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.	Supreme Court Case No.: 75053 Dist. Court Case No.: A-15-719860-B Coordinated with Cases Nos: 76981, 77648, 77333

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CORPORATE DISCLOSURE STATEMENT

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

Appellants Ellen Cotter, Margaret Cotter, Guy Adams, Judy Codding, Edward Kane, Douglas McEachern, and Michael Wrotniak are individuals.

The following law firms have represented Appellants in this litigation:

Appellant Reading International, Inc.:

Greenberg Traurig, LLP.

Appellants Ellen Cotter, Margaret Cotter, Guy Adams, Judy Codding, Edward Kane, Douglas McEachern, and Michael Wrotniak:

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Dated this 27th day of November 2019.

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TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

LEGAL ARGUMENT 5

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES BECAUSE THE EVIDENCE ESTABLISHED THAT COTTER, JR.'S CLAIMS WERE BROUGHT AND MAINTAINED BOTH WITHOUT REASONABLE GROUNDS AND FOR THE PURPOSE OF HARASSMENT 6

A. The District Court Failed to Consider That the Evidence Established That Some of Cotter, Jr.'s Claims Were Unequivocally Brought and Maintained Without Reasonable Grounds 7

B. The District Court Failed to Give Any Consideration to the Evidence Showing That Cotter, Jr.'s Claims Were Brought and Maintained for Purposes of Harassment 11

C. Cotter, Jr.'s Actions Cannot Be Justified on the Basis of Presenting New or Novel Legal Theories 15

D. The Amount of Fees Incurred by Reading Does Not Present a Basis for Denying Fees 18

II. RDI IS ENTITLED TO FEES INCURRED FOR THE DEFENSE OF ITSELF AND THE INDIVIDUAL DEFENDANTS, INCLUDING THE LATE WILLIAM GOULD 22

A. Reading Was the Prevailing Party 23

B. The Request for Fees Incurred on Behalf of William Gould Was Not Untimely 23

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE RULE 60(b) MOTION TO AMEND THE JUDGMENT TO INCLUDE READING....24

A. The Denial of a Rule 60 Motion Is Appealable....25

CONCLUSION....26

CERTIFICATE OF COMPLIANCE....28

CERTIFICATE OF SERVICE....29

TABLE OF AUTHORITIES

NEVADA CASE LAW

In re Amerco Derivative Lit.,
127 Nev. 196, 217 n.6, 252 P.3d 681, 697 (2011)……..……..17

Beam v. Stewart,
845 A.2d 1040, 1052 (Del. 2004)……..…….5

Benefore v. Jung Woong Cha,
C.A. No. 14614, 1998 Del. Ch. LEXIS 28, at *9
(Del.Ch. Feb. 20, 1998)……..…….5

Bergmann v. Boyce,
109 Nev. 670, 676, 856 P.2d 560, 563 (1993)……..…….8

Brown v. Stackler,
612 F.2d 1057, 1059 (7th Cir. 1980)…….……19

Clemens v. N.Y. Cent. Mut. Fire Ins. Co.,
903 F.3d 396, 399 (3d Cir. 2018)……..……19

Dezzani v. Kern & Assocs., Ltd.,
134 Nev. Adv. Op. 9, at *8 (Nev. Mar. 1, 2018)…….…….11

Environmental Defense Fund, Inc. v. Reilly,
1 F.3d 1254, 1258 (D.C. Cir. 1993)……..……20

Fair Housing Council v. Landow,
999 F.2d 92, 95 (4th Cir. 1993)……...……..20

Farmers Insurance Exchange v. Pickering,
104 Nev. 660, 662 (Nev. 1988) ……..……23, 24

Holiday Inn v. Barnett,
103 Nev. 60, 63 (Nev. 1987) ……25

Gumm v. Mainor,
118 Nev. 912, 59 P.3d 1220, 1225 (2002)……26

Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.,
343 P.3d 608, 615 (Nev. 2015)……...…….……24

Lewis v. Kendrick,
944 F.2d 949, 956 (1st Cir. 1991)……...20, 21

PERS v. Gitter,
133 Nev. Adv. Op. 18, 393 P.3d 673 (2013)……15

Pub. Employees' Ret. Sys. V. Coulter,
C.A. No. 19191, 2002 Del. Ch. LEXIS 144, at *28-29
(Del.Ch. Dec. 18, 2002)…….…….5

Schulte v. Dagger Props. 1, LLC,
No. 75857, at *4 and n.1 (Nev. Oct. 31, 2019)……...6, 7

Staccato v. Valley Hosp.,
123 Nev. 526, 530, 170 P.3d 503, 506 (2007)……..15

Uranium Energy Corp. v. Adnani,
No. 74196, at *4 (Nev. Feb. 22, 2019) ……...……5

Valley Elec. Ass'n v. Overfield,
121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)……..……..23

Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.,
133 Nev. Adv. Op. 52, 399 P.3d 334 (2017)……...……16

Yu v. Yu,
405 P.3d 639, 640, n.1 (Nev. 2017) ……...……..25

STATUTES AND RULES

EDCR 2.23……...…….9

NRAP 3…….……25, 26

NRAP 4……..……24

NRCP 23……..……..6

NRCP 34……..25

NRCP 54…….23

NRCP 60……..……25

NRS 18.010……..……passim

NRS 18.020……...……..23

NRS 78.140……..…….1,2,17

SCR 42……21

OTHER AUTHORITY

Black's Law Dictionary, 5th Ed. (1979), p. 645…….……13

Appellants Reading International, Inc. ("Reading" or the "Company"); and Ellen Cotter, Margaret Cotter, Guy Adams, Judy Codding, Edward Kane, Douglas McEachern, and Michael Wrotniak (collectively, the "Directors") through their counsel of record, Greenberg Traurig, LLP, respectfully submit their Reply Brief.

INTRODUCTION

This appeal arises from a lawsuit in which Cotter, Jr., a former Reading CEO who had served less than a year before his dismissal, masqueraded as a derivative plaintiff in hopes of winning back his job. *All* of his claims were premised on the theory that his two sisters had persuaded the other directors to vote on various internal governance issues to suit the sisters' personal interests, rather than the interests of the Company. More specifically, Cotter, Jr. contended that decisions made by his sisters—both of whom had worked for or with the Company for many more years than had Cotter, Jr.—were motivated by their own self-interest in obtaining or keeping employment positions with the Company, and that the other six directors simply did as the sisters asked. Cotter, Jr. contended that his sisters had engaged in actions for the purpose of entrenching their power in the Company.[1]

[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

Significantly, other than claiming that his sisters lacked sufficient experience to deserve their *compensation* (which was below average for the industry), Cotter, Jr. never claimed that the Company's assets were being pillaged or that his sisters were personally profiting from any transactions entered into by the Company.[2] Instead, for three years, he continually challenged various board decisions, such as those that terminated his employment; approved of a payment method for a stock option purchase[3]; appointed a new CEO; changed the membership of the Company's long-existing board's executive committee and utilized said committee; chose a date for the annual stockholder meeting; filled vacancies on the Board of Directors, and determined the response to a non-binding

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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 shareholders, *including any purportedly interested directors with voting shares,* approve of or ratify the challenged transaction with knowledge of the purported interest. Thus, by virtue of their control of a majority of the voting shares, Cotter, Jr.'s sisters—Ellen and Margaret Cotter—had no need to engage in "entrenchment"; they already possessed the power to control the company.

[2] Cotter, Jr. did allege that, while he was CEO, the outside directors had received increases in their compensation, and the Defendants had each received various bonuses, including $25,000 to Adams, Kane, and McEachern, $75,000 to Storey, and $200,000 to Ellen Cotter (the latter being to correct a tax burden caused by a Reading error related to stock options). Cotter, Jr. asked the Court to order that all Defendants, except Storey, be ordered to compensate Reading. **I RDI-A 047, ¶ 5.**

[3] 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). A payment made with equal value cannot be considered other than fair to the corporation.

expression of an interest in purchasing stock.[4] These actions were, according to Cotter, Jr., all taken so as to allow his sisters to "seize" control of Reading, and entrench their power. ***Id.*** He further claimed that various SEC disclosures and stockholder communications relating to the above decisions were false, *not* because of any objectively untrue statements therein, but simply because these communications did not disclose what he contended were the "true" motivations for the decisions. ***Id.***

Cotter, Jr.'s suit was filed on the very day his employment was terminated.[5] Prior to filing, he had threatened members of the board of directors with financial ruin if he was fired.[6] He sought injunctive relief that included his own reinstatement, a requirement that the Company make corrective disclosures, future restrictions on the appointment of board members to Reading, and restrictions on to the actions of any Reading Board members and Board committees that would have curtailed Reading's corporate rights under Nevada.[7] His suit prompted a copy-cat complaint by intervenors comprised of a group of hedge fund operators ("T2 Plaintiffs"), but after discovery, the T2 Plaintiffs voluntarily dismissed their

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[4] **I RDI-A0001-32, 87-136, 482-538.**

[5] **I RDI-A 001; I RDI-A 557-560.**

[6] **I RDI-A 558.**

[7] **I RDI-A029-030.**

action with the District Court's approval.[8] Despite the views expressed by persons whose stake in the company was, unlike Cotter, Jr.'s, purely financial, Cotter, Jr. not only maintained his claims, but even added to them.

In short, while claiming to be acting on behalf of Reading as a stockholder, Cotter Jr. initiated, and then maintained, a derivative shareholder suit as a means of exercising vengeance upon Reading and its directors. As a member of the Board of Directors throughout the litigation, he maintained his suit with full knowledge that the litigation was costing Reading millions of dollars, and knowing (at least during the final months of the litigation, if not from its commencement) that even if he were, by some miracle, successful, Reading could not gain any significant financial benefit from the suit under Nevada law due to Cotter, Jr.'s abandonment of his damages claims. Instead, Cotter, Jr. could only hope, at most, for a *fleeting* reinstatement to the position of CEO, because, under Reading's bylaws, the CEO position is entirely within the control of Board of Directors, none of whom supported Cotter, Jr. for that position. Thus, the only relief for which Cotter, Jr. could conceivably have achieved for Reading through this litigation was wholly ephemeral. Accordingly, the District Court should have granted the motion for attorney's fees.

[8] **I RDI-A 069-086; 402-405.**

LEGAL ARGUMENT

Cotter, Jr.'s suit should never have been allowed to proceed past the pleading stage, due to his patent unsuitability as a derivative shareholder, as well as his failure to show demand futility, as shown in Reading's Answer Brief in Appeal No. 75053, incorporated herein. Indeed, his *allegations* challenging the independence of the five Directors who were granted judgment in December 2017 were never sufficient to support his claims, as he presented no facts explaining how the purported relationships—*when such were even alleged*—would prevent the exercise of independent judgment.[9] *Uranium Energy Corp. v. Adnani*, No. 74196, at *4 (Nev. Feb. 22, 2019) (NSOP) (mere allegation of existence of relationship insufficient; fact showing how relationship prevent independence required).

[9] No *facts* purporting to show a lack of independence were ever even made against McEachern or Gould; the "facts" alleged against Kane were that he was a long-time friend of the late Cotter, Sr., whose children called him "Uncle Ed"; against Codding, that she was a friend of the *mother* of the three Cotter siblings, and against Wrotniak, that he was married to a friend of one of the sisters. **SAC, RDI-A482-536, ¶¶ 19, 25, 101(d), 124, 169-172**. None of these "facts," even if proven, would support a conclusion that the directors were unable to exercise independent judgment. *See e.g.*, *Beam v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004) (social relationships insufficient to create doubt of director independence); *Pub. Employees' Ret. Sys. v. Coulter,* C.A. No. 19191, 2002 Del. Ch. LEXIS 144, at *28-29 (Del.Ch. Dec. 18, 2002) (lifelong friendship with an interested party insufficient basis to doubt director's independence); *Benefore v. Jung Woong Cha,* C.A. No. 14614, 1998 Del. Ch. LEXIS 28, at *9 (Del.Ch. Feb. 20, 1998) (same).

While Cotter, Jr. contends that his success at overcoming the initial summary judgment motions establishes that his claims had substance, his argument ignores the obvious. Since he had insufficient evidence to withstand the renewed summary judgment motions as to his claims against Directors Codding, Gould, Kane, McEachern and Wrotniak (the "Independent Directors"), then he clearly did not have sufficient evidence to oppose the initial summary judgment motions. Cotter, Jr. should not be able to avoid the consequences of bringing and maintaining groundless claims simply because he persuaded the court to grant him the opportunity to conduct more discovery.

Cotter, Jr. injured Reading with his vengeful actions, costing it millions of dollars to defend itself and its directors (as it was legally required to do). He did this while claiming to act on Reading's behalf, misusing the Rule 23.1 process for his own ends. Cotter, Jr. should not be permitted to engage in such conduct with impunity.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING ATTORNEY'S FEES BECAUSE THE EVIDENCE ESTABLISHED THAT COTTER, JR.'S CLAIMS WERE BROUGHT AND MAINTAINED BOTH WITHOUT REASONABLE GROUNDS AND FOR THE PURPOSE OF HARASSMENT.

While an award of attorney's fees is discretionary, when "a district court exercises its discretion in clear disregard of the guiding legal principles," its discretion is abused. *Schulte v. Dagger Props. 1, LLC*, No. 75857, at *4 (Nev. Oct.

31, 2019) (reversing denial of attorney fees where plaintiff did not prove facts to support individual liability of defendant). In *Schulte*, as here, the plaintiff's claims had survived a motion to dismiss and "some cross-motions for summary judgment." In fact, the plaintiff even survived a motion for judgment as a matter of law. *Id.* at 4, and n. 1. Nevertheless, this Court found that the District Court "abused its discretion by permitting [the plaintiff] to maintain claims without reasonable grounds." Here, too, the District Court similarly abused its discretion.

A. The District Court Failed to Consider That the Evidence Established That Some of Cotter, Jr.'s Claims Were Unequivocally Brought and Maintained Without Reasonable Grounds.

In determining whether attorney's fees should be awarded under NRS 18.010, the District Court was required to construe the statute liberally to effect its purpose of discouraging groundless suits. Yet, here, the *only* analysis apparently performed by the Court was to consider whether the failure to survive a summary judgment motion was sufficient to constitute a frivolous claim. Such a limited analysis cannot satisfy the District Court's obligations under NRS 18.010.

Here, the evidence conclusively established that Cotter, Jr. *knew* he could not prove many, if not all, of his claims. Indeed, he frankly *testified* to his belief that two of the accused directors, McEachern and Gould, were, in fact, independent; despite this belief, he maintained his claims against those two directors *even after he gave such testimony*. And as to the other three Independent

Directors, Cotter, Jr.'s claims were based only on the existence of friendships between the directors and *third parties*. While the claims against Kane and Codding at least referred to their own purported friendships, albeit with the *parents* of the Cotter siblings' parents, in Wrotniak's case, it was not even his *own* purported friendship that supposedly prevent him from acting independently. Instead, Cotter, Jr. based a derivative claim asserting breach of fiduciary duty on solely on the fact that Wrotniak's *wife* was a friend of one of his sisters. While Cotter, Jr. might like to think that directors could honestly disagree with him only because of their friendship with his parents or their spouse's friendship with his sister, no authority, in Nevada or elsewhere, holds that such tangential relationships are sufficient to support an inference of a lack of independence.

Even when only some of a party's claims are brought or maintained with merit, an award of attorney's fees should be imposed. *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 563 (1993). The District Court apparently overlooked Cotter, Jr.'s failure to allege *any* facts supporting claims against Gould and McEachern, as well as his frank admission that they were independent. And, Cotter, Jr. did not present any evidence to support his *belief* that Kane, Codding, and Wrotniak failed to exercise their independent judgment. Instead, even after the T2 Plaintiffs had expressed their faith in Reading's Board of Directors, thus providing an objective that should have raised a red flag to a fiduciary

representative plaintiff as to the likely success of his claims, Cotter, Jr. maintained his claims, filing a Second Amended Complaint.

Cotter, Jr. takes RDI to task for including in its Excerpts of the Record portions of the record below that were not attached to the Motion for Attorney's Fees.[10] Cotter, Jr. ignores the fact that EDCR 2.23(e) precludes the attachment as exhibits of court filings from the same matter. Moreover, the Motion herein expressly stated that it was based on the "pleadings and paper on file with [the District Court]." **VIII RDI-A10559: 21-23**. And, of course, the Motion was presented to the District Court judge who had presided over the entirety of the case, and was therefore, familiar with the pleadings and motion practice.

Cotter, Jr. also berates RDI for citing to the entirety of his oppositions to the Motion for Summary Judgment, but in so complaining, he misstates the purpose of the citation. The citation to the entirety of documents was to support the RDI's contention that Cotter, Jr. had not presented evidence to support his claims of wrongful motives for at least five of the corporate decisions. Opening Brief, 19,

[10] Cotter, Jr. also attempts to turn what are obviously typographical mistakes, such as the inadvertent citation to a nonexistent record page, into claims that the cited evidence does not exist. While counsel for RDI acknowledges and apologizes for the miscitations, Cotter, Jr.'s pretense that the cited evidence does not exist is, at best, disingenuous. Cotter, Jr. is well aware of the findings of the California Superior Court regarding his use of undue influence on Cotter, Sr. *See*, **VIII RDI-A10610-10623**. He is also well aware that more than one Director Defendants had testified that they had hoped he could grow into the position.

citing **RDI-6197-8308.** Nothing less than citation to the *whole* of Cotter's presentation of evidence *could* support the assertion that he did not include evidence to support his claims. Contrary to Cotter, Jr.'s assertions to this Court, moreover, RDI *did* give a specific example of Cotter, Jr.'s reliance of "speculation, opinion, and blatantly false statements" by citing to Cotter, Jr.'s own declarations on which he had based the bulk of his summary judgment oppositions. Opening Brief, 19, citing to **RDI-A 6352-6366 and 8379-8390**.

The record here showed that Cotter, Jr. *never* had evidence to support his claims that five of the Reading Directors lacked the ability to exercise independent judgment. Accordingly, his claims against those directors were brought without grounds. Additionally, because those five directors could exercise independent judgment, the majority of Cotter, Jr.'s claims against the remaining three directors were also brought without reasonable grounds. A case, limited to just the issues of Cotter, Jr.'s termination and the issue of the use of stock for the payment for the Estate's stock options, would undoubtedly have been a very different and far less expensive, case, even assuming that allegations as to those two board decisions could themselves have survived a motion to dismiss. It was only Cotter, Jr.'s challenge to all of the board members, which challenge was brought solely on the basis of Cotter, Jr.'s wishful thinking and to support his contention that demand was futile, that allowed this case to proceed for as long as it did. Since that

challenge was without merit, Cotter, Jr. should bear the cost of the defense that Reading was forced to undertake for its directors and itself.

B. The District Court Failed to Give Any Consideration to the Evidence Showing That Cotter, Jr.'s Claims Were Brought and Maintained for Purposes of Harassment.

There are two distinct grounds for awarding fees set forth in NRS 18.010(2)(b) ("claim . . . was brought or maintained without reasonable ground or to harass the prevailing party.") Because the statute uses the conjunction "or," it must be presumed that the legislature intended two alternatives. *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. Advance Opinion 9, at *8 (Nev. Mar. 1, 2018) ("the word 'or' is typically used to connect phrases or clauses representing alternatives.") (internal quotation and citation omitted). Thus, attorney's fees are warranted when a claim or defense was brought or maintained without reasonable grounds and are also warranted where the claim was brought for the purpose of harassment. Accordingly, a claim brought for harassment, even if there is some merit to the claim, justifies the award of attorney's fees. However, the District Court did not address the ground for an award of attorney's fees, despite the existence of numerous indications that Cotter, Jr.'s purpose was harassment.

Other than the allegations surrounding Cotter, Jr.'s termination, the various acts which he contends demonstrated breaches of fiduciary duty occurred through the period of Cotter, Jr.'s term as CEO. Yet, he did not bring an action challenging

those actions, many of which had occurred six to eight months previously, until after he had been terminated. These circumstances alone give rise to an inference that the purpose of the lawsuit was harassment in retaliation for his termination, rather than genuine concern for the Company.

Additionally, at the time he filed his original Complaint, Cotter, Jr. did not allege facts showing that any investment in RDI was at risk in his initial Complaint. Indeed, the Motion to Dismiss that complaint was partially granted *because of* his failure to allege facts showing damages to the Reading. The District Court stated:

> "The Motion is granted in part. It is granted as to the damages aspect, which need to be more particularly pled for derivative purposes, *as opposed to direct benefits to the plaintiff*."

II JA 252:24-253:2 (emphasis added).[11]

Also significant is the fact that Cotter, Jr. was willing to abandon the claim for damages, yet maintained his claim for reinstatement. **VI RDI-A 9633-9773, VII RDI-A 9625:11-16; VIII RDI-A 10667, 10730**. Since the relief of reinstatement would itself have necessarily have been ephemeral—there was no

[11] Despite making this statement in ruling at the hearing, the District Court reversed the terms "derivative" and "direct" in the written ruling. **II JA 261 (**"JA" refers to the Joint Appendix filed by Cotter Jr. for Case Nos. 77648 and 76981, and to which he refers at times in his Answering Brief here). However, such a switch must surely have been mistaken, given that Cotter, Jr. claimed to be proceeding as a derivative plaintiff, and therefore, should and could not allege direct harm.

possibility that Cotter, Jr. believed that any of the Reading Board members would support him as CEO after his rape of the Company—Cotter, Jr.'s continued maintenance of his claims could only have been for purposes of harassment. *See* Black's Law Dictionary, 5th Ed. (1979), p. 645 (including as a definition of "harassment" the engagement in alarming conduct serving no legitimate purpose of the actor." Certainly, a *true* derivative plaintiff would have no legitimate purpose in pursuing such relief, at a cost of millions of dollars to the Company.

Moreover, the vituperative tone of Cotter, Jr.'s complaints further exemplifies his personal animas toward the defendants. While Cotter, Jr. advises this Court that his sisters "inject[ed]" the other litigation between the siblings into this matter (*see* Answering Brief, p. 37), that claim is belied by *the first paragraph of his original Complaint*. Indeed, in Paragraph 1, Cotter, Jr. contends that his termination was retaliation for his refusal to settle "certain trust and estate litigation"; in Paragraph 3, he asserts the defendant directors had chosen sides in family disputes, including "unbecoming disputes of a more personal nature, including the refusal of EC and MC to report to their "little brother." **I RDI 00003.** There are more than two dozen additional references to trust and or estate litigation contained in his Complaint. In fact, with a distinct lack of prescience and self-awareness, he contends that it was concern that the trust litigation was "machinations" by his sisters that they knew were "destined to ultimately fail,"

that had led his sisters to seek to have him ousted as CEO. ***Id.*****, at 00009, ¶ 23**. However, the outcome of that trust litigation was that cotter, Jr. was deemed to have exercised undue influence while his father was hospitalized, and the amendment to his father's trust, which would have given Cotter, Jr. potential voting authority over Reading stock, was invalidated in its entirety. **XXXVII JA 9070-9085.**

Cotter, Jr. contended his sisters feared he would demote or fire Ellen Cotter "to protect and further the interests of the Company"; that Ellen Cotter had "enlisted" other directors to undermine Cotter. Jr.; that his sister Margaret lacked candor, diligence, or both. He also accused both of his sisters of "pervasive and persistent self-dealing and misuse of RDI resources, and of complaining because Cotter, Jr. wanted to take (unidentified) actions that benefited all stockholders. ***Id.*** **at 004-9, ¶¶ 4, 24,26-27, 49, 50**.

Nor was Cotter, Jr.'s vitriol limited to his sisters. He accused Directors Adams, Kane, and McEachern of "extorting" him and of repeatedly furthering their own interests. *Id*. at 010-018, ¶¶ 32, 41, 57-60, 67, 74. He alleged that Adams took assorted actions because he was "bristling at the prospect of others being dissuaded from terminating JJC and then selecting Adams to replace JJC as CEO" and even went so far as to allege, in a purported derivative action, that Director Adams failed to disclose certain assets in his *divorce* proceedings. *Id.* at 019, ¶ 76,

109, ¶ 91 In his FAC, he alleged that Director Codding had "involvement in alleged criminal activity." **I RDI-A122, ¶ 150.**

In short, Cotter, Jr. left no stone unturned in his efforts to smear the defendants; but the District Court never even addressed this issue.

A District Court abuses its discretion when it fails to apply the appropriate legal standard to the issue before it. *Staccato v. Valley Hosp*., 123 Nev. 526, 530, 170 P.3d 503, 506 (2007) (stating that "the district court abuses its discretion if it applies an incorrect legal standard"). Here, the District did not consider whether Cotter, Jr. brought or maintained his claims for the purpose of harassment, and therefore, it used its discretion in denying fees.

C. Cotter, Jr.'s Actions Cannot Be Justified on the Basis of Presenting New or Novel Legal Theories.

Cotter, Jr. contends that this case involved "novel and complex" legal issues. Certainly, the case became complex; however, that complexity was not a product of novel legal theories, but instead, was merely the result of Cotter, Jr.'s shotgun pleading approach, wherein he challenged virtually every action taken by Reading's Board of Directors. Cotter, Jr.'s claims were a constantly moving target, changing with the wind, and each time, requiring more discovery, at ever rising costs to Reading. This is not the sort of novel legal issue discussed in Cotter, Jr.'s cited case of *PERS v. Gitter*, 133 Nev. Adv. Op. 18, 393 P.3d 673 (2013). *Gitter* involved a purely legal question, *i.e.,* whether Nevada's slayer statute applied to

override the express language of the PERS statutes for purposes of paying benefits to non-minor children when the employee was killed by her spouse. The relevant PERS statutes themselves lent support to PERS's argument, and thus, there was both a legal basis, and a factual basis, for PERS's position.

In contrast, it was factual, not legal novelty that was present here, due to the pretense that a CEO seeking reinstatement can be a suitable valid derivative plaintiff. Cotter, Jr. claims were not based on any unique theory of law; he brought claims of breach of fiduciary duty, claiming that each of the eight Director Defendants made corporate decisions, including the decision to terminate his own employment, based on their own interests, rather than on Reading's best interests. The fact that he could not present evidence showing that any of the challenged decisions (none of which could be objectively perceived as harmful to the Company) were motivated by anything other than genuine belief as to the Company's best interests does not render his case "novel."

Cotter, Jr. contends that because his suit was filed prior to this Court's decision in *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.,* 133 Nev. Adv. Op. 52, 399 P.3d 334 (2017), and because there is no caselaw interpreting ratification under NRS 78.140, his case presented novel issues at the time he filed it. But as Cotter, Jr. himself notes, the decision in *Wynn Resorts* was a *clarification* of Nevada law-not a change in it. Moreover, Cotter, Jr. took no action to dismiss his claims once

the *Wynn Resorts* decision was released, further showing that he maintained claims while knowing they were not viable.

As for ratification, NRS 78.140 is quite clear that ratification by either the Board of Directors or the stockholders of actions challenged based on director interest may not be voided on the basis of the purported interest, provided ratifying directors or stockholders are informed of the purported interest. Unlike the situation in *In re Amerco Derivative Lit.*, 127 Nev. 196, 217 n.6, 252 P.3d 681, 697 (2011) (noting that district court had denied a motion to dismiss based on ratification due to a dispute over the adequacy of disclosures), there can be no reasonable assertion here that the directors who voted in favor of ratification were not adequately informed as to the purported interests held by the other directors in the transaction. This entire litigation was based on those purported interests.

Significantly, other than the same, discredited claims of interest that Cotter, Jr. relied upon throughout this litigation, Cotter, Jr.'s only basis for challenging the ratification is that it was a "litigation strategy." Not surprisingly, Cotter, Jr. does not cite any authority to support his theory that a litigation strategy *expressly authorized by statute* is somehow improper. But this wholly unsupported theory is the closest Cotter, Jr. has come to identifying a "novel legal theory" in this matter. But not only did he not adopt that theory until the final months of the case (and thus, it cannot be used to justify his act of bringing and maintaining the claims up

to December 27, 2017), but he offers nothing to show that it is a theory brought in good faith.

Nor could he prevail on what was, again, his entirely speculative theory that ratification decision was not itself the product of independent judgment, *even after being given the benefit of a rebuttable presumption to the contrary*. The testimony of the five directors who voted in favor of ratification showed that the decisions were based on appropriate business considerations; again, Cotter, Jr. could offer nothing more than his wishful thinking to the contrary.

Cotter, Jr. bore a responsibility as a derivative plaintiff to place the interests of Reading ahead of his own in the prosecution of his claims. He failed to do so, and instead, insisted on pursuing claims from which no significant, let alone permanent, benefit could be granted to Reading. Because there was no legitimate purpose benefitting Reading for Cotter, Jr. to bring his claims, Cotter, Jr.'s claims must have been brought for the purposes of harassment. Accordingly, the District Court should have awarded attorney's fees.

D. The Amount of Fees Incurred by Reading Does Not Present a Basis for Denying Fees.

In a last-ditch desperate attempt to avoid an award of fees, Cotter, Jr. contends that because Reading incurred approximately $15.9 million in fees, $10 million of which was paid by insurance, the request for fees should be denied.

However, the denial of any fees on such a ground, on the record before the Court, could only be deemed an abuse of discretion.

The parties agreed, with the District Court's approval, to a two-part briefing process, with the first part devoted to the propriety of awarding any fees, and, if an award of fees was to be made, the second part to the amount. Accordingly, while the total amount of fees was stated (at Cotter, Jr.'s insistence) in the Motion for Attorney's Fees, no explanation for the fees was presented. Based solely on the total fees incurred, Cotter, Jr. contends that fees should have been denied, as "outrageously excessive." Answering Brief, p. 53. Cotter, Jr. cites various federal cases for this contention. *Id.* However, he ignores a significant aspect of the rule he recites – *i.e.*, that fees sought must be outrageously excessive "under the circumstances." In *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 903 F.3d 396 (3d Cir. 2018), the Third Circuit upheld the trial court's denial of fees where:

> In a thorough and well-reasoned one-hundred-page opinion, the court reviewed every time entry submitted, performed a traditional lodestar analysis, and concluded that eighty-seven percent of the hours billed had to be disallowed as vague, duplicative, unnecessary, or inadequately supported by documentary evidence.

Clemens, 903 F.3d at 399. In *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980), the fee request was denied because more than 800 billable hours had been claimed in a case involving a six-page complaint to enjoin enforcement of a statute. The majority of the work performed was filing a series of motions for

extension as the parties awaited a decision in another case, because "everyone knew [the outcome] would be controlled by the results of litigation pending in other courts." 612 F.2d at 1059. In *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258 (D.C. Cir. 1993), the fees sought amounted to $32,542.75, "of which $7,972.50 [was] for work on the merits and $24,570.25 [was] for work done in order to recover the attorneys' fees." In *Fair Housing Council v. Landow*, 999 F.2d 92, 95 (4th Cir. 1993), the fee request was for $604,113 in attorneys' fees and expenses, based time billing sheets that provided only general descriptions of the work performed, and did not identify which claims were involved. However, the plaintiff had prevailed only on one of its claims (breach of a prior settlement contract), and the trial preparation and the trial itself had been primarily directed at claims that the defendant engaged in racial discrimination. The lower court determined that the appropriate fees for a simple breach of contract case (in 1993) would have been $20,000. And, in *Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991), a wrongful arrest matter where the plaintiff had been incarcerated for an hour, and received $4000 on a $300,000 claim, Plaintiff's counsel claimed fees for their full 952.25 hours (approximately half a billable year). A lower amount of fees was granted, but the First Circuit reversed, stating, "[t]o turn a single wrongful arrest into a half year's work, and seek payment therefor, with costs, amounting to 140

times the worth of the injury, is, to use a benign word, inexcusable." 944 F.2d at 956.

Here, the amount of fees incurred is certainly high. But these were fees incurred for three different sets of counsel: Directors Gould and Storey had required separate counsel from the other directors because of a potential conflict; Reading also required separate counsel for the same reason. The two firms representing the directors are located in California, where several of the directors reside, and where the Company is headquartered; accordingly, two sets of local counsel were also required. Nevada's rules require the presence of local counsel at any court proceeding. SCR 42. Thus, for all hearings—and motion practice was extensive, as the 57 volume Joint Appendix filed in the companion cases shows—attorneys from five firms were required to attend.

During the more than three years of litigation, approximately 30 persons were deposed, with some depositions continuing for as many as five days. Thus, RDI was required to fund three sets of attorneys at each deposition. Additionally, as noted, there was extensive motion practice in the district court, and several writ petitions directed at this Court, requiring substantial briefing. And, of course, there was also extensive discovery. Cotter, Jr.'s insistence that the amount of fees is too

high, without taking into account the work actually performed, is absurd.[12] Significantly, Cotter, Jr. has failed to mention that the fees here were 9 and 13% of the $110 and $155 million in damages amounts to which Cotter, Jr.'s damages expert had opined (before he was essentially discharged by Cotter, Jr.). **VIII RDI-A10743-10744 and 10746.**

In this case, due to the parties' agreement to a two-part briefing process, the documentation showing how and why the fees were incurred is not before this Court. Given the number of defendants, the broad nature of the allegations, and the amount of depositions, discovery, briefing, and court appearances required for the matter, the circumstances of this case are vastly different from those on which Cotter, Jr. relies.

II. RDI IS ENTITLED TO FEES INCURRED FOR THE DEFENSE OF ITSELF AND THE INDIVIDUAL DEFENDANTS, INCLUDING THE LATE WILLIAM GOULD.

Cotter, Jr. concedes that NRS 18.010 permits a prevailing party to seek fees Significantly, Cotter, Jr. has cited no authority that holds that a nominal party is not a "party" for purposes of NRS 18.010.

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[12] Equally is absurd is Cotter, Jr.'s complaints about the number of firm employees who billed on the case, when there is no context for that number. For example, Cotter, Jr. appears to suggest that this firm had 23 persons working on the file *simultaneously*, rather than considering the effect of firm attrition, or the need to pull in several additional document reviewers for a single project to review voluminous documents for privilege, under a severe time crunch. Due to the agreed two-part briefing process, the actual time sheets were not presented.

A. Reading Was a Prevailing Party.

The term "prevailing party," as used in NRS 18.020(2)(b), is "broadly construed so as to encompass plaintiffs, counterclaimants, *and defendants*." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (emphasis added). The party need only succeed on "any significant issue in the litigation which achieves some of the benefit it sought in bringing suit." *Id.* Here, all of Cotter, Jr.'s claims were defeated.

Throughout the litigation, Reading was treated as a party. It provided Answers to the three iterations of the complaint, it participated in discovery, and it pursued a writ of mandamus with this Court to protect its attorney client privilege. *See* Supreme Court Case No. 74759.

B. The Request for Fees Incurred on Behalf of William Gould Was Not Untimely.

Cotter, Jr. erroneously cites the ten-day deadline to file a motion for attorney's fees in contending that a request for fees on behalf of Mr. Gould was untimely. However, by that rule's express terms, the deadline set forth in NRCP 54(d)(2)(B) does not apply to fees sought, as they were here, as "sanctions pursuant to a rule or statute." NRCP 54(d)(2)(C). No time limit is given for a motion for fees pursuant to NRS 18.010. See *Farmers Insurance Exchange v. Pickering*, 104 Nev. 660, 662 (Nev. 1988) (noting that NRS 18.010 contains no

time limit in which to request fees, and that a request for fees after successful appeal was timely).

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE RULE 60(b) MOTION TO AMEND THE JUDGMENT TO INCLUDE RDI.

The District Court abused its discretion in denying Reading's Motion to correct its exclusion from the final judgment.[13] The sole basis given by the District Court for its denial was that RDI was a nominal defendant. However, no Nevada authority provides that a nominal party is precluded from receiving a judgment in its favor.

Moreover, RDI filed an answer in this matter. It raised as affirmative defenses that its corporates actions were protected by the business judgment rule. **I RDI-A00222, ¶ 3, A00224, ¶ 17**, and received at least some of the relief it requested, as Cotter, Jr. took nothing by his claims, and RDI was awarded costs. **I RDI-A00225**. Indeed, as noted above, these facts are sufficient to show that RDI was not only a party, but also a *prevailing* party. *See Las Vegas Metro*. *Police Dep't v*. *Blackjack Bonding*, *Inc*., 343 P.3d 608, 615 (Nev. 2015) ("[A] party

[13]The failure to include RDI in the August 14, 2018 Judgment technically precluded that judgment from constituting a final judgment. However, because the order denying RDI's Motion for Judgment in Its Favor would constitute a final judgment in this matter, no issue of prematurity of the appeal would arise. NRAP 4(a)(6).

prevails if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit.") (internal citation omitted).

Despite Cotter, Jr.'s insistence that Reading was not a party for purposes of being awarded fees, Cotter, Jr. was nonetheless content to treat Reading as a party when it suited his interests. Reading was required to respond to discovery requests, and indeed, Cotter, Jr. moved to compel production from Reading. ***See e.g.,* XXIX JA 7222**. Only parties are subject to subject to the obligations of NRCP 34. NRCP 34(a) ("A party may serve on any other party a request..."). Thus, Reading's status as a party in this action, with the rights and obligations of the same, was recognized throughout the litigation.

A. The Denial of a Rule 60 Motion Is Appealable.

Cotter, Jr. asserts that the District Court's denial of RDI's Rule 60(b) motion was not an appealable order. However, this Court has expressly ruled to that the denials of motions brought pursuant to Rule 60(b) are appealable. *See, e.g*., *Yu v. Yu*, 405 P.3d 639, 640, n.1 (Nev. 2017) (noting that order was "appealable as a special order after final judgment or an order denying a motion pursuant to NRCP 60(b)), *citing Holiday Inn v. Barnett*, 103 Nev. 60, 63 (Nev. 1987) (indicating that order denying Rule 60(b) motion was appealable).

Cotter, Jr. engages in a circular argument to contest the appealability of the motion. He notes that, to be an appealable post-judgment order under NRAP

3A(8), an order must affect the rights of a party "growing out of the judgment previously entered." Answering Brief, p. 57, citing *Gumm v. Mainor*, 118 Nev. 912, 59 P.3d 1220, 1225 (2002). Cotter, Jr. then proposes that because the final judgment in this matter did not expressly establish any rights of RDI, the denial of the motion to correct *that exact defect* did not affect any *existing* rights, and therefore, did not "grow out of" the final judgment. This argument is the equivalent of saying that any time a judgment fails to provide specific relief to a party, and a post-judgment motion to correct that failure is denied, the denial is not appealable, because no rights "growing out" of the original judgment were affected. Not surprisingly, Cotter, Jr., does not cite any authority that supports this notion.

CONCLUSION

Cotter, Jr. used the derivative action process as his means to exact revenge on Reading and the Individual Defendants, and in the process, forced Reading to expend millions of dollars to defend the other victims and itself. Such conduct was directly contrary to the fiduciary obligations of representative litigation and should not be condoned. Because he chose to air his personal grievances in a fiduciary capacity, the reasonableness of his actions should be judged in that context. No reasonable derivative plaintiff would have brought these claims, still less would they have maintained them when the T2 Plaintiffs affirmed their satisfaction with the corporate governance and dismissed their claims—an act which the District

Court acknowledged eliminated any concerns that investment by the public was at risk. **XX JA 4809:24-4810:1**. As a matter of both law and equity, stockholders who choose to misuse the derivative complaint process by bringing claims not to vindicate corporate rights should be accountable to the corporation for the fees expended to defend against the claims.

The District Court abused its discretion in failing to liberally construe NRS 18.010, in failing to consider the entire circumstances of the claims, and in failing to acknowledge the ample evidence showing that the claims were brought for purposes of harassment. Accordingly, the judgment should be reversed and the matter remanded for a determination of the attorney's fees that should be awarded.

Respectfully submitted this 27nd 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 6679 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 27nd 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 ***Reply Brief of Appellants for Case No. 77733*** 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