA 10871-10899; XLV JA 11276-11279; LII JA128176-12890**.

Moreover, Cotter, Jr.'s concern that costs incurred may include those related to other matters was already addressed through Reading's reduction in its claim when Cotter, Jr. first raised that issue. **XXXVII JA9136, n. 17**. His concern that the same initial database created was also used for the discovery promulgated by the T2 Plaintiff is also misplaced. The fact that the data could be used for other litigation (involving other counsel) does not negate the necessity of its creation and use in this matter.

Furthermore, even if there had been some additional costs incurred in responding to the T2 Plaintiffs' claims within amounts claimed here, which Cotter, Jr. does not show, such costs were still incurred as part of Reading's defense in this matter. In *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1097 (Nev. 1995), this Court required a losing party to pay costs that had been *awarded against* the requesting party to a dismissed defendant. This court reasoned that the costs had been incurred as part of the prosecution of the case, and therefore, should be awarded. *Id.,* citing *Schouweiler v. Yancey Co.*, 101 Nev. at 832 ("[T]the costs of the prevailing defendants may be recovered by Homeowners from the losing defendants. . . ."). Here, as in *Semenza* and *Schouweiler,* any costs incurred by Reading with respect to the intervening T2 Plaintiffs were incurred in this action. Accordingly, even if Reading had included

some of such costs, which Cotter, Jr. has not established, it would not have been improper for Reading to have included such costs.

The award for e-discovery costs is amply supported by evidence in the record. Accordingly, the judgment should be affirmed.

2. The Reasonableness and Necessity for Legal Research Costs Is Supported by the Record.

Cotter, Jr. contends that the District Court abused its discretion in awarding $47,324 to Reading for computerized legal research costs, a category of costs expressly permitted under NRS 18.005(17). Cotter, Jr's major concern appears to be that the costs incurred here may have included other matters. However, the only support offered by Cotter, Jr. for this purported concern is the *false* assertion that "GT provided only printouts for charges" by client and not by case. **Opening Brief, p. 55, citing LIII JA 10776-10801**. A simple review of the cited records shows that the client is identified by two six-digit numbers separated by a period: "12076.010800." The first six-digit number identifies the client, and the second identifies the matter. The reason that Cotter, Jr. repeats this assertion here, when this false description of the records was expressly addressed in Reading's Opposition to the Motion to Retax, is unclear. **XXXVII JA9133** ("Computerized research services are billed to a client based on the input of a client matter number; therefore, Plaintiff's concerns that the research was for other matters for which GT represents Reading is misplaced.").

Nor is it clear why Cotter, Jr. repeats his complaint that Reading's computerized research costs were higher than those incurred on behalf of the Director Defendants. Such expenses were not *incurred* by the Director Defendants (and thus, not by Reading) to the extent that Reading's insurance carrier paid the fees for counsel. **XXXVII JA9132**.

Finally, Cotter, Jr. contends that the documentation was insufficient, because the Westlaw invoices were not included for charges prior to June 2016. However, both the documentation from this firm and that from Westlaw identified the date, amount, and researching attorney. The Declaration of Mr. Ferrario states that the amounts were reasonable and necessary. Such documentation is sufficient pursuit to *In re Dish Network,* 401 P.3d at 1093 (holding that itemization coupled with attorney verification was sufficient).

CONCLUSION

Through his masquerade as a derivative plaintiff, Cotter, Jr. forced Reading to incur millions in dollars of costs for the defense of itself and the Individual Directors. The Court awarded Reading much less than the total it had incurred, but a reduction of claimed costs by approximately half did not satisfy Cotter, Jr. Thus, he appealed the award that was so generous to him. However, he failed to show

any abuse of discretion, and accordingly, the Judgment should be affirmed.

Respectfully submitted this 27th day of November 2019.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 9425 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of November 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Greenberg Traurig, LLP, that in accordance therewith, I caused a true and correct copy of the foregoing ***Answering Brief of Respondent Reading International, Inc. for Case No*. 77648** to be served via this Court's e-filing system, on counsel of record for all parties to this matter on November 27, 2019.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP.