IN THE SUPREME COURT OF NEVADA

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

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

APPELLANT'S REPLY BRIEF IN CASE NO. 77648

Steve Morris, Esq. (NSB #1543)
Morris Law Group
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101
Telephone: (702) 474-9400

Attorneys for Appellant
James J. Cotter, Jr.

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant James J. Cotter, Jr. is an individual. He was represented in the district court by Mark G. Krum and Noemi Kawamoto of Yurko, Salvesen & Remz, P.C., and Steve Morris and Akke Levin of Morris Law Group.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris (NSB #1543)
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101

Attorneys for Appellant
James J. Cotter, Jr.

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I. SUMMARY OF ARGUMENT

RDI's arguments cannot overcome the lack of record evidence to support an $853,000 award for four expert witnesses whose opinions were never put to use in the district court. RDI *admits* that none of the directors' expert witnesses testified, and that the directors did not use their expert witness opinions—not even to support one of their six, multi-issue motions for partial summary judgment. These undisputed facts alone should have limited the award to $1,500 per expert; they conclusively disprove the declaration of counsel that it was "necessary" to retain them to defend this derivative action.

It is too late for RDI to argue that $853,000 is a reasonable amount for four experts. RDI already admitted below that the expert witness fees incurred by the directors were "prohibitive." While the hourly rates of the four experts may have compared to those charged by Cotter Jr.'s experts, RDI did not point to any record evidence before the district court demonstrating that the *total* amount awarded to each expert was reasonable. There is none. The district court not only awarded in full the costs billed by the un-utilized four experts themselves—$292,000—but awarded $561,000 for the costs billed by their **fourteen** staff members. This

rendered the total compensation unreasonable and contrary to NRS 18.005(5), which only allows costs "of not more than **five** expert witnesses."

RDI's ever-changing arguments also cannot overcome the legal reality that RDI was a non-prevailing, nominal defendant. RDI could not artificially make itself a prevailing party by joining in the defense of claims that Cotter Jr. made on its behalf. RDI did not become a prevailing party because of the discovery RDI invited by answering Cotter Jr.'s complaint. The company merely injected itself into every aspect, motion, and hearing of the case to improperly side with the Cotter sisters. Because RDI *lost* on every motion it filed and was rightfully denied a judgment in its favor, it was an abuse of discretion by the district court to award nominal defendant RDI any costs at all, much less $581,718.69.[1] The $1,554,319.73 cost judgment should be reversed.

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[1] RDI makes a number of unsupported or exaggerated claims in its answering brief and characterizations of facts. *E.g.*, Answering Brief ("AB") at 5 (alleging an "assault on its corporate autonomy"), *id.* at 6 (accusing Cotter Jr. of "crying wolf"). Cotter Jr. objects to each of RDI's unsupported claims and arguments and will only address those relevant to the issues raised in this cost appeal, having already addressed similar claims in other briefs.

II. ARGUMENT

A. RDI failed to rebut undisputed evidence showing that the $853,000 award for expert witness fees was an abuse of discretion.

RDI's Answering Brief leads off with the gratuitous argument that Cotter Jr.'s challenge of the expert cost award was "mostly without supporting authority." AB at 18. This is false and RDI knows it.

Cotter Jr. relied on NRS 18.005(5) and the relevant, seminal case law interpreting it, including *Pub. Employees' Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 393 P.3d 673 (2017), *Khoury v. Seastrand*, 132 Nev. 520, 377 P.3d 81 (2016), *Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 89 P.3d 1000 (2004), *Frazier v. Drake*, 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015), *Busick v. Trainor*, No. 72966, 2019 WL 1422712 (Nev. March 28, 2019), and *Las Vegas Land Partners, LLC v. Nype*, Nos. 68819 & 70520, 2017 WL 5484391 (Nev. Nov. 14, 2017). *See* Cotter Jr.'s Opening Brief ("OB") at 29-31, 33, 35, 37, 41, and 44; *see also id*. at viii, ix (Table of Authorities).

In fact, *Frazier v. Drake,* 131 Nev. 632, 357 P.3d 365 (Ct. App. 2015)—one of the most instructive cases on the standard to determine the necessity and reasonableness of expert witness fees in excess of $1,500—is

discussed and cited throughout Cotter Jr.'s brief. *See* OB at 29-31, 33, 35, 37, 41, and 44.

RDI's resort to fabrication is understandable given that RDI was forced to admit that: (1) none of the directors' experts testified; (2) none of the directors used expert opinions in their dispositive motions; (3) the district court did not rely on expert testimony in granting summary judgment either; and (4) the case law cited by Cotter Jr. holds that under those circumstances, the prevailing party may recover only *minimal* expert witness costs and fees. To overcome and distract from these facts, RDI raises a number of other arguments, all of which should be rejected for the reasons below.

1. The expert cost award should have been limited to $1,500 per expert because none of the five experts testified at trial or in support of the directors' MSJs.

This Court's case law, which Cotter Jr. cited on pages 29 through 31 of his Opening Brief, is clear: to recover more than $1,500 per expert, the experts must testify. *See Busick*, 2019 WL 1422712, at *4 ("[a] non-testifying expert is not entitled to more than $1,500 under NRS 18.005(5)"); *Gitter*, 133 Nev. at 134, 393 P.3d at 681 (holding that the district court has "discretion to award up to $1,500 in reasonable costs for a

nontestifying expert consultant under NRS 18.005(5)"); *Nype*, 2017 WL 5484391, at * 7 (holding that "under *Gitter*, the district court abused its discretion by awarding more than $1,500 per nontestifying expert").

It is not just that the experts did not testify at trial, as RDI admits; none of them testified in support of any of the motions for summary judgment the directors filed. Unlike in *Logan v. Abe*, 131 Nev. 260, 350 P.3d 1139 (2015), where the " 'circumstances surrounding the [lack of] expert's testimony'. . . were of the [*plaintiffs*]' creation" because the plaintiffs chose not to call their experts at the last minute before trial, *id*. at 268, 350 P.3d at 1144, nothing prevented the directors from using their experts to obtain summary judgment.

RDI's astonishing argument that expert testimony "would not have been helpful" on the issues on which summary judgment was sought, AB at 19, is equivalent to an admission that their experts' testimony was useless to their case and the cost of it was unnecessarily incurred: The directors filed six separate motions for partial summary judgment ("Partial MSJs") on nine separate issues, addressing virtually every factual allegation made by Cotter Jr. in his second amended complaint. VI JA1486-XIV JA3336; III JA519-574. Partial MSJ No. 6 alone addressed four claims—*i.e.*,

Cotter Jr.'s "claims related to [1] the Estate Option's Exercise, [2] the appointment of Margaret Cotter, [3] the compensation packages of Ellen Cotter and Margaret Cotter, and [4] the additional compensation to Margaret Cotter and Guy Adams." XII JA2861; *see* III JA522-523 (¶¶ 6, 10), JA525-528 (¶¶15, 18, 21), JA532-533 (¶¶ 37-40), 548-552 (¶¶ 102-120), 560 (¶¶ 148-153).

Yet not one of the six Partial MSJs relied on the directors' experts—not even Partial MSJ No. 1 on Cotter Jr.'s termination, despite the directors' counsel declaration that "Professor Klausner's expert opinion and testimony on matters of corporate governance related to the termination of . . . Cotter, Jr. as CEO of [RDI] ***was necessary*** in the defense against Plaintiff's claims . . . ***specifically Plaintiff's claim that the Defendants breached their fiduciary duty in their decision to termination [sic] James Cotter***." XXXIV JA8522 (¶ 7(a)) (emphasis added).

The fact that not one bit of Klausner's opinion was used in the many briefs filed in support of MSJ No. 1 between 2016 and 2017 wholly undercuts this conclusory declaration by counsel for the directors.

2. Cotter Jr. is not to blame for the directors' failure to use their experts.

The directors' decision not to use any of their four experts to obtain summary judgment has nothing to do with Cotter's decision in May 2018 not to call his damages expert, Duarte-Silva. Even before Cotter Jr. made this decision in May 2018, the directors did not use any of their three damages expert experts to obtain summary judgment in the many briefs they filed in support of their Partial MSJs in 2016 and 2017. The directors, who repeatedly claimed below that damages were a *sine qua non* to prevail and that Cotter Jr. had provided no evidence of damages, could have brought a motion for summary judgment based on the alleged absence of damages, using any of their three damages experts' opinions. But the directors did not move for summary judgment on that basis.

RDI's argument that it is "difficult to imagine a *successful* motion for summary judgment that relies on expert testimony," AB 24, overlooks that director Gould relied on excerpts of *his* expert's corporate governance report to obtain summary judgment and was ultimately

successful. III JA600, III JA618; V JA1077-1078, JA1108-1109; XIX JA4610-4677 at JA4623-4624, JA4641-4648.[2]

Further, the use of expert testimony on a motion for summary judgment is not limited to support a disputed factual issue, as RDI argues in a footnote. AB at 20 n. 10. Expert testimony could also be used to support the *absence* of a factual issue. In *Gaylord Container Shareholders Lit.*, 753 A.2d 462, 487 (Del. Ch. 2000), for example, the court considered the parties' respective expert reports before granting summary judgment based on the absence of an issue of material fact. *Cf. In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 759 (Del. Ch. 2005) (Chancellor relying on expert testimony at trial to conclude that Ovitz could not have been fired for cause). In *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991), the defendants successfully relied on medical expert testimony to obtain summary judgment below, even though the order was reversed on appeal. *Id*. at 3, 7, 805 P.2d at 590, 593. After all, expert testimony is used "to determine a fact in issue . . . ." NRS 50.275.

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[2] The district court denied Gould's request for costs, including for his expert, as untimely, and RDI does not challenge this decision on appeal.

3. The record does not support the district court's findings.

RDI next misquotes and mischaracterizes the first two *Frazier* factors (which Cotter Jr. also discussed in his Brief). They do not "relate to the necessity of an expert relating to the issues to [sic] the case," as RDI cryptically contends, AB at 20.

The first factor pertains to the "*importance* of the expert's testimony *to the party's case*," requiring the district court to ask, in this case: Was the expert's testimony important to the director's defenses?

Contrary to RDI's contention, there was no record evidence from which the district court could reasonably conclude that the experts' testimony was "very important to the Defendants' preparation of their defense." The conclusory declaration of Marshall Searcy, counsel for the directors, explaining what each expert's focus was and that retention of the experts was "necessary," XXXIV JA8520, is *contradicted* by the record evidence. Cotter Jr. had the burden of proving (1) the lack of independence and interestedness; (2) breaches of fiduciary duties; and (3) damages. The directors retained three damages experts and one expert on corporate governance—all four focusing on elements of Cotter Jr.'s claims as to which

he had the burden of proof. The directors prepared their defense and prevailed on summary judgment *without* expert testimony.

Again, the example cited above is telling: The directors paid $447,764.91 to Professor Klausner to opine on "matters of corporate governance related to the termination of Plaintiff James J. Cotter, Jr. as CEO of [RDI]," XXXIV JA8522, but his pricey opinions were not used in support of Partial MSJ No. 1 that was focused entirely on Cotter Jr.'s termination. This fact—which RDI did not and cannot dispute—disproves their counsel's representation that Klausner's opinion was "necessary in the defense against Plaintiff's claims . . . specifically Plaintiff's claim that the Defendants breached their fiduciary duty in their decision to termination [sic] James Cotter." *Id*. Similarly, the directors did not use any of their three damages experts' opinions—ever. The record evidence thus shows that the experts' testimony was insignificant to the directors' case.

The second *Frazier* factor pertains to the importance of the expert opinion to the trier of fact. In other words: Did the expert testimony play an important role in the trier of fact's determination?

RDI's argument that the second factor did not apply because the district court did not sit as a jury overlooks that this factor applies by

analogy to the order granting summary judgment. *See Frazier*, 131 Nev. at 650, 357 P.3d at 378 (explaining that the factors "are nonexhaustive and other factors may therefore be appropriate for consideration depending on the circumstances of a case"). As Cotter Jr. established in his Opening Brief, and as RDI admits, Judge Gonzalez did not rely on expert testimony at all.

4. The exorbitant amount of expert witness costs is not justified by the amount of Cotter Jr.'s alleged damages.

RDI argues and the district court appears to have accepted that the directors' outrageous expert witness fees were justified and reasonable based on the amount of damages Cotter Jr. alleged and his damages expert estimated. But the reasonableness is not determined by the amount of alleged damages. Rather, "the circumstances surrounding [each] expert's testimony [must be] of such necessity as to require the larger fee." NRS 18.005(5); *see also Logan*, 131 Nev. at 268, 350 P.3d at 1144 ("NRS 18.005(5) allows the district court to award more than $1,500 for an expert's witness fees if the larger fee was necessary"). The reasonableness of expert fees does not increase based on the money a plaintiff seeks. Reasonableness relates to how important expert witness testimony is to a party's case—no matter how many millions of dollars are sought. *See Gilman*, 120 Nev. at 272-73, 89 P.3d at 1006-07; *Frazier*, 131 Nev. at 650, 357 P.3d at 378.

A perfect example is the directors' own reliance on freely available online information to refute Cotter Jr.'s allegation that RDI suffered millions of dollars in damages in the stock market after his termination, rather than on their damages expert's opinions for which they had paid **$425,165.00**. XVIII JA4540 (n.16); VII JA1517; IX JA2126-2135; XXXIV JA8523. This evidence not only competes with the declaration of counsel that it was "necessary" to retain Mr. Roll; it *invalidates* the declaration. Again, this demonstrates that the directors found Mr. Roll's stock market analysis to be—quite literally—useless. Unlike in *Gilman*, expert testimony made no part of the directors' case.

5. The amounts awarded to the experts were arbitrary, unreasonable, and included noncompensable costs.

In the district court, RDI *agreed* that the expert witnesses' fees were "prohibitive." XXXVII JA9123 (lines 26-27). This admission belies any argument that the expert witness costs were nevertheless reasonable. The only evidence cited to avoid this admission is, again, the declaration of attorney Marshall Searcy. But all he did was compare the *hourly rates* of Cotter Jr.'s experts to those of the directors and conclude that the hourly rates were reasonable. XXXIV JA8524 (¶ 8). That comparison does not establish reasonableness. There must be evidence that the *total* amount

awarded was reasonable for its do-nothing experts, not what Cotter Jr.'s experts billed. Here, the directors provided no evidence of reasonableness of its experts' fees.

First, there is no "inference" under NRS 18.005(5) that expert fees are reasonable, as RDI contends. AB at 25. The directors had the burden of showing that the "prohibitive" (read, exorbitant) amount they incurred in expert witness fees was nevertheless reasonable under the circumstances. NRS 18.005(5).

Second, Cotter Jr.'s argument that the fees were unreasonable had nothing to do with "the timing of the Respondents' retention of their experts . . . ." AB at 23. The directors were free to retain any expert they wanted when they wanted an expert. But under NRS 18.005(5), the directors can only recover expert witness fees that were necessary *and* reasonable. Here, it was neither *necessary* nor *reasonable* for the directors to incur hundreds of thousands of dollars for two initial experts to prepare initial reports on two issues as to which Cotter Jr. carried the (high) burden of proof. Because the experts prepared initial reports without knowing what Cotter's experts would say, the directors allege they were "forced" to spend hundreds of thousands of dollars more for two *additional* damages

experts to rebut opinions of Cotter Jr.'s damages expert Duarte Silva—and a rebuttal report on corporate governance. The $779,332.03 incurred in costs for ***three*** damages experts retained by the defendant directors, XXXIV JA8522-8524—none of which cost was put to use in the case—was not "reasonable" and thus not compensable under NRS 18.005(5).

This is not a "hindsight" argument, as the directors pejoratively contend. AB at 23. It is the directors' "necessity" argument that is based on hindsight: It was never "necessary" for the defendant directors to hire three damages experts. Their retention was not a result of the needs of the case but the result of the directors jumping the gun by hiring an initial damages expert with limited expertise (Roll) who hypothesized on Cotter Jr.'s damages theory. XXXIV JA8522-8524. Thus, there is no analogy between this wasteful conduct and the need to take depositions that were of no use, as RDI contends. *See* AB at 24 (citing *Pavel v. Univ. of Oregon*, No. 6:16-CV-00819-AA, 2019 WL 5889299 (D. Or. Nov. 12, 2019)).

Third, as a matter of undisputed record evidence, each of the directors' four experts used six or more individuals with fancy titles ("Vice President"; Senior Analyst") whose ill-described work more than doubled,

or (in Roll's case), quadrupled the fees billed by the experts themselves, as the following chart shows:

Expert	**Expert fees**	**Staff fees**	**Total fees**[3]
Foster	$90,585	$110,415	$201,000
Strombom	$43,517	$108,483	$152,000
Klausner	$115,008	$134,992	$250,000
Roll	$43,496	$206,504	$250,000
Totals:	$292,606	$560,394	$853,000

XXXV JA8639-JA8800; LIII JA13166 (¶ 3).

These excessive additional fees made the hourly fees of the experts themselves, as well as the total fees awarded *un*reasonable. Notably, the district court awarded all of Strombom's and Foster's fees—including the $110,000 billed by Foster's **ten** staff members and the $108,483 billed by Strombom's five staff members. Cotter Jr. extensively demonstrated below and again in his Opening Brief in this appeal to what

[3] This column represents the fees awarded by the district court. The cost bills of Klauser and Roll exceeded $400,000 each, XXXIV 8522-8523, thus the actual ratio between the work performed by the experts and their support staff was even larger.

extent the experts' bills reflect overstaffing, duplication of work, and overbilling for work that was barely described to verify the cost. XXXVI JA8928-8933; OB at 11, 38-42.

Contrary to RDI's contention, AB at 25, Cotter Jr. *did* provide authority to show that the costs for these fourteen staffers[4] could not be recovered: NRS 18.005(5). *See* OB at 41; *see also id*. at 28, 38. Only "[r]easonable fees of not more than five expert witnesses" are defined as compensable costs. NRS 18.005(5). Thus, the statute by its terms is limited to "reasonable" fees incurred by five experts. To allow, as the district court did below, the directors to recover more than half a million dollars for duplicative, paralegal-type or clerical work—especially work that is barely described to ascertain whether the costs were reasonably incurred—would be the equivalent of awarding them attorneys' fees. *Cf. Windy City Innovations, LLC v. America Online, Inc.*, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006) (disallowing costs for coding services and keyword searching because "expenses for such systems are more properly considered expenses

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[4] These staffers include: Gold, Stichman, Overcash, McClure, Chen, Nabi, Morley, Crew, Bergmann, Murphy, Bosley, Petruzzi, Levine, and Grant. XXXV JA8638-8800.

incidental to an award of attorneys' fees, not costs of suit' that are recoverable in a bill of costs").

Fourth, RDI argues—without support—that "the record establishes 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 . . . . stock market records and analyses, industry analyses, and business valuation data." AB at 26. In fact, the billing records show otherwise: Two experts (Roll and Klausner) did not describe their work at all, XXXV JA8640, 8644, 8650, 8657, 8667 (Klausner), 8691, 8699, 8707, 8714 (Roll), and neither did most of the fourteen staffers. As demonstrated in Cotter Jr.'s Opening Brief and below, hundreds of staffer hours were block-billed by descriptions saying nothing more than "Review documents," "review depositions," "analysis," "discussions with team," "assist with preparation of expert report," or "Rebuttal report research." *E.g.* XXXV JA8644-8647, JA8650-8653, JA8671, JA8685-8687, JA8691-8695, JA8699-8703, JA8722-8726, JA8730, JA8735, JA8740-8744, JA8762; OB at 11. The billing records did not identify a single deposition transcript or document the many staffers purportedly reviewed or analyzed. *See id.*

Fifth, while the district court reduced the amounts awarded to Roll and Klausner to $250,000 each, the reductions were wholly arbitrary, and still resulted in grossly excessive awards for each. The district court did not it explain why it reduced the costs of Roll and Klausner and not those of experts Foster and Strombom whose billing records displayed the same block-billing, overstaffing, and insufficiently described work, *e.g.*, XXXV JA8722-8724, 8740-8743 ("research . . . analysis . . . discussion with counsel . . . assist with. . . report"), including more than hundred hours for clerical work. XXXV JA8725-8726 ("Updated appendices and exhibits . . .making exhibit . . .assembling depo binder"), JA8735-8736 ("oversee production of materials . . .assemble backup binders. . .").

Thus, even assuming the directors were entitled to more than $1,500 per expert, their utter failure to use their experts in any stage of the proceeding disclaims their importance, and the arbitrary reductions did not take into account the pervasive overbilling by supporting staff and the failure by two experts to even describe their work. It was an abuse of discretion to award $853,000 on these facts.

B. It was legal error to award nominal defendant RDI any costs, because RDI was not a prevailing party.

RDI admits that it did not obtain a judgment below, and that the district court expressly denied RDI a judgment in its favor when RDI moved for one. AB at 30. RDI nevertheless argues it won, because a judgment was entered against Cotter Jr. *Id.* at 29. But a party is not entitled to costs just because a judgment is entered against someone else. The crucial language of NRS 18.020, which RDI overlooks, is that costs may only be awarded "to the prevailing party," which RDI is not.

1. RDI is not a prevailing party because it joined in the defense against Cotter Jr's complaint that ultimately was dismissed.

RDI's arguments in support of its claim that it is nevertheless a prevailing party and was entitled to $581,000 in costs keep evolving. First, RDI made the bold claim that three of Cotter Jr.'s causes of action were directed against all "Defendants" and thus included RDI, requiring it to file an answer. XXXVII JA9104. RDI either did not read, or ignored, that the three claims were explicitly directed at "the individual defendants" in their respective roles of "director." III JA526-529 (¶¶18-25). Either way, RDI could not make itself a prevailing party by defending against claims made on its behalf against directors. Just because the directors prevailed on the

claims does not turn RDI into a winner. RDI does not show on what "significant issue" it prevailed. AB at 29. In fact, RDI admits that it *lost* each motion it filed for Cotter Jr.'s alleged failure to make a demand.

Next, RDI argued that its position of nominal defendant should be compared to that of the third-party subcontractors in *Copper Sands, Homeowners Ass'n, Inc. v. Flamingo 94 Ltd. Liab.*, 335 P.3d 203, 206 (Nev. 2014). XXXVII JA9118. RDI again discusses *Copper Sands* on page 30 of its answering brief. But RDI does not explain how the facts of that case apply here, because it can't: Unlike the subcontractors who were aligned with the prevailing developer and adverse to the HOA that alleged construction defects, RDI was "functionally aligned" with Cotter Jr. who made claims and asked damages and injunctive relief on its behalf *against* the prevailing directors. RDI should have been denied costs for the same reason Cotter Jr. cannot recover costs: RDI was a nominal defendant, functionally aligned with Cotter, and lost.

Once Cotter Jr. pointed RDI to *Ross v. Bernhard*, 396 U.S. 531, 538–39 (1970), which holds that a nominal defendant is the "real party in interest" on whose behalf the derivative case is brought, RDI shifted to the

meritless argument that Cotter Jr. sought "certain relief" against RDI. XXXVI JA8918-8919; XXXVII JA9115-9116.

Finally, after Cotter Jr. demonstrated that the only relief that even involved RDI was his request for corrective disclosures and that such corrections would benefit rather than threaten RDI's existence, RDI amended its argument and now makes the hysterical claim that Cotter Jr.'s claims posed an existential threat to RDI that justified RDI to actively defend against the claims so that when the directors prevailed, so did RDI. AB at 5, 16, 32. As discussed next, this latest argument is pure nonsense.

2. The threat of which RDI complains to justify its partisan position is imaginary.

As the district court recognized when it denied RDI a judgment in its favor, RDI is a nominal defendant on whose behalf Cotter Jr.'s claims were brought. LIII JA13179-13182. Under *Blish v. Thompson Auto. Arms Corp.*, 64 A.2d 581 (Del. 1948) and the other case law which RDI cites, the general rule is that the corporation should remain neutral and only defend "if the corporate interests are *threatened* by the suit." *Id*. at 591 (emphasis added). Examples of threats are actions to: (1) interfere with a corporate reorganization, such as a merger; (2) interfere with internal management in the absence of an allegation of bad faith or fraud; (3) enjoin performance of

contracts; or (4) appoint a receiver. *See National Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959) (citing cases). None of these or similar exceptions were shown in this case.

It was up to RDI to show an exception to the foregoing rule applies, but it failed to do so. None of the *Adler* examples apply here. While RDI cites cases holding that a corporation may defend itself against threats, AB at 27-28, RDI never explains *how*—if the relief requested by Cotter was awarded—its existence was threatened.

It bears repeating that Cotter Jr. sought damages and injunctive relief ***on behalf of*** RDI. III JA570-572. RDI claims that Cotter Jr.'s complaint asked for a number of measures against it, AB at 27, but fails to cite *where*, in Cotter Jr.'s complaints, such requests may be found. In fact, the only relief sought by Cotter Jr. that even mentioned RDI was ¶ 3(c) of the SAC, which asked both "RDI and the individual defendants to make . . . corrective disclosures . . . in advance of RDI's 2017 [Annual Shareholders' Meeting] . . . ." III JA572 (Prayer for Relief ¶ 3(c) (emphasis added). Such relief hardly poses a threat to the corporation. On the contrary, it is actually proper corporate governance to issue public statements that comport with the facts.

Cotter Jr. also did not ask RDI to terminate or breach any contract. And the T2 Plaintiffs—*not* Cotter Jr.—sought "an order reinstating James J. Cotter, Jr. as the President and CEO of RDI." I JA124 (¶ B(ii)) (T2 Deriv. Compl.). Cotter Jr. asked for an order declaring that the individual directors lacked independence or disinterestedness to vote on his termination and that their vote was invalid. III JA571-572 (SAC ¶ 3(a)).

The likelihood of whether or not a derivative plaintiff can meet the standards of NRS 78.138(7)(b)(2) is irrelevant to the question as to whether RDI was entitled to take on an adversarial role or whether RDI is entitled to costs. AB at 33-34. Thus, there was simply no basis for RDI's frenzied claim that it was "at risk of liability for the relief Cotter Jr. sought." AB at 32.

3. RDI's newest argument also fails.

RDI's latest argument is that the $581,000 cost award can be justified under NRS 18.050, but this statute has no application at all. By its terms, it allows the costs of the prevailing party—here, the costs of the directors—to be apportioned among the parties. But in this case, the directors' costs were "apportioned" to Cotter Jr. only. RDI, a non-

prevailing party, was awarded its own costs, which were also not apportioned among the parties, but to Cotter Jr. alone.

C. The $581,000 costs awarded to RDI were not only excessive but were self-inflicted.

1. RDI should have remained neutral.

Despite the fact that Cotter Jr.'s complaint did not threaten RDI's existence, RDI went far beyond making standing defenses in demand futility motions: It answered complaints; it joined in all directors' six Partial MSJs and Gould's MSJ; it joined in evidentiary motions; its counsel attended all hearings and depositions; and RDI admits that its counsel even prepared the Cotter sisters, who were clearly interested and non-independent, for trial. *E.g.*, II JA397-418; XV JA3704-XVI JA4014; XIX JA4568-4609; XIX JA4736-XX JA4890; XX JA4891-4916, JA4978-4980, JA5025-5027; XXIII JA5718-5792; XXXVII JA9206. Even on appeal, RDI continues to take an adversarial position and incur needless costs: It filed a separate answering brief in an appeal that does not even concern RDI. *See* RDI's Nov. 27 Answering Brief in case 76981, on file.

These partisan efforts on RDI's behalf only confirm the merits of Cotter Jr.'s claims that the SIC and Board were not independent when ratifying the challenged decisions because they were advised by hopelessly

conflicted counsel. RDI's gratuitous briefs also dispel any notion that RDI is concerned with shareholder value: RDI and the directors admitted they blew through the $10 million D&O policy more than a year ago. XXXVI JA9020. RDI's counsel is only further decreasing shareholder value by having its counsel prepare and file redundant appellate briefs in appeals that do not concern it.

RDI points to the fact that it was served with substantial discovery, but it was ***RDI*** that injected itself into the litigation and invited discovery by answering Cotter Jr.'s complaints. II JA397-418. RDI could have, and should have, remained entirely neutral in the process.

RDI's counsel was also not required to attend depositions to preserve RDI's privileges: all directors were represented by able Quinn Emanuel counsel who were obligated to invoke privileges on behalf of the company, where warranted. *See CFTC v. Weintraub*, 471 U.S. 343, 348-49 (1985) ("the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors" who must "exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals").

2. RDI did not apportion its total E-discovery costs.

RDI initially sought $902,016.77 in E-discovery costs. XXXIV JA8431. After being alerted to the fact that its E-discovery costs included costs that pertained to other matters in its cost bill, RDI reduced its demand to $893,849.93. XXXVII JA9136, n.17. The district court awarded approximately half of those costs, because the other half involved non-compensable paralegal-type work. LIII JA13093-13103, JA13172.

However, this reduction still left Cotter Jr. to pay $450,000 for the E-discovery costs of a database that was used for several cases, including (1) an employment arbitration initiated by RDI in 2015 in which Cotter Jr. prevailed, (2) the T2 derivative case; and (3) the trust and estate litigation in California. Contrary to RDI's claim, Cotter *did* provide proof below and again on appeal to show that the database was used for the T2 plaintiffs' case and to respond to their discovery. LII JA12966-13058; OB at 8.

RDI did not apportion the total costs of using the Navigant database between the various cases. Instead it shifted *all* E-discovery costs onto Cotter Jr. who should have been charged no more than a third of RDI's true E-discovery costs; *not* the full $450,000.

There is no analogy between the facts in this case and those in *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1097, 901 P.2d 684, 689 (1995), where, *after a trial*, one defendant prevailed on his defense while the other defendant lost. As the ultimate prevailing parties in the case, the *Semenza* plaintiffs could therefore pass on the costs they had to pay to the prevailing defendant to the losing defendant. Here, by contrast, the directors and the T2 plaintiffs settled *without* either being declared a prevailing party. I RA67-85. And RDI is not a prevailing party as to Cotter Jr. Thus, there is no legitimate basis for RDI to pass on the costs it could not recover against the T2 plaintiffs to Cotter Jr., nor could it pass on other E-discovery costs incurred in other cases serviced by Navigant, such as the cost of setting up the database and uploading all the data.

3. $47,000 in legal research costs incurred by a nominal defendant is excessive.

Given RDI's role as a nominal defendant, it was not entitled to any Westlaw electronic legal research costs in excess of those costs pertaining to standing defenses. RDI never demonstrated the need for Westlaw research in such an excessive amount. The fact that RDI incurred $47,000 for this matter alone is patently excessive, unnecessary, and unreasonable.

III. CONCLUSION

For the reasons stated above and in Cotter Jr.'s Opening Brief, the Court should reverse the $1.5 million Cost Judgment, hold that RDI is not entitled to any costs; and hold that the Cotter directors are not entitled to more than the statutory maximum of $1,500 per expert witness. Alternatively, the Court should reverse and remand the matter to the district court with instructions to further reduce the directors' expert witness fees, RDI's E-discovery fees, RDI's deposition transcript fees, and RDI's legal research fees for the reasons discussed in Cotter Jr.'s briefs.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris (NSB #1543)
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101

Attorneys for Appellant
James J. Cotter, Jr.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **REPLY BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains **5677** words.

3. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied is to be found.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
Steve Morris (NSB #1543)
411 E. Bonneville Ave., Ste. 360
Las Vegas, NV 89101

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Stan Johnson
Cohen-Johnson, LLC
255 East Warm Springs Road, Ste. 110
Las Vegas, Nevada 89119

Christopher Tayback
Marshall Searcy
Quinn Emanuel Urquhart & Sullivan LLP
865 South Figueroa Street, 10th Floor
Los Angeles, CA

Attorneys for Respondents Edward Kane, Douglas McEachern, Judy Codding, Michael Wrotniak and Mary Ann Gould, Executor of William Gould's Estate

Mark Ferrario
Kara Hendricks
Tami Cowden
Greenberg Traurig, LLP
10845 Griffith Peak Drive Suite 600
Las Vegas, Nevada 89135

Attorneys for Nominal Defendant Reading International, Inc.

Dated this 13th day of January 2020.

By: /s/ Patricia A. Quinn