the restaurant.

**Q. What did you say and what did he say?**

A. I told him, We've been down this previous with Jim Junior as CEO. We all wanted him to succeed. We all wanted him to take the reins and lead the company forward but there were glaring deficits. And I recounted to him how we formed this committee, if you will, resolution committee or conflicts committee, of which Tim Storey and Doug McEachern were on for the Cotter siblings to meet and talk. And McEachern told me that was -- didn't work that well.

Then we had Tim Storey acting as Jim Junior's coach. And later Tim Storey was promoted to ombudsman for this position and Tim got very involved in working with Jim Junior and coaching him. And Tim Storey was giving every month, glowing, glowing reports about how good things were going with Jim Junior.

And I disagreed with those reports and I told both Ed Kane on the phone and I told Bill Gould in person when I met him about that. And then I told Bill Gould two concerns that I had. The first concern was at some point, and I don't remember the exact date, it could have been

December, it could have been January, but Jim Junior had an analysis of movie theatres in Australia and New Zealand and their margins in Australia, and movie theatres in the USA, their margins, and there was a gap. I don't remember the precise gap but maybe it was -- the margin gap was maybe 16, 18 percent.

And Junior showed me one time in his office the spreadsheet and said, you know, Look at the gap, This is terrible. If the USA theatres operated there and had the same margins, think what the impact that would be on our earnings, et cetera, et cetera.

So there was a board meeting. I came in early for the board meeting and I went into Junior's office. In the board book, they laid out the margins for Australia and the USA. And if you adjusted the margins for the film rental in the USA compared to the film rental in Australia and New Zealand, two different markets, and you adjusted -- made adjustments for the rental, the lease rentals, it wasn't a 16 or 18 percent gap. It was like a 2 percent gap.

And Jim Junior says, Yeah, well, I don't care about that now. And this was something he was

really concerned about, I mean, for months. And then he said, Well, I'm not worried about that now. I'm concerned about the labor. The labor in Australia and New Zealand is a lot less than labor costs in the US. And I said, Well, I don't know anything about that. You're going to have to look into that.

So that was an hour before the board meeting. We went to the board meeting and Jim Junior brought up to the board this thing about the labor costs. USA theatre labor costs versus Australia and New Zealand labor costs.

And Ellen didn't really have an answer at the time. She -- she said she'd look into it, et cetera. And I thought, okay, we'll get to the bottom of it.

And later that week or the next week or the next week, I saw Andrzej Matyczynski, the ex-CFO of the company, and I said, What is this about the labor cost? Why is the labor cost so high for theaters in Australia and New Zealand -- so low in Australia and New Zealand and so high here? And Andrzej says, Well, that's easy. In the USA they allocate the G and A down to the theatre level so the theatre level labor cost looks high,

and in Australia and New Zealand, they allocate a lot of the labor costs up to G and A so the labor cost looks really low.

And I said, Does Jim Junior know this? He says, Yes, I've told him this before. And I said, We're looking at this and the board's -- he's got the board concerned about this. And Andrzej says, Yeah, I wish you all would have called me in. I could explain that.

So I told Bill Gould that -- the following: I like Jim Junior, I want him to succeed as much as anyone, but it's clear, not understanding the theatre margins, I questioned his knowledge about the business he's managing and his management style of bringing to the board this problem about labor costs.

And he hadn't even, in my opinion, properly investigated that himself. I was forming the opinion or had formed the opinion that he wasn't really learning the business and he wasn't leading us forward. And I told Bill that. I said, We've been working with Jim Junior all these months and I don't see progress.

**Q. When did you tell Mr. Gould that?**

A. At this lunch meeting.

**Q. The lunch meeting in April?**
A. In April, yes.
**Q. And this -- you told him in April about this --**
A. These two examples.
**Q. These two examples that were raised at the board meeting in December of '14 or January of '15?**
A. Yeah.
**Q. And let me be clear. What you just described, was that the two concerns you talked about when you prefaced your lengthy answer?**
MR. TAYBACK: Object to the -- object to the form of the question to the extent it mischaracterizes his testimony.
You can answer.
BY MR. KRUM:
**Q. Let me ask it this way --**
A. That's all --
**Q. -- you used the term "two concerns" that you described to Mr. Gould, or words to that effect.**
A. Yes.
**Q. Is there anything else that falls into the category of two concerns beyond what you just**

**described?**

A. There may have been one more concern that I can recall was about the leadership of the company and working on the budget. And Jim Junior complained that Ellen and Margaret weren't getting their budget in on a timely basis and whatnot.

I explained to Bill Gould that for the CEO, getting the division's budget, that's income they expect to receive and expenses they expect to spend. But the vision of where we're going, how we're going to lead -- where is our CEO leading our company, I said, We haven't heard a whiff of this. And I discussed this with Jim Junior several times over the last three months prior to this, and he said he's working on it. Nobody saw it; nobody heard it.

And I told Bill Gould, you know, To be a CEO, you have to lead. And I thought this was another item that raised my concern. There may have been other items we discussed over lunch regarding this matter but I don't remember them at this time.

**Q. And what did Mr. Gould say at that lunch?**

A. He said -- he agreed with me that Junior wasn't progressing fast. He disagreed with me that

Tim Storey wasn't doing a good job. He thought Tim Storey was doing a great job. He disagreed with me that we should act. He told me let's wait. And I said, Why are we waiting? He said, Well, let the thing be adjudicated and we'll find out how it turns out. And I said, That could take years. I think we need to make a decision what's best for the company now. And he says he wanted to wait. And I said, Bill, you and I have a different opinion about this.

**Q. Did you ever tell Tim Storey you disagreed with his glowing reports about Jim Junior?**

A. Yes.

**Q. When?**

A. It was later on. Probably around March, I would say, at a March meeting that -- along that timeline. I don't remember a specific day. But the --

**Q. Was it at a board meeting?**

A. Yeah, after a board meeting, yes.

**Q. Okay. And what did you say and what did he say, generally?**

A. I said, Tim, I appreciate your efforts. I know you're doing this with the best of

# EXHIBIT 2

(Filed Separately Under Seal)

# Exhibit 3

# Exhibit 3

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc.,<br><br>Plaintiff,<br><br>vs.<br><br>MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive,<br><br>Defendants.<br><br>and<br><br>READING INTERNATIONAL, INC., a Nevada corporation,<br><br>Nominal Defendant. | No. A-15-719860-B<br>Coordinated with:<br>P-14-082942-E |

DEPOSITION OF TIMOTHY STOREY, a defendant herein, noticed by LEWIS ROCA ROTHGERBER CHRISTIE LLP, at 1453 Third Street Promenade, Santa Monica, California, at 9:28 a.m., on Friday, February 12, 2016, before Teckla T. Hollins, CSR 13125.

Job Number 291961

**Q. Now having looking at this document, does that refresh your recollection of whether there was any discussion at the August 4, 2015 board meeting when Ellen announced the members of the search -- CEO search committee of whether there was any question or discussion about whether she was or might be a candidate?**

A. I don't think there was.

**Q. Would you have approved a candidate being a member of a search committee?**

A. No.

**Q. Did you have or do you have any thoughts about whether someone who is an interim CEO might be, likely is, or almost certainly is a candidate?**

MR. SEARCY: Objection. Vague.

MR. RHOW: Join.

THE WITNESS: I didn't have any view around that, I don't think.

MR. KRUM:

**Q. By the way, you recall at the August 4 board meeting, there was a vote with respect to board minutes from meeting in May and June?**

A. Not specifically, no.

**Q. Do you recall a board meeting at which you abstained from the vote to approve board minutes?**

A. Was that -- I thought I was in L.A. for that meeting.

**Q. I believe you were.**

A. Okay. So was I at the meeting at August 4th? Because I assumed I hadn't been.

**Q. Well, you know --**

A. Whichever meeting it was.

**Q. Let me correct it. I do not know whether you were there in person.**

A. I recollect being at a board meeting in L.A., somewhere around here, where the issue of minutes was discussed, I think.

**Q. And what do you recall about that discussion about that issue?**

A. About the minutes? We received a series of draft minutes quite well after the meetings that they referred to, and that they were for discussion, as they usually were. And my view was that it was impossible for me to look at those meetings in detail -- I'm sorry look at those minutes in detail, and make any meaningful comment at the meeting.

I had been told, and it was apparent to me, that the minutes had been carefully prepared and reviewed and they were quite long, and it just seemed to me in the circumstances very difficult for me to make any kind of

meaningful comment around changing them to make them what I thought would accurately reflect of what was said.

**Q. So did you abstain from the vote?**

A. So I abstained.

**Q. We're done with that document. Thank you.**

**Mr. Storey, let me show you what the court reporter has marked as Exhibit 31, and that's a document -- one-page document bearing production number TS 614.**

A. I recognize the document.

(Whereupon the document referred to is marked by the reporter as EXHIBIT 31 for identification.)

MR. KRUM:

**Q. What do you recognize it to be?**

A. It is an e-mail from me to Ellen Cotter, copied to the board, asking for an update on the process to select a CEO.

**Q. So does that reflect that between August 4 and September 9, you'd received no information?**

A. Yes.

**Q. Let me show you what the court reporter has marked as Exhibit 32, a document bearing production numbers TS 615 through 617.**

A. Yes.

(Whereupon the document referred to is marked by

I, Teckla T. Hollins, CSR 13125, do hereby declare:

That, prior to being examined, the witness named in the foregoing deposition was by me duly sworn pursuant to Section 30(f)(1) of the Federal Rules of Civil Procedure and the deposition is a true record of the testimony given by the witness.

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to text under my direction.

____ That the witness was requested to review the transcript and make any changes to the transcript as a result of that review pursuant to Section 30(e) of the Federal Rules of Civil Procedure.

____ No changes have been provided by the witness during the period allowed.

____ The changes made by the witness are appended to the transcript.

____ No request was made that the transcript be reviewed pursuant to Section 30(e) of the Federal Rules of Civil Procedure.

I further declare that I have no interest in the event of the action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

WITNESS my hand this 3rd day of March, 2016.

Teckla T. Hollins, CSR 13125

# Exhibit 4

# Exhibit 4

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Complete caption, next page.

VIDEOTAPED DEPOSITION OF GUY ADAMS

LOS ANGELES, CALIFORNIA

FRIDAY, APRIL 29, 2016

VOLUME II

REPORTED BY: LORI RAYE, CSR NO. 7052

JOB NUMBER 305149

**re-election?**

A. Yes.

**Q. Tell us about those communications, please.**

MR. TAYBACK: Object to the form of the question.

You can answer.

THE WITNESS: She said they would not -- if we nominated him, that she and Margaret would not vote the shares for him to be elected.

BY MR. KRUM:

**Q. And she said that to you and anybody else, or was it just you?**

A. To me before -- in the office, she mentioned that to me.

**Q. What was your response?**

A. Okay.

**Q. So --**

A. I agreed with her.

**Q. You said two or three weeks after the call with Mr. Storey, I believe, that someone suggested a candidate; is that right?**

A. Maybe two, yeah.

**Q. And who suggested who?**

A. I think -- my recollection is, after

Ellen said she had someone in mind, she sent an email with Judy Codding's résumé around for us to speak to and review and consider.

**Q. Between the time the special committee voted unanimously not to nominate Mr. Storey to stand for re-election and the however many weeks later Ellen Cotter sent an email with Judy Codding's résumé, what steps, if any, did the special nominating committee take to identify directorial candidates for the slot that was vacated by the decision not to renominate Mr. Storey?**

MR. TAYBACK: Objection; form and foundation.

THE WITNESS: We talked about if we knew of anyone. I said I didn't know anyone that would serve on the company in these circumstances, being sued, and who's going to ultimately vote the stock and control it. No one would come aboard that I knew.

And Ed Kane said he didn't know anyone. Doug McEachern said he would think about it; he might have an idea or two. And that's where we were. And then Ellen said, I think I have a name of somebody that will serve.

///

BY MR. KRUM:

**Q. Did McEachern ever suggest anyone?**

A. I think -- my recollection is that Judy's name came to us while Doug was in the process.

**Q. So the answer is, you don't think he did because you received a candidate from Ellen?**

A. My answer is, I think he was in the process and he stopped it when he got Judy Codding's résumé.

**Q. Did you have any conversations with either Ed Kane or Doug McEachern about a process or trying to create a process to identify directorial candidates?**

A. Not at the nominating committee meeting, we did not. It was after the nominating committee we said we should consider this in advance and not do this up against a time -- time constraint.

**Q. Well, at the time, the shareholder meeting, annual shareholders meeting had been scheduled; right?**

A. I believe so, yes.

**Q. So as a practical matter, you did have a time constraint, you had to have a nominee to include in the proxy statement; correct?**

A. Yes.

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA )
)SS:
COUNTY OF LOS ANGELES )

I, Lori Raye, a duly commissioned and licensed court reporter for the State of California, do hereby certify:

That I reported the taking of the deposition of the witness, GUY ADAMS, commencing on Friday, April 29, 2016 at 9:10 a.m.;

That prior to being examined, the witness was, by me, placed under oath to testify to the truth; that said deposition was taken down by me stenographically and thereafter transcribed; that said deposition is a complete, true and accurate transcription of said stenographic notes.

I further certify that I am not a relative or an employee of any party to said action, nor in anywise interested in the outcome thereof; that a request has been made to review the transcript.

In witness whereof, I have hereunto subscribed my name this 2nd day of May 2016.

Lori Raye

LORI RAYE
CSR No. 7052

# Exhibit 5

# Exhibit 5

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES COTTER, JR., derivatively on behalf of Reading International, Inc.,
Plaintiff,

vs. Case No.

MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, JUDY CODDING, MICHAEL WROTNIAK, and DOES 1 through 100, inclusive, A-15-719860-B
Defendants.

and

READING INTERNATIONAL, INC., a Nevada corporation,
Nominal Defendant.

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(CAPTION CONTINUED ON NEXT PAGE.)

VIDEOTAPED DEPOSITION OF JAMES COTTER, JR.
Los Angeles, California
Wednesday, July 6, 2016
Volume III

Reported by:
JANICE SCHUTZMAN, CSR No. 9509
Job No. 2343561
Pages 568 - 838

Q. So by the time you were terminated, it's not that -- you had not concluded that it was wasteful for the company to have both Mr. Ellis provide services as a general counsel and Mr. Tompkins to be a consulting lawyer to the company? 11:54AM

A. I do think there's a degree of waste having, again, two high-powered lawyers serving as counsel for the company.

And in fact, in terms of just going back to my testimony, that is one of the things I would have done, to have one general counsel representing the interest of the company, not have two. It just was a recipe for disaster. 11:54AM

Q. And by the time you were terminated, that was something that, even though you thought it was wasteful in your view, you hadn't undertaken to do; correct? 11:55AM

A. Correct. I didn't think it was inappropriate, given the timing and the situation. Had we had different circumstances, I certainly would have taken that ac- -- that step. 11:55AM

Q. One of the things you said that you wouldn't -- would not have done is delay -- or use outside lawyers to draft the minutes of board 11:55AM

meetings and delay in their dissemination, and you also said include fabricated information.

What information do you believe reflected in the company's board minutes has been fabricated?

MR. KRUM: Object to the characterization of the testimony. 11:56AM

THE WITNESS: I mean, there were examples of draft minutes that were prepared by Bill Ellis, who was functioning as corporate secretary, and in the first draft he had a set of minutes. 11:56AM

And once it goes to Akin Gump, who was representing the company or Ellen in terms of the -- in terms of my termination, and to Greenberg Traurig, the minutes evolve into minutes that I don't recognize and actions taken in the minutes that I didn't believe reflected what actually happened but that substantiated the positions that Ellen and the company wanted to take. 11:57AM

BY MR. TAYBACK:

Q. And can you think of a single specific statement that you recall seeing in a board minute that you say, that's just false, that's untrue? 11:57AM

A. There were a number of examples that I had related to the company with a number of the minutes.

Q. And when --

A. So I can't tell you today specifically the examples.

Q. When you say "related to the company," you mean in written correspondence; correct?

You said you objected to the minutes in some written form. 11:57AM

A. I think there were examples where I had. I had also objected orally at the meetings, saying these things didn't occur.

Like for example, I think we had discussed at the last deposition where Ellen had said, hey, let's move item No. 10 to item No. 1, and that was just one example of something that did not occur. 11:58AM

Q. And when you made objections orally at the -- to the minutes at the meeting at which those minutes were presented, in fact, your objection was recorded in the minutes; correct? 11:58AM

MR. KRUM: Objection, the document speaks for itself.

You can answer if you know. 11:58AM

THE WITNESS: I can't specifically recall.

BY MR. TAYBACK:

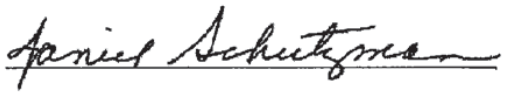
Q. Did you ever have your counsel draft any letters to the company objecting to the minutes that were being disseminated? 11:58AM

I, JANICE SCHUTZMAN, Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that the testimony of the witness and all objections made by counsel at the time of the examination were recorded stenographically by me, and were thereafter transcribed under my direction and supervision; and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney or any of the parties.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of July, 2016.



JANICE SCHUTZMAN

CSR No. 9509

# Exhibit 6

# Exhibit 6

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc.,<br><br>Plaintiff,<br><br>vs.<br><br>MARGARET COTTER, ELLEN COTTER, GUY ADAMS, EDWARD KANE, DOUGLAS McEACHERN, TIMOTHY STOREY, WILLIAM GOULD, and DOES 1 through 100, inclusive,<br><br>Defendants.<br><br>and<br><br>READING INTERNATIONAL, INC., a Nevada corporation,<br><br>Nominal Defendant. | No. A-15-719860-B<br>Coordinated with:<br>P-14-082942-E |

DEPOSITION OF TIMOTHY STOREY, a defendant herein, noticed by LEWIS ROCA ROTHGERBER CHRISTIE LLP, at 1453 Third Street Promenade, Santa Monica, California, at 9:28 a.m., on Friday, February 12, 2016, before Teckla T. Hollins, CSR 13125.

Job Number 291961

**Q. Now having looking at this document, does that refresh your recollection of whether there was any discussion at the August 4, 2015 board meeting when Ellen announced the members of the search -- CEO search committee of whether there was any question or discussion about whether she was or might be a candidate?**

A. I don't think there was.

**Q. Would you have approved a candidate being a member of a search committee?**

A. No.

**Q. Did you have or do you have any thoughts about whether someone who is an interim CEO might be, likely is, or almost certainly is a candidate?**

MR. SEARCY: Objection. Vague.

MR. RHOW: Join.

THE WITNESS: I didn't have any view around that, I don't think.

MR. KRUM:

**Q. By the way, you recall at the August 4 board meeting, there was a vote with respect to board minutes from meeting in May and June?**

A. Not specifically, no.

**Q. Do you recall a board meeting at which you abstained from the vote to approve board minutes?**

A. Was that -- I thought I was in L.A. for that meeting.

**Q. I believe you were.**

A. Okay. So was I at the meeting at August 4th? Because I assumed I hadn't been.

**Q. Well, you know --**

A. Whichever meeting it was.

**Q. Let me correct it. I do not know whether you were there in person.**

A. I recollect being at a board meeting in L.A., somewhere around here, where the issue of minutes was discussed, I think.

**Q. And what do you recall about that discussion about that issue?**

A. About the minutes? We received a series of draft minutes quite well after the meetings that they referred to, and that they were for discussion, as they usually were. And my view was that it was impossible for me to look at those meetings in detail -- I'm sorry look at those minutes in detail, and make any meaningful comment at the meeting.

I had been told, and it was apparent to me, that the minutes had been carefully prepared and reviewed and they were quite long, and it just seemed to me in the circumstances very difficult for me to make any kind of

meaningful comment around changing them to make them what I thought would accurately reflect of what was said.

**Q. So did you abstain from the vote?**

A. So I abstained.

**Q. We're done with that document. Thank you.**

**Mr. Storey, let me show you what the court reporter has marked as Exhibit 31, and that's a document -- one-page document bearing production number TS 614.**

A. I recognize the document.

(Whereupon the document referred to is marked by the reporter as EXHIBIT 31 for identification.)

MR. KRUM:

**Q. What do you recognize it to be?**

A. It is an e-mail from me to Ellen Cotter, copied to the board, asking for an update on the process to select a CEO.

**Q. So does that reflect that between August 4 and September 9, you'd received no information?**

A. Yes.

**Q. Let me show you what the court reporter has marked as Exhibit 32, a document bearing production numbers TS 615 through 617.**

A. Yes.

(Whereupon the document referred to is marked by

# EXHIBIT 7

(Filed Separately Under Seal)

# Exhibit 8

# Exhibit 8

DISTRICT COURT

CLARK COUNTY, NEVADA

| | |
|---|---|
| JAMES J. COTTER, JR., individually and derivatively on behalf of Reading International, Inc., Plaintiff, vs. MARGARET COTTER, et al., Defendants. and READING INTERNATIONAL, INC., a Nevada corporation, Nominal Defendant | Case No. A-15-719860-B<br>Coordinated with:<br>Case No. P-14-082942-E |

VIDEOTAPED DEPOSITION OF ROBERT MAYES

TAKEN ON THURSDAY, AUGUST 18, 2016

REPORTED BY:

PATRICIA L. HUBBARD, CSR #3400
Job No.: 331292

**particular candidate?**

A. There was a general consensus toward -- toward one -- one candidate in particular. But there was not -- the feedback from the board was, you know, "Now we think we might need more operating company experience." There was a shift.

**Q. Do you recall whether Korn Ferry recommended Ellen Cotter for further assessment along with any other candidates?**

A. We did -- we rec- -- we encouraged Craig Tomkins to run Ellen through the assessment process.

**Q. Okay.**

MS. LINDSAY: Can you please mark this as 422.

(Whereupon the document referred to was marked Defendants' Exhibit 422 by the Certified Shorthand Reporter and is attached hereto.)

BY MS. LINDSAY:

**Q. Do you recognize Exhibit 422?**

A. Yes.

**Q. What is it?**

A. It is a candidate report.

**Q. For Ellen Cotter?**

A. Correct.

**Q. And what did you do to prepare this candidate report, if you prepared it?**

A. We did this at the behest of, I believe, Craig Tomkins and formulated a resume from the internet, did some basic internet research, and then I wrote a brief assessment -- well, it's not an assessment. I wrote a brief overview of her candidacy based on my interaction with her as a search committee member.

**Q. So it was based partially on your opinion of her?**

A. Yeah. Starting with the professional attributes on page three.

**Q. Do you recall when this candidate report was prepared?**

A. I think it was just after the new year.

MR. KRUM: Excuse me. Taking Kara's line here, does this document have a production number?

MS. LINDSAY: It was produced by Korn Ferry.

MR. KRUM: Okay. Thanks.

BY MS. LINDSAY:

**Q. Directing your attention to -- I'm done**

REPORTER'S CERTIFICATE

I, PATRICIA L. HUBBARD, do hereby certify:

That I am a duly qualified Certified Shorthand Reporter in and for the State of California, holder of Certificate Number 3400, which is in full force and effect, and that I am authorized to administer oaths and affirmations;

That the foregoing deposition testimony of the herein named witness, to wit, ROBERT MAYES, was taken before me at the time and place herein set forth;

That prior to being examined, ROBERT MAYES was duly sworn or affirmed by me to testify the truth, the whole truth, and nothing but the truth;

That the testimony of the witness and all objections made at the time of examination were recorded stenographically by me and were thereafter transcribed by me or under my direction and supervision;

That the foregoing pages contain a full, true and accurate record of the proceedings and testimony to the best of my skill and ability;

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the outcome of this action.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of August, 2016.

Patricia L. Hubbard

PATRICIA L. HUBBARD, CSR #3400

# EXHIBIT 9

(Filed Separately Under Seal)

# Exhibit 10

# Exhibit 10

8-K 1 rdi-20150618x8k.htm 8-K

**UNITED STATES**
**SECURITIES AND EXCHANGE COMMISSION**
**Washington, D.C. 20549**

# FORM 8-K

Current Report
Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of Earliest Event Reported): June 12, 2015

READING INTERNATIONAL, INC.
(Exact Name of Registrant as Specified in its Charter)

Nevada
(State or Other Jurisdiction of Incorporation)

| 1-8625 | 95-3885184 |
|---|---|
| (Commission File Number) | (I.R.S. Employer Identification No.) |
| 6100 Center Drive<br>Suite 900<br>Los Angeles, California | 90045 |
| (Address of Principal Executive Offices) | (Zip Code) |

(213) 235-2240
(Registrant's Telephone Number, Including Area Code)

n/a
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425).

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12).

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b)).

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c)).

EXH 347
DATE 6-28-16
WIT Ellis
PATRICIA HUBBARD

**ITEM 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers**

On June 12, 2015, the board of directors (the "Board") of Reading International, Inc. ("we," "our," "us," "Reading" or the "company") terminated the employment of James J. Cotter, Jr. as our President and Chief Executive Officer, effective immediately. The Company currently intends to engage the assistance of a leading executive search firm to identify a permanent President and Chief Executive Officer, which will consider both internal and external candidates.

On June 12, 2015, our Board appointed Ellen Marie Cotter, 49, Chairperson of the Board and the Chief Operating Officer of our Domestic Cinemas Division, to serve as our interim President and Chief Executive Officer. No new compensatory arrangements were entered into with Ms. Cotter in connection with her appointment as interim President and Chief Executive Officer.

Ellen Cotter has been a member of the Board since March 7, 2013, and on August 7, 2014 was appointed as its Chairperson. Prior to joining our company in 1998, Ms. Cotter spent four years in private practice as a corporate attorney with the law firm of White & Case in Manhattan. She is a graduate of Smith College and holds a Juris Doctorate from Georgetown Law School. Ms. Cotter is the sister of James J. Cotter, Jr. and Margaret Cotter.

Under Mr. Cotter, Jr.'s employment agreement with the company, he is entitled to the compensation and benefits he was receiving at the time of a termination without cause for a period of twelve months from notice of termination. At the time of termination, Mr. Cotter Jr.'s annual salary was $335,000.

Under his employment agreement, Mr. Cotter, Jr. is required to tender his resignation as a director of our company immediately upon the termination of his employment. After a request to do so, Mr. Cotter, Jr. has not yet tendered his resignation. The company considers such refusal as a material breach of Mr. Cotter, Jr.'s employment agreement, and has given him thirty (30) days in which to resign. If he does not do so, the company will terminate further severance payments, as permitted under the employment agreement.

No new compensatory arrangements were entered into with Mr. Cotter, Jr. in connection with his termination.

**ITEM 8.01 OTHER EVENTS**

On June 12, 2015, Mr. Cotter, Jr. filed a lawsuit against us and each of our other directors in the District Court of the State of Nevada for Clark County, titled James J. Cotter, Jr., individually and derivatively on behalf of Reading International, Inc. vs. Margaret Cotter, et. al. The lawsuit alleges, among other allegations, that the other directors breached their fiduciary duties in taking the actions to terminate Mr. Cotter, Jr. as President and Chief Executive Officer of the company and that

Margaret Cotter and Ellen Cotter aided and abetted the breach of such fiduciary duties of the other directors. The lawsuit seeks damages and other relief, including an injunctive order restraining and enjoining the defendants from taking further action to effectuate or implement the termination of Mr. Cotter, Jr. as President and Chief Executive Officer of the company and a determination that Mr. Cotter, Jr.'s termination as President and Chief Executive Officer is legally ineffectual and of no force or effect. The company believes that numerous of the factual allegations included in the complaint are inaccurate and untrue and intends to vigorously defend against the claims in this action. The company has been informed that the other directors intend to seek indemnification from the Company for any losses arising under the lawsuit, in which case the company will tender a claim under its director and officers liability insurance policy.

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EX-99.1 2 rdi-20150618ex991400879.htm EX-99.1

**ITEM 9.01 FINANCIAL STATEMENTS AND EXHIBITS**

(d) The following exhibit is included with this Report and incorporated herein by reference:

| Exhibit No. | Description |
|---|---|
| 99.1 | Press release of Reading International, Inc. of June 15, 2015 |

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this Report to be signed on its behalf by the undersigned, thereunto duly authorized.

Dated: June 18, 2015

READING INTERNATIONAL, INC.

By: /s/ William D. Ellis

William D. Ellis

General Counsel and Secretary

Exhibit 99.1

# Reading International Announces Appointment of Ellen Cotter as Interim Chief Executive Officer

**Los Angeles, California, (Business Wire) June 15, 2015** – Reading International, Inc. (NASDAQ:RDI) announced today that its Board of Directors has appointed Ellen M. Cotter as interim President and Chief Executive Officer, succeeding James J. Cotter. Jr. The Company currently intends to engage the assistance of a leading executive search firm to identify a permanent President and Chief Executive Officer, which will consider both internal and external candidates.

Ms. Cotter is the Chairman of the Board of Directors of the Company and has served as the senior operating officer of the Company's US cinemas operations for the past 14 years. In addition, Ms. Cotter is a significant stockholder in the Company.

Ms. Cotter commented, "James Cotter, Sr., who served as our Company's Chairman and Chief Executive Officer for over 20 years, grew Reading International, Inc. to a major international developer and operator of multiplex cinemas, live theaters and other commercial real estate assets. I look forward to continuing his vision and commitment to these businesses as we move forward to conduct our search for our next Chief Executive Officer. I will work diligently to ensure that this transition is seamless to all of our stakeholders."

The Company plans to report its second quarter financial results on or before August 10, 2015.

**About Ellen Cotter**
Ellen M. Cotter has been a member of our Company's Board of Directors since March 2013, and in August 2014 was appointed as Chairman of the Board. She joined Reading International, Inc. in 1998 and brings to the position her 17 years of experience working in our Company's cinema operations, both in the United States and Australia. For the past 14 years, she has served as the senior operating officer of our Company's domestic cinema operations. Ms. Cotter is a graduate of Smith College and holds a Juris Doctorate from Georgetown Law School. Prior to joining our Company, Ms. Cotter was a corporate attorney with the law firm of White & Case in New York, New York.

**About Reading International, Inc.**
Reading International (http://www.readingrdi.com) is in the business of owning and operating cinemas and developing, owning and operating real estate assets. Our business consists primarily of:

- the development, ownership and operation of multiplex cinemas in the United States, Australia and New Zealand; and
- the development, ownership, and operation of retail and commercial real estate in Australia, New Zealand, and the United States, including entertainment-themed retail centers ("ETRC") in Australia and New Zealand and live theater assets in Manhattan and Chicago in the United States.

Reading manages its worldwide business under various different brands:

Exhibit 99.1

- in the United States, under the
  - o Reading brand (http://www.readingcinemasus.com);
  - o Angelika Film Center brand (http://www.angelikafilmcenter.com);
  - o Consolidated Theatres brand (http://www.consolidatedtheatres.com);
  - o City Cinemas brand (http://www.citycinemas.com);
  - o Beekman Theatre brand (http://www.beekmantheatre.com);
  - o The Paris Theatre brand (http://www.theparistheatre.com);
  - o Liberty Theatres brand (http://libertytheatresusa.com/); and
  - o Village East Cinema brand (http://villageeastcinema.com)

- in Australia, under the
  - o Reading brand (http://www.readingcinemas.com.au); and
  - o Newmarket brand (http://readingnewmarket.com.au)
  - o Red Yard Entertainment Centre (http://www.redyard.com.au)

- in New Zealand, under the
  - o Reading brand (http://www.readingcinemas.co.nz);
  - o Rialto brand (http://www.rialto.co.nz);
  - o Reading Properties brand (http://readingproperties.co.nz);
  - o Courtenay Central brand (http://www.readingcourtenay.co.nz);
  - o Steer n' Beer restaurant brand (http://steernbeer.co.nz);

Media Contact:
Andrzej Matyczynski
Tel: 213-235-2240

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# Exhibit 11

# Exhibit 11

| | |
|---|---|
| **From:** | Susan Villeda |
| **Sent:** | Monday, January 11, 2016 2:06 PM |
| **To:** | US Cinema General Managers; US Projectionists; MarketingGroup; Rod Tengan; Jennifer Deering; ccm@readingcinemas.com.au; ccm@readingcinemas.co.nz; cinemas@readingcinemas.com.au; cinemas@readingcinemas.co.nz; Ellen Cotter; Margaret Cotter; James Cotter (jcotterprivate@gmail.com); Guy Adams; Kane; M.Wrotniak@Aminco.biz; judycodding@gmail.com; 'McEachern, Doug (US - Retired)'; Andrzej Matyczynski; Craig Tompkins; Crystal Huang; Dev Ghose; Doug Hawkins; Erin Shull; Gabriela Sanchez; Gilbert Avanes; John Goeddel; John Sittig; Jorge E. Alvarez; Josie M. Castilho; Ken Gillich; Ken Lee; Kenneth Tucker; Kristine Ngo; Laura Batista; Marcelo Axarlian; Mike Conroy; Robert Carnatz; Susan Villeda; Tara King; Terri Moore; Toni Camacho; Victor Albizures; William Boggan; William Ellis; Andrew Smoker; Denise Hughes; Kate Bost; Kelley Anderson; Linda Hogarty; Rita Samlalsingh; Robert Smerling; Scott Rosemann; Woody Brunson; Ben Deighton; David Orbach; Dominica Walsh; Grace Donald; Jason Griffiths; John Cerrone; Kevin Rispin; Kim Olney; Mark Douglas; Martin Appleby; Matthew Bourke; Ryan Fox; Shane McLaren (Cinema); Wayne Smith; Ajay Ranchord; Anita Parsot; Chris Owen; Colin Urquhart; David O'Hagan; Dawn Logan; Freeman Tong; Ginny Seo; Hadyn Bell-Norris; Jennifer Acabado; Joanne Robinson; Jonathan Rowe; Jonathan Tay; Katie Park; Lindsey Tang; Maria Florendo; Mark Kendrick; Michelle Lai; Paul Mansfield; Ricky Pillai; Robert Provoost; Ryan Santoso; Sarah Carpenter; Sonia Smith; Steve Lucas |
| **Cc:** | 'wgould@troygould.com' |
| **Subject:** | Appointment of President and Chief Executive Officer |
| **Attachments:** | image001.jpg; Letter from Bill Gould to Employees re Appointment of President and CEO dtd 1-11-2016.pdf |

Reading Directors, Management and Employees,

Sent on behalf of William D. Gould, the Company's Lead Independent Director, please see the attached letter regarding the Appointment of Ellen M. Cotter as the Company's President and Chief Executive Officer.

Regards,
**Susan Villeda**
**Executive Assistant to CFO**
6100 Center Drive, Suite 900, Los Angeles, CA 90045
O: (213) 235-2245 | F: (213) 235-2229
E: susan.villeda@readingrdi.com

EXH 390
DATE 6-29-16
WIT Gould
PATRICIA HUBBARD

READING
INTERNATIONAL

RDI0042976

058

READING
INTERNATIONAL

January 11, 2018

**Re: Appointment of President & CEO**

Ladies & Gentlemen:

I am very happy to announce, on behalf of the Board of Directors of Reading International, that Ellen Cotter has been appointed as our Company's permanent President and Chief Executive Officer.

Ellen has been a part of our Company for 18 years, and has served as the senior operating officer of our Company's domestic cinema operations for more than a decade. She spent a year on our behalf in Australia helping us acquire what are now some of our key assets in that country. And, since June 12, 2015, she has served as our Company's interim Chief Executive Officer.

Ellen is well known and respected in the cinema business. In 2015, Ellen was awarded a Gotham Award at the Independent Filmmaker Project Gotham Awards for her contributions to the independent film industry. She was also inducted into the ShowEast Hall of Fame.

Additionally, while serving as COO of our domestic cinemas, Ellen gained substantial hands-on real estate experience, dealing with landlords and developers while expanding our domestic cinema chain.

Over the past six months, she has effectively managed the disparate elements of our multi-national company, displaying her leadership and commitment to Reading. Furthermore, as a result of her sizable equity interest in our Company, her interests and those of our stockholders are well-aligned. Reading is her passion and her life. She is, in the view of the Board, clearly the best person to take on the duties and responsibilities of our Company's President and Chief Executive Officer.

Please join me in congratulating Ellen on her appointment.

Best,

Bill Gould
Lead Director

Reading International, Inc.
6100 Center Drive, Suite 900
Los Angeles, California 90045

t: 213.235.2240 f: 213.235.2229



www.readingrdi.com

# EXHIBIT 12

(Filed Separately Under Seal)

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CLERK OF THE COURT

RPLY
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Attorneys for Defendants Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, and Edward Kane

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

Case No.: A-15-719860-B
Dept. No.: XI

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

Related and Coordinated Cases

**BUSINESS COURT**

**INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (NO. 1) ON PLAINTIFF'S TERMINATION AND REINSTATEMENT CLAIMS**

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: October 27, 2016
Time of Hearing: 1:00 p.m.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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**Cases**

**Other Authorities**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

As a matter of law and undisputed facts, the Individual Defendants are entitled to summary judgment on Plaintiff's claims arising from his termination as President and CEO of Reading International, Inc. ("RDI" or "the Company").

First, there is no basis in law or fact to find that the termination of Plaintiff as an officer was, or could have been, a breach of fiduciary duty. Plaintiff has not identified a single case in any jurisdiction—let alone Nevada—in which a board's decision to terminate an officer was subjected to any "fairness" review, or in which the firing of an officer has ever been determined to be a breach of fiduciary duty, or in which a former CEO has been reinstated as a remedy for a purported breach of fiduciary duty. There are no such cases. To the contrary, courts uniformly bar breach of fiduciary duty claims against directors arising from their decision to terminate an officer—even where, as here, those claims were asserted by the officer and stockholders. Their reasoning is clear: *the termination of an executive by a board is a purely operational decision that does not implicate its fiduciary duties*. Thus, Nevada's corporate statutes vest broad discretion in RDI's Board to determine the course of the Company, and allow "removal before the expiration" of an officer's term whenever "prescribed by the bylaws." NRS 78.130(3)-(4). RDI's Bylaws, which are the contract between its stockholders, similarly provide that Plaintiff could "be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the entire Board at any meeting thereof." Indeed, Nevada law provides for broad application of the business judgment rule to all business matters, such as decisions on hiring and firing of executives. NRS 78.138(3). Not surprisingly, Plaintiff has simply avoided Nevada law, RDI's Bylaws, and the majority vote of the entire Board in favor of his removal in both his motion and opposition on the issue of his termination. The law and undisputed facts are fatal to his claims.

Second, even assuming the termination of an executive could be actionable as a breach of directors' fiduciary duties in Nevada (even under the law as Plaintiff wishes it was), Plaintiff has woefully failed to establish the elements of such a claim. Although there is no basis for

evaluating the "fairness" of the process of the decision to terminate, the undisputed evidence compels a conclusion it was fair—to RDI foremost (the actual "derivative plaintiff"), *cf.* NRS 78.140(2)(d) (Nevada's only "fairness" test, which analyzes whether an interested director transaction was "fair to the corporation" before potentially voiding it), but also to Plaintiff. After a period of difficult and abrasive management requiring extensive intervention by Board members (individually and collectively), the Board made a decision after extensive debate and with Board members (now Defendants) freely voting on each side. In an act of classic fairness (and consistent with RDI's Bylaws), the majority ruled—and decided—to terminate Plaintiff. These same undisputed facts establish that, even if there was a fiduciary breach stemming from the Board's decision, the Individual Defendants would not be liable because there is *no evidence* that the breach involved "intentional misconduct, fraud or a knowing violation of law," as required by NRS 78.138(7). Finally, Plaintiff has proffered no evidence of damages to RDI or proximate causation. Indeed, to the extent his "damages" consist of the fact of termination and he seeks reinstatement, such a remedy is unavailable.

Third, even if the termination of an employee could theoretically constitute the breach of a fiduciary duty (which it cannot), and Plaintiff could establish the required elements of such a claim (which he cannot), Plaintiff lacks standing to derivatively assert breach of fiduciary duty claims against the director Defendants arising from his termination. After over a year of discovery, he has failed to identify a single stockholder of RDI (other than himself) that supports his wrongful termination claims and demand for reinstatement. Plaintiff's pursuit of a purely personal claim makes him inadequate to sue derivatively on the claim.

With no legal or factual support for Plaintiff's termination claims and reinstatement demand, the Individual Defendants are entitled to summary judgment.

## II. ARGUMENT

### A. Plaintiff's Termination Cannot Support a Breach of Fiduciary Duty Claim

Despite 50 pages of briefing, Plaintiff has failed to come forward with evidence to establish disputed facts supporting his claim. Moreover, he cites no law to support a breach of

fiduciary duty claim arising from an executive's termination. Plaintiff does not identify any case, anywhere, that has recognized the viability of such a claim.[1] Indeed, the law and facts belie such a claim. As the Individual Defendants argued in their opening brief, Plaintiff cannot assert a viable breach of fiduciary duty claim arising from his termination given RDI's clear Bylaws and the broad latitude afforded decisions by a board of directors under Nevada law. (Defs.' MSJ No. 1 at 14-17.) Plaintiff, in both his motion and his opposition, has *entirely ignored this issue*, which is dispositive of his termination claim and reinstatement demand.

Plaintiff does not dispute that a Nevada corporation is a product of statutory and contract law. The statute is NRS Chapter 78: Private Corporations. The charter and bylaws are the contracts among the stockholders of a corporation. *See* NRS 78.060, 78.120, 78.135; *see also Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990) (same). "[U]nder Nevada's corporations laws, a corporation's board of directors has full control over the affairs of the corporation." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632 (2006) (citation and internal quotation marks omitted); *see also* NRS 78.120(1) ("Subject only to such limitations as may be provided by this chapter, or the articles of the corporation, the board of directors has full control over the affairs of the corporation.").

Under Nevada law—ignored by Plaintiff—corporate officers such as a CEO or President have no vested right to remain in their position. Rather, officers serve only "for such terms and have such powers and duties as may be prescribed by the bylaws or determined by the board of directors," and an officer may be subject to "removal before the expiration of his or her term." NRS 78.130(3)-(4). RDI's Bylaws mirror NRS 78.130, and expressly provide that Plaintiff served solely "at the pleasure of the Board of Directors," such that he could "be removed at any time, with or without cause, by the Board of Directors by a vote of not less than a majority of the

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[1] As noted in the Individual Defendants' opposition, Plaintiff relies entirely on Delaware authority about general fiduciary duties arising under Delaware law, and inferences drawn from Delaware cases addressing where a board is alleged to have breached its duties when faced with a corporate merger or sale, or where there is an accusation that corporate assets have been misused. Noticeably absent is any case law in which the termination of an officer's employment is the subject of a fiduciary duty claim. (Defs.' Opp'n at 14 (collecting cases cited by Plaintiff).)

entire Board at any meeting thereof." (HD#1 Ex. 19 Art. IV § 10.)[2] Not surprisingly, Plaintiff's Employment Contract was consistent with RDI's Bylaws, as it similarly recognized that the Board had an undiminished right to terminate him "with cause," in which event he was owed no relief, or "without cause," in which case he was due a specified sum. (HD#1 Ex. 20 § 10.)

Plaintiff makes no showing how the Individual Defendants breached a contract with RDI's stockholders and abrogated any of their fiduciary duties if the Company's Bylaws and his employment contract *specifically allowed the Board to terminate Plaintiff at any time, for any reason, and a majority of the entire Board voted to do so*—which is what indisputably occurred.[3] Indeed, numerous courts have held that a plaintiff cannot use "an appeal to general fiduciary law" to transform a case involving the dismissal of an officer into a claim that a company's directors "breached a fiduciary duty as corporate officers," and have found arguments identical to those asserted by Plaintiff to be "novel" and with "no case in support." (*See* Defs.' MSJ No. 1 at 14-16 (collecting cases).) In short, a board's decision to fire (or hire) an officer is an operational function that does not implicate its fiduciary duties.

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[2] Citations to "HD#1" refer to exhibits attached to the Declaration of Noah S. Helpern in Support of the Individual Defendants' Motion for Summary Judgment No. 1; citations to "HD#2" refer to exhibits attached to the Helpern Declaration in Support of the Individual Defendants' Motion for Summary Judgment No. 2; and citations to "HDO" refer to any new exhibits attached to the Helpern Declaration in Support of the Individual Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment. Any exhibits cited by Plaintiff in his opposition but not already included in the Individual Defendants' previous filings will be referred to using Plaintiff's "Appendix." No new factual evidence is attached to this reply brief.

[3] The Board's January 15, 2015 resolution—in which all five non-Cotter directors agreed that in order to terminate "the CEO" (and/or Ellen and Margaret Cotter), a majority of the *non-Cotter* directors would be required to vote in favor of doing so—is beside the point. Not only is it black-letter law that bylaws trump board resolutions, *see* 18A Am. Jur. 2d *Corporations* § 253 (2016), a majority of the non-Cotter directors in fact voted to remove Plaintiff as RDI's CEO and President. Although that should be the end of the issue, as explained in the briefing relating to the Individual Defendants' Motion for Summary Judgment (No. 2) re: the Issue of Director Independence, each of these non-Cotter directors also were disinterested in the decision before them and therefore "independent." Indeed, directors voted on both sides of the issue, remained directors for some time thereafter (and Mr. Gould even to the present), and nonetheless are Defendants in this lawsuit.

Rather than attempting to distinguish these decisions (which he cannot, because they also address situations in which the plaintiff was both an officer and a stockholder, as here), Plaintiff's only response is "[t]his is a different version of the same argument the Court rejected previously in denying the motion to stay this case and compel arbitration." (Pl.'s Opp'n at 18; *see also id.* at 24-25 (same).) Not so. Plaintiff's argument misrepresents the issues involved in RDI's Motion to Compel Arbitration, and the Court's denial thereof. That motion was predicated on RDI's argument that "the Employment Agreement is a valid and existing contract with an agreement to arbitrate disputes thereunder, and all of Mr. Cotter's claims arise from or relate to the Employment Agreement." (RDI's Mot. to Compel Arbitration (Aug. 10, 2015) at 5.) In denying RDI's motion, the Court merely recognized that, to the extent that Plaintiff may have derivative claims as an RDI stockholder, rather than as an employee, they do not "arise from or relate to" his Employment Contract and are thus not issues subject to arbitration. (*See* Sept. 1, 2015 Hr'g Tr. at 9:21-10:1 ("While the issue related to employment is a factor important to both Mr. Cotter and the Intervenors, it does not preclude them from pursuing this litigation, rather than going through arbitration, for preservation of their rights as shareholders.").

That Plaintiff's alleged derivative claims fall outside the corners of his Employment Contract is a far different issue than whether the causes of action he asserts as a stockholder are actually valid as a matter of law. With respect to his termination claim, they are not—based on the law of ***every*** jurisdiction to consider it. *See, e.g.*, *Berman v. Physical Med. Ass'n, Ltd.*, 225 F.3d 429, 433 (4th Cir. 2000) (affirming dismissal of fiduciary duty claim that directors did not follow fair procedures in deciding to terminate stockholder/doctor's employment because "any injury caused by the termination decision itself would be an injury to his interests as an employee, not as a stockholder"); *In re Eagle Corp.*, 484 B.R. at 654 (a stockholder "who is also an employee cannot recover on a breach of fiduciary duty claim when the claim is grounded solely in an employment dispute"); *Wall St. Sys., Inc. v. Lemence*, No. 04 Civ. 5299, 2005 WL 2143330, at *8 (S.D.N.Y. Sept. 2, 2005) (dismissing third-party claims against directors because "they are essentially employment disputes that cannot sustain a claim of fiduciary breach under Delaware law"); *Dweck v. Nassar*, No. 1353-N, 2005 WL 5756499, at *5 (Del. Ch. Nov. 23,

2005) ("[the shareholder's] allegations of wrongdoing in connection with her termination as President and CEO" by the Board of Directors "are insufficient to support a claim for breach of fiduciary duty"); *Nahass v. Harrison*, C.A. No. 15-12354, 2016 WL 4771059, at *6 (D. Mass. Sept. 13, 2016) (terminated officer could not maintain a breach of fiduciary duty claim where his termination was authorized under "the Bylaws"); *In re Eagle Corp.*, 484 B.R. 640, 654 (Bankr. D.N.J. 2012) (removal of officer and director could not be a breach of fiduciary duty where "Delaware General Corporation Law provides for removal . . . with or without cause"); *Goldstein v. Lincoln Nat'l Convertible Sec. Fund, Inc.*, 140 F. Supp. 2d 424, 438 (E.D. Pa. 2001) (plaintiff could not maintain fiduciary duty claim "[g]iven the express statutory authorization for the Board's action"), *vacated on other grounds*, 2003 WL 1846095 (3d Cir. Apr. 2, 2003); *Quadrant Structured Prod. Co., Ltd. v. Vertin*, C.A. No. 6990-VCL, 2014 WL 5465535, at *3 (Del. Ch. Oct. 28, 2014) (dismissing action where the "governing documents authorized" the challenged "strategy"); *see also* 2 Fletcher Cyc. Corp. § 363 (2015) ("where a bylaw provided that any officer might be removed by a majority vote of the entire board whenever the best interests of the company require it, it was for the directors to determine what was in the best interests of the company; the courts will not interfere unless for fraud or illegality").

Plaintiff cannot distinguish or avoid this authority. In fact, even "under Delaware law," which Plaintiff maintains is the "persuasive authority" on which he relies (Pl.'s Mot. at 22 n.6), courts are emphatic that "there can be no breach of fiduciary duty stemming from the termination of [an officer's] employment." *Kasper v. LinuxMall.com, Inc.*, No. Civ. A. 00-2019, 2001 WL 230494, at *3 (D. Minn. Feb. 23, 2001) (applying Delaware law in termination of president); *see also Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39-40 (Del. 1996) (no breach of fiduciary duty where stockholder/plaintiff was "an employee of the corporation under an employment contract with respect to issues involving that employment"). Simply put, his claim is meritless.

### B. Even If the Termination of an Employee Could Constitute a Breach of Fiduciary Duty, Plaintiff's Claims Fail as a Matter of Law

Even assuming *arguendo* that the termination of an employee could *ever* support a breach of fiduciary duty claim in Nevada, Plaintiff cannot establish an actionable breach of fiduciary in

this case with respect to the Board's termination decision because (1) the Board's decision was protected by the business judgment rule, which always applies to employment decisions under Nevada law; (2) the decision to terminate Plaintiff based on the undisputed facts was fair to the Company and its stockholders (and, although irrelevant for these claims under Nevada law, fair to Plaintiff); (3) Plaintiff cannot show that the Board's termination decision involved "intentional misconduct, fraud, or a knowing violation of the law," as is required for individual liability under Nevada law; and (4) Plaintiff has no evidence of any damages to RDI proximately caused by his termination.

**1. Under Nevada Law, the Business Judgment Rule Applies in the Context of an Employee Termination**

Plaintiff does not contest that if the business judgment rule were to apply, his fiduciary duty claims arising out of his termination would fail as a matter of law. (*See* Pl.'s Opp'n at 10-18.) Instead, he expresses surprise in his opposition brief that the Individual Defendants' opening brief "makes no mention" of *Delaware's* "entire fairness" standard, which Plaintiff claims applies to the Board's termination decision given his allegations regarding the interestedness or lack of independence of certain Board members. (Opp'n at 15.)

There is no justification for Plaintiff's purported shock. Plaintiff has failed to identify *a single case* in which *any court* (let alone a Nevada court) has subjected a board's decision to terminate an officer to Delaware's "entire fairness" test.[4] More importantly, *Nevada law*—not Delaware law—governs Plaintiff's termination claim.[5] Nevada's business judgment rule, codified by statute, provides that "[d]irectors and officers, in deciding upon *matters of business*, *are presumed to act in good faith*, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3) (emphasis added). Nevada's corporate law identifies only two situations where the business judgment presumption may be disturbed: (1) where directors take

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[4] Nor, as RDI points out in its concurrently-filed reply brief, does it make sense to apply a Delaware test focused on "fair price" to an employment termination situation where price is not an issue. (*See* RDI Reply in Support of Ind. Defs.' MSJ No. 1 § I.)

[5] While Nevada courts may take into consideration Delaware precedents, such consideration is unnecessary here where there exists Nevada law.

certain actions to resist "a change or potential change in control of the corporation," NRS 78.139(1)(b), 2-4; and (2) in an "interested director transaction," which may involve "self-dealing" between a director and a corporation, NRS 78.140. In his opposition, Plaintiff concedes that, "[b]y their terms, on their face, those two statutory provisions do not speak to circumstances other than those described" and are therefore not relevant to his termination claims. (Pl.'s Opp'n at 15 n.4.) The Individual Defendants agree. But Plaintiff has not identified any Nevada statute or legal decision that has disturbed the application of the business judgment rule outside of these two situations. And he cannot identify a single case subjecting a board's decision to terminate an officer to *any* "fairness" review (under Nevada law or elsewhere).

The conclusion is simple: the RDI Board's business decision to remove a CEO was a purely operational decision that is one of those "matters of business" always entitled to the Nevada statutory presumption of reasonable business judgment under NRS 78.138(3). *See Nahass*, 2016 WL 4771059, at *5 (questioning how the "entire fairness" doctrine ever "would apply to employment decisions," and rejecting fiduciary duty claim by officer terminated by company's directors).[6] This is fully consistent with the wide discretion afforded to corporate boards under Nevada law on matters that determine the course of the company, *see* NRS 78.120, 78.135, 78.138, whether or not to sell the company, *see* NRS 78.139, and the limitations on liability, *see* NRS 78.037, 78.751, 78.7502. As Nevada corporate policy, these statutes are designed to vest decision-making in the board, and to protect directors who are called upon to make these decisions (usually working on a part-time basis, sometimes with less-than-perfect knowledge, and typically for not much money). *See also* NRS 78.138(7) (providing additional legal protections to directors with respect to potential personal liability).[7]

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[6] In short, in Nevada, there is a marked contrast between "operational decisions," such as removing an officer or changing a marketing strategy, and "transactional decisions," such as where a director can be on both sides of a particular transaction. It defies logic to imply a more stringent standard for operational decisions like the termination of an executive (*i.e.*, Delaware's "entire fairness" test) than there is under existing Nevada statutes where a director sits on both sides of a specific transaction (*i.e.*, the NRS 78.140 "fair as to the corporation" analysis).

[7] The only other basis upon which Plaintiff challenges this Board decision relies on allegations of "lack of independence" by certain Board members. Even if the disinterestedness

### 2. The Board's Termination of Plaintiff Was Fair

As noted above, Nevada law does not recognize Delaware's "entire fairness" standard in the context of an officer termination. Nor does it employ a "fairness review" outside of the inapplicable circumstances of NRS 78.140(2)(d)—and specifically not for an "employment decision." But even assuming that this Court should evaluate the fairness of the Board's process or ultimate decision to terminate Plaintiff as CEO and President, no colorable argument can be made that Plaintiff's removal was not "fair" to RDI (which is the actual "derivative plaintiff") both procedurally and on the merits. *See, e.g.*, NRS 78.140(2)(d) (refusing to void interested director transaction if it was "fair as to the corporation at the time it is authorized or approved").

#### (a) The Process Involved in Plaintiff's Removal Was Fair

The months-long reasoned review process underlying Plaintiff's removal was fair to RDI (and, although not required, to Plaintiff as well). (*See* Defs.' MSJ No. 1 at 21-22; Opp'n at 26-27.) Prior to formally discussing Plaintiff's removal at any Board meeting, the RDI Board worked informally with Plaintiff over several months in an attempt to rectify and alleviate his many deficiencies, including by appointing Director Storey as an "ombudsman" to help coach Plaintiff. (*See* Defs.' MSJ No. 1 at 8-9; Defs.' Opp'n at 8-10.) Storey had warned Plaintiff well prior to May 21, 2015 that he faced removal absent significant short-term improvement; in an April 15, 2015 email to Plaintiff, Storey wrote: "It has been made clear to Jim he needs to make progress in the business and with Ellen and Margaret quickly, or the board will need to look to alternatives to protect the interests of the company." (HD#1 Ex. 37 at 1-3.)[8] As Director

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and/or independence of RDI's directors could have an impact on whether the business judgment rule applies to the Board's termination of a corporate officer (which they do not), Directors Edward Kane and Guy Adams were clearly "disinterested" and "independent" with respect to their decisions to support Plaintiff's removal from office for the reasons set forth in the Individual Defendants' Motion for Partial Summary Judgment (No. 2) re: the Issue of Director Independence (*see* Defs.' MSJ No. 2 at 6-10, 15-19, 22-27), the Individual Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment (Defs.' Opp'n at 22-26), and the Individual Defendants' concurrently-filed Reply in Support of their Motion for Partial Summary Judgment (No. 2). Plaintiff is wrong on the law and unsupported by the facts to the extent that he seeks to challenge the disinterestedness and independence of RDI Directors Kane and Adams on the issue of termination or any of the various Board actions he challenges.

[8] Plaintiff, in his opposition, does not deny that Storey gave him this warning. Instead,

McEachern testified, Plaintiff "knew that his position as CEO was in jeopardy for a longer period of time than just May 21," (HD#1 Ex. 7 at 176:1-9), and Plaintiff conceded at deposition that he was aware that there was "the possibility of getting an interim CEO . . . as early as October 2014." (HD#1 Ex. 11 at 528:9-529:20.)

Plaintiff objects that the ombudsman process did not continue until the end of June 2016 (Pl.'s Opp'n at 7 n.2), and asserts that agenda items distributed by Ellen Cotter two days in advance of the Board's May 21, 2015 meeting—which listed "status of President and CEO" as an item for discussion (HD#1 Ex. 39)—were vague and unexpected. (Pl.'s Opp'n at 5.) But neither complaint is valid. Regardless of what certain Directors may have preferred (or Plaintiff himself may have wanted), the Board "never set a date of June 30 for our intervention" and Director Kane and others felt that "there was no reason for us to wait until June 30" without progress, as protecting stockholder value needed to be considered paramount to Plaintiff's self-interested desire to remain CEO and President. (HD#1 Ex. 6 at 532:12-533:15.) Plaintiff's claim that Ellen Cotter's agenda item was ambiguous is contradicted by the presence of Plaintiff's current litigation counsel at the May 21, 2015 Board meeting (HD#1 Ex. 29 at 1), and the fact that, in the days prior, both Plaintiff and his counsel threatened to sue each director "and ruin them financially" if they voted for his removal. (HD#1 Ex. 3 at 426:19-427:9; HD#1 Ex. 7 at 78:14-79:2.)[9] Plaintiff was well aware that the Board was going to discuss his potential removal on May 21, 2015.

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Plaintiff merely suggests that Storey not only cautioned that a removal could involve Plaintiff, it could involve Ellen and/or Margaret Cotter as well—a fact that is irrelevant to whether the process involving Plaintiff's removal was fair. (Pl.'s Opp'n at 5.)

[9] While Plaintiff makes vague allusion to "entrenchment" in his opposition (Pl.'s Opp'n at 15), there is no evidence that his termination was about entrenchment of any director. On its face, none of the non-Cotter directors had a stake in the outcome of the vote, and Plaintiff proffers no evidence that any director was more or less likely to remain on the Board based on how they voted. Entrenchment is "engaging in [an] action which had the effect of protecting their tenure" and being "motivated primarily or solely for the purpose of achieving that effect"—the very definition of "entrenchment," *In re Fuqua Indus., Inc. S'holder Litig.*, Civ. A. No. 11974, 1997 WL 257460, at *11 (Del. Ch. May 13, 1997). The only evidence of entrenchment as a motive is from Plaintiff's threats to "ruin" board members "financially" through a lawsuit if

Plaintiff's related insinuation that he was not provided sufficient notice of his potential removal prior to the May 21, 2015 Board meeting is similarly flawed. Not only was Plaintiff aware for months that his job was in jeopardy, and given specific notice that his status would be debated at a formal Board meeting two days prior to its occurrence (both of which factually disprove Plaintiff's argument), Plaintiff ignores the clear authority collected by the Individual Defendants in their opening brief (Defs.' MSJ No. 1 at 21) establishing that directors need not give a CEO ***any*** advance notice of a plan to remove him or her.[10] RDI's Bylaws contain no such requirement, and instead provide that Plaintiff could "be removed at any time." (HD#1 Ex. 19 Art. IV § 10.) As such, Plaintiff's notice and timing objections are baseless.

Plaintiff's characterization of communications between Board members leading up to the May 21, 2015 Board meeting as "consist[ing] of secret machinations and agreements" is also a product of his own imagination. (Pl.'s Opp'n at 17.) None of the evidence he cites supports his depiction. (*See id.* at 7.) Rather, as various directors independently contemplated Plaintiff's removal over the weeks leading up to May 21, 2015, they began a series of emails, meetings, and informal straw polls as to a potential termination vote, and commenced discussing what to do on an interim basis in the event that Plaintiff was fired. (HDO Ex. 9 at 175:17-179:7; HDO Ex. 3 at 98:8-99:22; HDO Ex. 4 at 366:14-373:2.) None of this was improper, as Plaintiff suggests. Rather, the Board had to determine if it was even worthwhile to formally discuss Plaintiff's employment status during a Board meeting, and it had an obligation to plan ahead if he was ultimately removed.

Directors holding informal discussions in advance of a meeting as to how they might vote on an important matter, and contemplating what steps to take should a vote go a certain way, is

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they dared to exercise their fiduciary duties and debate the merits of his continued tenure. (HD#1 Ex. 3 at 426:19-427:9; HD#1 Ex. 7 at 78:14-79:2.)

[10] Plaintiff does not cite a single case for the proposition that any notice is required. Other authority is clear that notice is not necessary. *See OptimisCorp. v. Waite*, C.A. No. 8773-VCP, 2015 WL 5147038, at *66-67 (Del. Ch. Aug. 26, 2015) (rejecting argument that directors "breached their duty of loyalty by not advising [CEO] in advance of his potential termination"); 2 Fletcher Cyc. Corp. § 357.20 (2015) (a board's failure to give CEO advance notice of a plan to remove him as CEO does "not invalidate his termination").

exactly what diligent board members should do. Moreover, there is "a difference between corporate acts and informal intentions or discussions." *In re Numoda Corp. S'holders Litig.*, C.A. No. 9163-VCN, 2015 WL 402265, at *9 (Del. Ch. Jan. 30, 2015). "Corporate acts are driven by board meetings, at which directors make formal decisions," and courts look "to organizational documents, official minutes, duly adopted resolutions, and a stock ledger, for example, for evidence of corporate acts." *Id.* Conversations and even "conversational agreements" are not "corporate acts" and do not provide the basis for any liability. *Id.*

Finally, once the formal Board review process began, there was no "kangaroo court," as Plaintiff misleadingly claims. (Pl.'s Opp'n at 7, 14, 17.) The only emails cited by Plaintiff in support of this point pre-date the Board's May 21, 2015 meeting, and merely evince Director Storey's disagreement with the "apparent view" of certain directors "that no discussion is necessary" and a simple vote on Plaintiff's employment would suffice once a motion to terminate was raised and seconded. (*See, e.g.*, HDO Ex. 14.) Storey instead wanted to "define and address the issue, discuss it, and come to a conclusion," which was "a separate issue [as] to the merits of the decision before us." (HDO Ex. 1 at 134:9-135:1; HDO Ex. 13 at 1-2.)

What Plaintiff leaves out is that the RDI Board took Storey's advice, engaged outside counsel to assist it in its fiduciary duties,[11] and vigorously debated the merits of Plaintiff's

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[11] Citing no legal precedent in support, Plaintiff asserts that the Individual Defendants' factual statement that they engaged the services of outside counsel when discussing Plaintiff's potential termination (and their related suggestion that such engagement is indicative of a board acting responsibly) is somehow equivalent to "asserting reliance on counsel" as an affirmative defense. (Pl.'s Opp'n at 16 n.6.) Plaintiff is wrong as a matter of law. Acknowledging receipt of advice from an attorney is different and distinct from asserting an advice of counsel affirmative defense (which the Individual Defendants have not done and are not doing, as they are not claiming that they cannot be held liable ***because*** they relied in good faith on the informed advice of counsel in taking a specific action—*i.e.*, to terminate Plaintiff). *See In re Comverge, Inc. S'holders Litig.*, Civ. A. No. 7368-VCP, 2013 WL 1455827, at *1, *3-4 (Del. Ch. Apr. 10, 2013) (finding no waiver of privilege and no invocation of advice of counsel defense; holding that "it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice"). Plaintiff cannot have it both ways—he cannot proclaim there was a "kangaroo court" and then seek to prevent the Individual Defendants from noting steps taken to show that no procedural improprieties occurred. Regardless, had the RDI Board not engaged outside counsel, the procedure it employed in deciding whether to terminate Plaintiff would still have been procedurally fair.

termination in three different Board meetings held over a three-week period that lasted a combined 13 hours. (*See* Defs.' MSJ No. 1 at 8-12; Defs.' Opp'n at 10-14.) The Board gave Plaintiff the opportunity to speak "at length" regarding his tenure, and the chance to present a business plan (which he was unable to do). His response was nothing more than an appeal to nepotism (*see* HD#1 Ex. 30 at 3 (plaintiff asserting "that it was the intention of his father . . . that he run the Company and the Board should observe his wishes")) and an attempt to intimidate the Board by again threatening a lawsuit. (HD#1 Ex. 3 at 426:19-427:9.) The Board properly deferred a final termination decision when it appeared that Plaintiff agreed to a revised management structure, which would have created oversight over his responsibilities and had the potential to end his adversarial relationship with his sisters, who were key RDI employees and also sat on the Board. (*See* HD#1 Ex. 30 at 3-4 (Minutes of the May 29, 2015 Board meeting); HD#1 Ex. 40 (May 27, 2015 version of agreement-in-principle); HDO Ex. 16 (June 3, 2015 revision).) And the Board gave Plaintiff three separate chances to stay on as President under a new CEO so that he could better learn the business and gain the management skills he so sorely lacked. (HD#1 Ex. 29 at 4; HD#1 Ex. 30 at 1.) The extensive reasoned review process utilized by the Board went far above any "fair procedure" requirement.

**(b) The Decision to Terminate Plaintiff Was Fair on the Merits**

The decision to terminate Plaintiff also was unquestionably fair on the merits with respect to RDI (and, although not required, also to Plaintiff). (*See* Defs.' MSJ No. 1 at 18-20; Opp'n at 27-28.) After over a year of discovery, Plaintiff has not been able to meet the minimum proof thresholds required to create a triable issue of fact as to whether his termination was fair on the merits. Instead it is beyond reasonable dispute that:

- Plaintiff Lacked Significant Experience in Areas Critical to RDI: There is no evidence in the record that Plaintiff's background would enable him to be an effective CEO or President. Instead, the Individual Defendants have established (and Plaintiff has not contested) (*see* Defs.' MSJ No. 1 at 5-6; Defs.' Opp'n at 5) that Plaintiff lacked noteworthy experience in numerous areas critical to RDI. Director McEachern recognized that Plaintiff "had no real estate experience, no international experience, no management experience, no cinema experience and

no live theater experience"—virtually all of the business areas relevant to RDI's operations. (HD#1 Ex. 7 at 49:25-50:7.) Director Adams was similarly worried that Plaintiff "was young" and "didn't have that much experience" (HD#1 Ex. 4 at 462:14-25), while Director Storey believed that "if his last name wasn't Cotter, he wouldn't be CEO." (HD#1 Ex. 4 at 460:12-24.) Given this undisputed absence of experience, Plaintiff's eventual termination due to performance issues—which arose, in part, because he was not yet ready to be CEO—was more than fair.[12]

- Teamwork and Morale Was Poor Under Plaintiff's Abusive Leadership: As the Individual Defendants have established (and Plaintiff has not contested) (*see* Defs.' MSJ No. 1 at 7; Defs.' Opp'n at 5-6), the Board was troubled by Plaintiff's "behavior," "temperament," and "anger issues" (HD#1 Ex. 15 at 55:21-57:5), and some Directors considered sending Plaintiff to a "psychologist or psychiatrist" or to anger management classes in early 2015. (HD#1 Ex. 6 at 529:22-530:2; HD#1 Ex. 35 at 3.) As Director Storey recognized, under Plaintiff, "morale" within RDI was "poor and needs to be improved," Plaintiff "need[ed] to establish teamwork," and he required hand-holding "to lead/develop leadership role." (HD#1 Ex. 33 at 3.)

- Plaintiff Lacked an Understanding of Key Components of RDI's Business: The Individual Defendants have established that Plaintiff demonstrated a lack of understanding with respect to costs and margins highly critical to RDI's cinema business. (*See* Defs.' MSJ No. 1 at 7; Defs.' Opp'n at 6-7.) Plaintiff has offered no evidence in response. (*See* Pl.'s Opp'n.)

- Plaintiff Could Not Work With Key RDI Executives: Plaintiff does not dispute that his sisters, Ellen and Margaret Cotter, were key executives within RDI. Nor does he dispute that he could not work well with them, as established by the Individual Defendants. (*See* Defs.' MSJ No. 1 at 6-7; Defs.' Opp'n at 7-9.) And he does not contest that, due to this inability, Director Gould and others determined that RDI was faced with "a dysfunctional management team" in

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[12] Plaintiff's only counter is that—five-and-a-half years ***before*** his election as CEO—his father authored a memo suggesting that he intended Plaintiff to succeed him. (Pl.'s Opp'n at 4.) Not only is this memo irrelevant to the issue of whether Plaintiff did or did not have significant experience in areas critical to RDI (and it actually proves true Director Storey's worry about nepotism), the intent of the late James J. Cotter, Sr. in 2009 has no bearing on whether the termination of his son years later was fair to the Company and its stockholders.

which there was "'thermonuclear' hostility" between the Cotters. (HD#1 Ex. 35 at 2-3.) In fact, Plaintiff testified that the tensions between him and his sisters had become so intense by 2015 that RDI was unable to function, such that drastic reform in behavior or potential termination(s) were required to get beyond the current paralysis. (HD#1 Ex. 12 at 696:22-700:3, 704:7-22.)

Each of these issues, which were articulated and considered by the Individual Defendants prior to rendering their termination vote, is separately sufficient to justify Plaintiff's removal as CEO and President. Taken together, they render the fairness of the Board's termination decision beyond dispute.[13] But Plaintiff's evidentiary failures do not end here. There is no evidence in the record that continuing Plaintiff as CEO and/or President would have been in the best interests of RDI. Nor is there any evidence in the record that returning him to office would be in the best interests of the Company. As McEachern testified, "from August of 2014 until [Plaintiff's] termination, I cannot tell you one thing that we did that created value for the company, one thing that Jim Cotter, Jr. managed to do. Nothing." (HD#1 Ex. 7 at 292:2-5.) Given the absence of record evidence, apparently Plaintiff cannot as well. At the summary judgment stage, this is fatal to Plaintiff's challenge to the fairness of his termination, as he cannot show that his removal was in any way "unfair" to RDI—the actual derivative plaintiff in this action.

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[13] With respect to the above-deficiencies, Plaintiff's asserts—with absolutely no support—that the substantial testimony and documentary evidence collected by the Individual Defendants is "flimsy"; his one factual response is to claim that Director Kane, at least, did not actually share these concerns. (Pl.'s Opp'n at 4.) A reference to the evidence collected by the Individual Defendants belies any suggestion that it is "flimsy," and such naming-calling, of course, falls well short of Plaintiff's obligation to muster contrary evidence at the summary judgment stage. Moreover, Plaintiff's single reference to an early June 2015 email chain with Director Kane is itself "flimsy" and perplexing. If Plaintiff believes that Kane wanted him to remain CEO in early June 2015, it disproves his theory that there was a conspiracy amongst the Individual Defendants to remove him from office with no debate in mid-May 2015. In reality, the emails cited by Plaintiff regarding Kane, whom Plaintiff had begged to help him "broker" a deal with Ellen and Margaret Cotter (*see* Defs.' Opp'n at 12-13), merely show Kane using flattery in an attempt to reason with Plaintiff, forestall his firing, and advocate for a negotiated resolution of the myriad of management problems plaguing Plaintiff's tenure. (*See* Pl.'s Appendix Ex. 2.) None of these actions by Kane, which were attempting to avert the prevent, costly corporate battle, were in any way improper.

Despite this, Plaintiff still maintains that his termination was unfair because the Board engaged in "attempted extortion and execution on the extortion threat" when it delayed his potential termination on May 29, 2015 after a potential negotiated settlement between the Cotters was agreed to in principle, and when it ultimately terminated him on June 12, 2015 when that settlement fell through. (*See* Pl.'s Opp'n at 6, 17-18.) There are two fatal problems to this argument. First, it relates only to fairness as it applies to Plaintiff—not RDI. But, in a derivative action, whether or not an action was fair vis-à-vis Plaintiff is irrelevant as to whether it was fair to RDI, the actual plaintiff on whose behalf this lawsuit is (purportedly) being brought. Indeed, to the extent that Nevada has a "fairness review," it analyzes whether an action is "fair as to the corporation," not the individual involved. NRS 78.140(2)(d).

Second, Plaintiff's pejoratives are unfounded. (*See* Defs.' MSJ No. 1 at 10-11, 20; Defs.' Opp'n at 12-14, 28.) The Board's support for and consideration of a potential compromise between the Cotter siblings was far from "extortion"; rather, affording respect to the potential deal made business sense because it could have alleviated the admitted "dysfunction" within the management ranks that was clearly affecting the Company and stockholder value; rectified some of the otherwise-terminal problems in Plaintiff's CEO tenure; and ameliorated Plaintiff's managerial deficiencies by providing him with an Executive Committee structure under which he would have operated as CEO going forward, which could have allowed him the chance to grow and gain needed experience. (*See* HD#1 Ex. 30 at 3-4; HD#1 Ex. 40.)

Once that agreement fell through, the Board was left with the same intractable problems as before—which Plaintiff does not dispute. As *both* Storey (who voted against termination) and Kane (who voted for termination) testified, the Individual Defendants felt that "things should be dealt with now," "[t]hey had come to a head and there was no point in delaying," "the current disharmony within the business was untenable going forward," "[t]here was a polarization in the office among the employees, and it had to be resolved one way or another." (HD#1 Ex. 1 at 119:25-120:12, 154:2-14; HD#2 Ex. 5 at 331:11-332:17.) Given that the Board was faced with a CEO that could not perform adequately, lacked experience and expertise, required close

supervision, did not process the requisite leadership skills, and could not work well with various directors or executives, its decision to terminate Plaintiff was objectively fair.

**3. RDI Was Not Damaged by Plaintiff's Termination**

Even if Plaintiff's termination was somehow "unfair" to RDI (which it was not), Plaintiff's fiduciary duty claims arising from his removal must fail because he has not shown any damages to RDI resulting from his firing, nor has he provided evidence that any such damages were proximately caused by the Board's June 12, 2015 decision. (*See* Defs.' MSJ No. 1 at 22-23; Defs.' Opp'n at 19-20.)

Plaintiff, in his opposition, spends pages on a convoluted argument suggesting that he is not required to actually prove *any* damages to RDI in order to establish his breach of fiduciary duty claims against the Individual Defendants. (*See* Pl.'s Opp'n at 19-21.) In fact, he labels such a requirement "imaginary." (*Id.* at 20.) But not once does Plaintiff cite applicable Nevada law.[14] In fact, Nevada precedent is clear that damages and proximate causation are both ***elements*** of a breach of fiduciary claim (and any related aiding and abetting claim). *See Olvera v. Shafer*, No. 2:14-cv-01298, 2015 WL 7566682, at *2 (D. Nev. Nov. 24, 2015) ("A claim for breach of fiduciary duty under Nevada law requires a plaintiff to demonstrate a fiduciary duty exists, that duty was breached, and the breach proximately caused the damages."); *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009) (same, applying Nevada law); *In re Amerco Deriv. Litig.*, 127 Nev. 196, 225 (2011) (adopting standard for "aiding and abetting a breach of a fiduciary duty," for which one of the "four elements" is "the

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[14] *Kendall v. Henry Mountain Mines, Inc.*, 78 Nev. 408 (1962), the one Nevada case that Plaintiff cites for the proposition that corporations may void the challenged transactions of interested directors (Pl.'s Opp'n at 20), says nothing about the elements of a fiduciary duty claim or whether damages are a required showing. Similarly, *Cinerama, Inc. v. Technicolor, Inc.*, 643 A.2d 345 (Del. 1993), a Delaware case, does not support Plaintiff's argument. While that case states that "[t]o require proof of injury as a component of proof necessary to rebut the business judgment presumption would be to convert the burden shifting process from a threshold determination of the appropriate standard of a review to a dispositive adjudication on the merits," *id.* at 371, this quote does not stand for the proposition that *no proof* of injury is required at all—instead, it merely establishes ***the timing as to when*** proof of injury is required. In fact, the court went on to state that "injury or damages becomes a proper focus only after a transaction is determined *not* to be entirely fair." *Id.* (emphasis in original).

breach of the fiduciary relationship resulted in damages"); *see also Stalk v. Mushkin*, 125 Nev. 21, 28 (2009) ("a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship").

In contrast to his motion (where he did not discuss damages at all), Plaintiff in his opposition contends that he "has produced evidence of damages." (Defs.' Opp'n at 21.) But nothing Plaintiff cites constitutes economic harm to RDI proximately "caused by" his termination. To the extent that Plaintiff identifies certain corporate actions taken after his firing as "waste," such as "monies paid to third-party consultants" (*id.*), he introduces no proof that this alleged conduct was wasteful, nor does he introduce evidence showing that *his terminati*on was the proximate cause of such waste. Indeed, Plaintiff still sits on RDI's Board, and his failure to prevent the conduct of which he complains undermines any causal connection to his removal (as it apparently would have occurred irrespective of his firing).[15]

Plaintiff also baldly asserts—without citation—that RDI's stock price suffered a "diminution" in "the days following disclosure of" Plaintiff's termination. (*Id.*) As an initial matter, this is not actually true. On June 18, 2015, the day that RDI filed a Form 8-K announcing Plaintiff's removal (HD#1 Ex. 25), RDI's stock price closed at $13.53/share, up from $13.45/share the day before.[16] By June 30, 2015, the Company's stock price was $13.85/share, and it reached $14.00/share on July 1, 2015. Even if RDI's stock price had not risen, a mere drop in share price is insufficient to satisfy the required causation. *See Morgan v. AXT, Inc.*, No. C 04-4362, 2005 WL 2347125, at *16 (N.D. Cal. Sept. 23, 2005) (that share price dropped after disclosure revealed prior misrepresentations is insufficient to constitute causation). And, of course, a "decline" in "stock price is not even a derivative injury" and cannot support the

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[15] Plaintiff also asserts that the Individual Defendants "have wrongfully insisted that Plaintiff resign as Company director." (Pl.'s Opp'n at 8.) While this allegation has absolutely no relevance to whether or not Plaintiff's termination was a fiduciary breach, Plaintiff in fact did not resign and instead remains a Board member to this day—meaning that neither he nor RDI could have suffered any damages from this purportedly wrongful conduct.

[16] *See* http://www.nasdaq.com/symbol/rdi/historical.

required causation in the context of Plaintiff's purported derivative action. *South v. Baker*, 62 A.3d 1, 25 (Del. Ch. 2012).

Plaintiff is left with an assertion, based on a single twenty-year-old New York case, that a shift in the "control of the company" may "be viewed as irreparable injury." *Vanderminden v. Vanderminden*, 226 A.D.2d 1037, 1041 (App. Div., 3d Dep't, 1996). But "control" of RDI did not shift with Plaintiff's termination: Ellen and Margaret Cotter, as trustees of the Estate of James J. Cotter, Sr. (recognized by this Court), controlled the majority of RDI's shares both *before and after Plaintiff's termination*. Moreover, the *Vanderminden* case does not involve a derivative claim; rather, it addresses an inapposite situation, where rival shareholders were battling for control of a trust (and thus a shift in voting power was irreparable harm to one plaintiff). *See id.* In contrast, this action is brought by Plaintiff in a derivative capacity, as a representative of the Company itself; he must show harm to RDI, not himself. But there is no such evidence. Uncontroverted testimony and documentary evidence from within RDI indicates that Plaintiff "was very weak as a C.E.O. or as a manager," and "wasn't really leading the business and he wasn't leading us forward." (Defs.' MSJ No. 1 at 22 (citations omitted)). Similarly, RDI's major unaffiliated investors have indicated that it would not " make much difference" to the Company's stockholders if Plaintiff was CEO, and that the overall performance of the RDI, along with its business plan, have remained entirely consistent and appropriate since Plaintiff's termination. (*Id.* at 22-23 (citations omitted).)

Because Plaintiff does not have evidence of any "economic harm" flowing to RDI following his termination, let alone evidence that his firing was the "proximate cause" of such harm, he cannot establish an actionable breach of fiduciary claim.

**4. Plaintiff Cannot Show That His Termination Involved Intentional Misconduct, Fraud, or a Knowing Violation of the Law**

Finally, even if Plaintiff's termination was somehow unfair (it was not) and proximately caused damages to RDI (which it did not), the Individual Defendants are statutorily immune from individual liability where, as here, any "breach" did not involve intentional misconduct, fraud, or a knowing violation of law. (*See* Defs.' MSJ No. 1 at 14, 18; Defs.' Opp'n at 28-29.)

Nevada's corporate law provides "a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director unless it is proven that . . . the breach of those duties involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). There can be no "knowing violation" or "intentional misconduct" where the RDI Board weighed the propriety of Plaintiff's termination over several meetings, considered his attempted defense of his tenure, engaged outside counsel to assist it in exercising its fiduciary duties, and articulated a wide variety of business-specific reasons motivating its removal decision. Even the Directors that voted not to terminate Plaintiff on June 12, 2015 recognized significant problems with his performance, and objected more to the timing of his removal than to the underlying basis. (*See* Defs.' MSJ No. 1 at 8-12, 19.) Plaintiff has not identified a single case anywhere in which directors have been held liable for breaching their fiduciary duties in the context of an employee termination, let alone under the strict requirements set forth in NRS 78.138(7).

Plaintiff's only response is to cite Delaware law, and argue that "the exculpatory statute" does not apply where, as here, he has asserted "duty of loyalty" claims. (Pl.'s Opp'n at 16 n.5.) Once again, Plaintiff's reliance on Delaware law—as opposed to Nevada law—is flawed. In contrast to whatever Delaware may hold, the Nevada Supreme Court has made clear that under Nevada law, "directors and officers may only be found personally liable for ***breaching their fiduciary duty of loyalty*** if that breach involves intentional misconduct, fraud, or a knowing violation of the law." *Shoen*, 122 Nev. at 640 (citing NRS 78.138(7) (emphasis added)). Because Plaintiff cannot meet this requirement (nor has he even attempted to), his claims fail as a matter of law.

### C. Plaintiff's Reinstatement Demand Is Unsupportable and Untenable

As the Individual Defendants emphasized in their opening brief, even if the Board's removal of Plaintiff somehow constituted a breach of fiduciary duty, the reinstatement relief demanded by Plaintiff is untenable as a matter of law and practice. (Defs.' MSJ No. 1 at 28-30; Defs.' Opp'n at 29-30.) Perhaps for this reason Plaintiff has not identified a single case in any jurisdiction in which the firing of a corporate officer was reversed following a breach of

fiduciary duty claim. (*See id.*) The Individual Defendants identified six reasons such a remedy is precluded. (*See* Ind. Defs.' MSJ No. 1 at 28-30.) Plaintiff does not address *any* of them. Failure to make a responsive argument in the first instance constitutes a waiver. *Chonwdhry v. NLVH, Inc.*, 111 Nev. 560, 563 (1995); *see also Polk v. State*, 126 Nev. 180, 185 (2010) (failure to address or dispute argument is "a confession of error on this issue"). Notwithstanding Plaintiff's waiver, the numerous problems associated with any reinstatement of Plaintiff as CEO and President of RDI render that relief untenable. Such a request, which is unsupported by law, contradicted by the terms of Plaintiff's Employment Contract, and operationally problematic, should be denied.

### D. Even If the Termination of an Employee Could Constitute a Breach of Fiduciary Duty, Plaintiff Lacks Standing to Maintain His Derivative Action

Finally, Plaintiff's termination claim fails as a matter of law for yet another independent reason: Plaintiff lacks standing to derivatively assert breach of fiduciary duty claims against the Individual Defendants arising out of his termination.

Plaintiff's main response is that an attack on his derivative standing "has been rejected by the Court previously." (Defs.' Opp'n at 22.) This is misleading at best. Elements of standing are not merely pleading requirements, but are also an "indispensable part of the plaintiff's case" on which "the plaintiff bears the burden of proof" at each of "the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also CCWIPP v. Alden*, No. Civ. A. 1184, 2006 WL 456786, at *10 (Del. Ch. Feb. 22, 2006) ("discovery" and "[f]urther development of the facts" may prove a plaintiff is "an inadequate derivative plaintiff"). At the motion to dismiss stage, the Court was required to accept Plaintiff's mere allegations as true, and afford him any and all reasonable inferences warranted on the pleadings alone. But Plaintiff cannot meet his burden now that discovery has occurred and he must provide *actual evidence* to support standing with respect to his ability to derivatively assert his termination claim and his demand for reinstatement.[17]

[17] In his opposition, Plaintiff points to purported "substantial evidence of self-dealing" conduct by the Individual Defendants with respect to their approval of both a stock option and

In their opening brief, the Individual Defendants' established why Plaintiff lacks derivative standing with respect to his termination claim and reinstatement demand: clear economic antagonisms exist between Plaintiff and other shareholders and the remedy sought by Plaintiff is entirely personal. (Defs.' MSJ No. 1 at 24-27.) Plaintiff's responses to these arguments are, at best, unsatisfactory on their face: he cites no cases in support of any of his points, and distinguishes none of the authority collected by the Individual Defendants. (*See* Pl.'s Opp'n at 23-24.)

But it is indisputable that Plaintiff lacks derivative standing for one simple reason: after over a year of discovery, he has failed to identify a single RDI stockholder (other than himself) who supports his derivative action with respect to his termination claim or his demanded reinstatement. This alone is fatal to Plaintiff's attempted derivative standing. *See Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL 1388744, at *41 (Del. Ch. May 9, 2006) ("the inadequacy of a plaintiff may be concluded from a strong showing of only one factor" if that factor involves "some conflict of interest between the derivative plaintiff and the class"). Instead, several notable third-party shareholders have gone on the record to actively *oppose* Plaintiff's termination and reinstatement claims. (*See* Defs.' MSJ No. 1 at 28 (individuals who control over 1 million shares of RDI's Class A stock and over a thousand Class B shares have rejected the idea of reinstating Plaintiff because "the well has been poisoned" with respect to Plaintiff as CEO, his reinstatement would perpetuate a "divided company," Plaintiff is not "the single best qualified person to run" RDI, and his advancement was the product of "nepotism").)

Plaintiff's only response is a naked assertion that this "claim is inaccurate, as reflected by the objections to the T2 Plaintiffs' request for court approval of their settlement." (Pl.'s Opp'n at 24.) But Plaintiff does not actually cite to or quote what these objections say, for good reason—they are have nothing to do with Plaintiff's termination claim and reinstatement

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the nominations of new directors to justify his standing as a derivative plaintiff. (Defs.' Opp'n at 22.) While the Individual Defendants do not challenge Plaintiff's theoretical ability to derivatively assert claims relating to those types of corporate actions, that "evidence"—which is, in fact, nonexistent—is entirely irrelevant to Plaintiff's derivative standing *with respect to his separate termination claim and reinstatement demand*—.the subject of this motion.

demand. (*See* Objs. of Diamond A. Partners, L.P. and Diamond A. Invs., L.P., to Settlement at 3-6 (objecting to the settlement because it "provides no tangible benefit to shareholders" and "the General Release of all possible claims against Defendants and others is quite valuable and overbroad"); Obj. of Mark Cuban to Settlement at 4-6 (same, focusing on an argument that the settlement "releases any unknown claims Reading may bring").) Nowhere do the objecting stockholders provide any indication that they explicitly support Plaintiff's termination claim or are actively in favor of his demand for reinstatement as CEO and President of RDI. (*See id.*)

This resounding "lack of support" for Plaintiff's termination and reinstatement claims by relevant "non-defendant shareholders" is fatal to Plaintiff's standing. *Love v. Wilson*, No. CV 06-06148, 2007 WL 4928035, at *6 (C.D. Cal. Nov. 15, 2007) (rejecting derivative standing); *see also Smith v. Ayres*, 977 F.2d 946, 948 (5th Cir. 1992) (lack of "cooperation" or support from other shareholders undermined attempted derivative action); *Energytec, Inc. v. Proctor*, Nos. 3:06-cv-0871 *et al.*, 2008 WL 4131257, at *7 (N.D. Tex. Aug. 29, 2008) (applying Nevada law and rejecting derivative standing of former CEO because other stockholders do not "share" an interest in his "regain[ing] control" of the company). Because Plaintiff lacks standing to pursue a derivative action seeking relief on his termination and reinstatement claims, summary judgment is entirely appropriate.

## III. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request that the Court grant both their Motion for Summary Judgment (No. 1) re: Plaintiff's Termination and Reinstatement Claims and provide such other and further relief as the Court may deem necessary and proper.

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Dated: October 21, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2016, I caused a true and correct copy of the foregoing **INDIVIDUAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (NO. 1) ON PLAINTIFF'S TERMINATION AND REINSTATEMENT CLAIMS** to be served on all interested parties, as registered with the Court's E-Filing and E-Service System.

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Dated this 21st day of October, 2016.

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

AND

READING INTERNATIONAL, INC., a Nevada corporation,

Nominal Defendant.

Case No.: A-15-719860-B
Dept. No.: XI

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

Related and Coordinated Cases

**BUSINESS COURT**

**REPLY IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (NO. 2) RE: THE ISSUE OF DIRECTOR INDEPENDENCE**

Judge: Hon. Elizabeth Gonzalez
Date of Hearing: Oct. 27, 2016
Time of Hearing: 1:00 P.M.

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## I. INTRODUCTION

Plaintiff's arguments against granting summary judgment on the issue of the Individual Defendants' independence with respect to the litany of Board actions about which Plaintiff complains misapprehend the law and rely on speculation rather than facts.

First, Plaintiff wrongly asserts that the independence of board members with respect to a specific action is a factual question inappropriate for summary judgment. Not so. Courts regularly decide the issue of director independence as a matter of law at the summary judgment stage—and even earlier, on motions to dismiss.

Second, Plaintiff attempts to twist and complicate the facts to fit his favored narrative—without regard to the evidence—of a board willing to do whatever the Cotter sisters might ask. Plaintiff ignores the dearth of facts supporting this view. Plaintiff refuses to concede that Douglas McEachern ("McEachern") is independent but provides nothing to rebut Plaintiff's admission to the contrary at his deposition. He believes that Edward Kane ("Kane") favors Ellen and Margaret Cotter and is biased against him based on Kane's prior friendship with their father; Judy Codding ("Codding") favors them due to her friendship with their mother; and Michael Wrotniak ("Wrotniak") favors Margaret Cotter because of her friendship with his wife. Case law, however, is starkly to the contrary: mere friendship does not make a director biased—*especially* when that friendship is with someone else entirely and not the director him- or herself. Plaintiff points to payments to Guy Adams ("Adams") by Ellen and Margaret Cotter as reason for Adams' purported lack of independence. The undisputed facts, however, are that (i) Adams earned those payments from preexisting business deals with James Cotter, Sr.; (ii) there is no certainty that his position on the Board or relationship with Reading is assured by "supporting" the sisters because future control of Cotter, Sr.'s Estate is disputed in a separate lawsuit and may ultimately rest with Plaintiff; and (iii) the compensation Adams receives is not material to his overall finances. In short, Plaintiff's allegations of second-hand friendships and nominal business ties are too remote as a matter of law to show a lack of independence with respect to any board action.

Third, Plaintiff does not present any evidence to show that any specific board action by any individual director defendant was actually compromised by the bias that he argues exists. Rather than point to specific self-dealing transactions (which do not exist) as would be typical in a challenge to director independence on an issue, he relies on the meaningless phrases "usurpation" and "entrenchment" as the goal. Generalized "usurpation" and "entrenchment" is insufficient to establish breach-of-fiduciary-duty claims against directors in Nevada; rather, Plaintiff must have *evidence* that *specific* board actions were affected by *specific* bias or lack of independence by *specific directors* rising to the level required by NRS 78.138(7)(a) (requiring intentional misconduct, fraud or knowing violation of the law for liability of individual directors). He does not, and accordingly his claims based on alleged lack of independence of individual directors should be summarily adjudicated against him.[1]

## II. ARGUMENT

### A. Summary Judgment is Appropriate on This Record

Utterly misreading the authority he cites, Plaintiff argues that because director independence is a "fact-specific determination," summary judgment is inappropriate. (Opp. at 11-12.) Plaintiff relies on *Beam ex rel Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004), but the court in *Beam* actually granted the director defendants' motion to dismiss upon holding that the plaintiff's factual allegations did not show a lack of independence. *Id.* at 1049-54. If director independence can appropriately be determined on a

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[1] At least the following board actions arguably comprise the claims Plaintiff contends are tainted by alleged director bias, and are covered by this summary judgment motion: (1) discussions about terminating Plaintiff (*id.* ¶ 2); (2) terminating Plaintiff (*id.* ¶ 3); (3) reactivating the Executive Committee (*id.* ¶ 99); (4) electing Codding to RDI's board of directors (*id.* ¶ 11); (5) electing Wrotniak to RDI's board of directors (*id.* ¶ 12); (6) approving the Estate's exercise of an option for 100,000 Class B shares in September 2015 (*id.* ¶ 10); (7) manipulating the CEO search (*id.* ¶¶ 137-147); (8) selecting Ellen Cotter as RDI's CEO (*id.* ¶ 146); (9) setting Ellen Cotter's salary as CEO (*id.* ¶ 152); (10) selecting Margaret Cotter for her New York real-estate position (*id.* ¶ 149); (11) setting Margaret Cotter's salary in that position (*id.* ¶ 150); (12) making a $200,000 payment to Margaret Cotter when she became an RDI employee (*id.* ¶ 151); (13) making a $50,000 payment to Guy Adams for his board service (*id.* ¶ 153); (14) deciding not to pursue a third-party's indication of interest in purchasing RDI (*id.* ¶¶ 154-162); and (15) making purportedly misleading public statements in press releases and SEC filings (*id.* ¶¶ 101, 135, 136).

motion to dismiss, it can certainly be determined with the factual record present at summary judgment. According to Plaintiff, determining director independence as a matter of law would "ignore[ ] the clear teaching from Delaware's highest court." (Opp. at 11-12 (citing *Beam*, 845 A.2d at 1049).) Putting aside that Nevada law applies here, the Delaware Supreme Court has noted that "Delaware courts have often decided director independence as a matter of law at the summary judgment stage." *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (citing *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 369-70 (Del. Ch. 2008) and *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 465 (Del. Ch. 2000)); *see also SEPTA v. Volgenau*, C.A. No. 6354-VCN, 2013 WL 4009193, at *12-21 (Del. Ch. Aug. 5,2013) (holding, on summary judgment, that directors on the special committee were disinterested and independent).[2]

Plaintiff also appears to suggest that summary judgment would be improper because, under Nevada Rule of Civil Procedure 56(f), the Court may grant a party opposing summary judgment additional time to conduct further discovery. (Opp. at 10-11.) However, Plaintiff does not explicitly request such relief and would not be entitled to it even if he did. Plaintiff makes no effort to identify (by affidavit or otherwise) any further evidence that he needs to collect to oppose the motion, as is required by the rule. *Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 118 (2005) (noting that a continuance under NRCP 56(f) is "appropriate only when the movant expresses how further discovery will lead to the creation of a genuine issue of material

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[2] The other out-of-state authorities cited by Plaintiff on this point also do not hold that it is improper to determine director independence at summary judgment. *See In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 922 F. Supp. 2d 445, 468 (S.D.N.Y. 2013) (granting motion to dismiss due to plaintiff's failure to allege lack of independence or disinterestedness); *In re Finisar Corp. Derivative Litig.*, 542 F. Supp. 2d 980, 988 (N.D. Cal. 2008) (same); *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015) (same); *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) (affirming lower court's decision to deny injunction where there was no evidence of directors' self-interest and no fiduciary duty was breached); *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 880 (S.D.N.Y. 1986) (preliminary injunction appropriate where court found that directors were not disinterested and had not show that transaction was fair); *Patrick v. Allen*, 355 F. Supp. 2d 704, 712 (S.D.N.Y. 2005) (denying motion to dismiss where plaintiffs sufficiently alleged that defendants were not disinterested directors).

fact"); *Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 871 (2011) (party opposing summary judgment is required by NRCP 56(f) to "provide an affidavit stating the reasons why denial or continuance of the motion for summary judgment is necessary to allow the opposing party to obtain further affidavits or discovery"). Given that trial is scheduled to start in only a few weeks, the Court should not grant any further time for discovery.

### B. RDI Directors McEachern, Kane, Codding, Wrotniak, and Adams are Independent as a Matter of Law

#### *1. Douglas McEachern*

Plaintiff inexplicably contends that while he "does not concede that McEachern was disinterested and/or independent," he somehow "can prevail on this Motion without showing McEachern to have lacked disinterestedness or independence" and therefore "chooses not to address McEachern." (Opp. at 16 n.3.) As was noted in the Motion, Plaintiff admitted at his deposition that McEachern is independent. (Mot. at 5, 15, 23.) When asked "Mr. McEachern, is he independent, in your view?" Plaintiff answered "Yes. I mean, he's – I mean, again, he's independent. He's got no relationship with Ellen and Margaret or, you know, no business relationship with Ellen and Margaret." (HD#2[3] Ex. 7 at 84:21-85:1.) When pressed as to whether, "in your view, Mr. McEachern is independent and has always been independent," Plaintiff responded "Okay. Yes." (*Id.* at 85:6-86:4.) Given that the Motion seeks summary judgment on the issue of independence as to each of the Individual Defendants except for Ellen and Margaret Cotter,[4] Plaintiff has not met his burden of identifying "admissible evidence" showing "a genuine issue for trial" regarding McEachern's independence with respect to any board action. *Posadas v. City of Reno*, 109 Nev. 448, 452 (1993); *Shuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436 (2010) ("bald allegations without supporting facts" are insufficient).

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[3] "HD#2" refers to the Declaration of Noah Helpern filed in support of the Individual Defendants' Motion for Partial Summary Judgment (No. 2) Re: the Issue of Director Independence.

[4] Solely for purposes of this Motion, the Individual Defendants do not contest the independence of Ellen and Margaret Cotter. (*See* Mot. at 14 n.2.)

*2. Edward Kane*

Plaintiff concedes that the "deep friendship" of which he complains was actually between Kane and James Cotter, Sr.—not between Kane and Ellen or Margaret Cotter. (Opp. at 1-2.) Plaintiff argues that Kane's relationship with James Cotter, Sr. rendered him unable to be independent regarding disputes between Plaintiff, on the one hand, and Ellen and Margaret Cotter, on the other (Opp. at 2-3), but this defies logic. Plaintiff cites no evidence that Kane's friendship with James Cotter, Sr. resulted in Kane having a closer personal relationship with James Cotter, Sr.'s daughters than with his son. While Ellen and Margaret Cotter have at times referred to Kane as "Uncle Ed," so did Plaintiff until he was terminated. (App.[5] Ex. 1 at 37:4-14.) Indeed, Plaintiff does not dispute the fact that he has also known Kane all his life and even visited Kane at his home as late as the spring of 2015, just weeks before his termination, personally imploring him to help Plaintiff resolve his disputes with his sisters and retain his position as CEO. (Mot. at 16.) Even if Kane were Ellen and Margaret's uncle by blood (and not Plaintiff's), that is considered a "more remote family relationship[ ]" that is "not disqualifying" to a director's independence as a matter of law. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 232-33 (2011) ("[A]n uncle/nephew relationship does not establish the parties as members of one another's immediate families[.]"); *see also Beam*, 845 A.2d at 1050 ("Allegations of mere personal friendship or mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence.").

Plaintiff also alleges bias because of Kane's understanding that James Cotter, Sr. intended for Margaret Cotter to control the Voting Trust and cites Kane's supposed "actions to make that happen" as evidence of Kane's lack of independence. (Opp. at 18.) As a preliminary matter, Plaintiff does not explain why Kane having an opinion about Cotter, Sr.'s intentions with respect to his personal estate would impact his independence as a Reading Board Member. Moreover, contrary to Plaintiff's claim that Kane attempted to "extort" him into settling his trust and estate disputes with his sisters (*id.*), the evidence shows that it was actually Plaintiff who

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[5] "App." refers to the Appendix of Exhibits filed by Plaintiff in support of his Opposition.