In The Supreme Court of the State Of Nevada

Supreme Court Case No. 75053

JAMES J. COTTER, JR., Individually And Derivatively on Behalf of Reading International, Inc., Petitioner, v. DOUGLAS McEACHERN, EDWARD KANE, JUDY CODDING, MICHAEL WROTNIAK, MARY ANN GOULD, Personal Representative of the Estate of William Gould, AND Nominal Defendant READING INTERNATIONAL, INC., a Nevada Corporation, Respondents.	Coordinated with Case Nos. 76981, 77648, 77333 District Court Case No. A-15-719860-B

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

RESPONDENTS' ANSWERING BRIEF FOR CASE NO. 76981

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NRAP 26.1 DISCLOSURE

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

Respondents Douglas McEachern, Edward Kane, Judy Codding, and Michael Wrotniak are individuals. Former Respondent William Gould (now deceased) was an individual. Pursuant to this Court's September 19, 2019 Order Granting Motions, Mary Ann Gould, personal representative of the Estate of William Gould, has now been substituted as a party in place of Mr. Gould.

All Respondents are now represented in this litigation by H. Stan Johnson of Cohen|Johnson|Parker|Edwards, and Christopher Tayback and Marshall M. Searcy of Quinn Emanuel Urquhart & Sullivan, LLP. Prior to Mrs. Gould's Substitution of Counsel Under NRAP 46(e)(2) filed on October 15, 2019, Mr. Gould and his Estate were represented in this litigation by Donald A. Lattin and Carolyn K. Renner of Maupin, Cox & LeGoy, and Ekwan E. Rhow and Shoshanna E. Bannett of Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C. Mr. McEachern, Mr. Kane, Ms. Codding, Mr. Wrotniak, and Mrs. Gould (as personal representative of the Estate of William Gould) are collectively referred to herein as "Respondents."

Dated this 27th day of November 2019.

COHEN|JOHNSON|PARKER|EDWARDS

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SUMMARY OF THE ARGUMENT

In December 2017, the District Court entered judgment in favor of five Directors of Reading International, Inc. ("RDI")—Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak (the "Independent Directors")—because they were disinterested and independent as a matter of law. As a result, all of the corporate transactions alleged by Appellant to be actionable breaches of fiduciary duty were indisputably approved by a majority of disinterested, independent directors, save for two: (1) the Board's termination of Appellant as President and CEO of RDI in June 2015 following a string of performance issues; and (2) the RDI Compensation Committee's September 2015 approval of the exercise of a stock option held by the Estate of James J. Cotter, Sr., for non-cash consideration in accordance with applicable plan documents. With respect to those transactions, the outcome-determinative vote was cast by Director Guy Adams, and the Court concluded there were issues of material fact as to his independence that precluded judgment as a matter of law in his favor or in favor of the two other remaining defendants, Directors Ellen and Margaret Cotter.

Following the District Court's decision, the full RDI Board convened a Special Meeting on December 29, 2017 at the request of the Independent Directors to reevaluate those two remaining transactions. After discussing Appellant's allegations as to the potential interestedness or non-independence of Mr. Adams,

the Independent Directors addressed the Termination and Share Option Decisions. In doing so, they were informed by the Company's counsel, their own extensive knowledge of the applicable facts, their previous board experience, and a further review of the contemporaneous RDI Board materials relevant to those decisions. The Board also allowed additional debate and comment. Ultimately, with Mr. Adams, Ellen Cotter, and Margaret Cotter abstaining, the RDI Board voted 5–1 (with only Appellant dissenting) to ratify each decision. The District Court subsequently agreed that this ratification, explicitly made pursuant to NRS 78.140, triggered the application of the business judgment rule to the Termination and Share Option Decisions. Because Appellant could not adduce sufficient evidence to overcome that presumption, the District Court granted judgment in favor of the three remaining defendants on all outstanding claims in June 2018.

Appellant now raises a variety of fanciful legal and factual arguments in an effort to keep his purported "derivative" litigation—currently joined by no other RDI stockholder—alive. None have any merit.

First, Appellant suggests that Nevada does not actually permit the RDI Board to have voted in favor of ratifying the decisions at issue because they were not "transactions." But Nevada law does not support the distinction between business "decisions" and "transactions" that Appellant attempts; instead, "any corporate act" is subject to ratification in Nevada, including board decisions—a

fact also supported by RDI's Bylaws, which Appellant ignores. Similarly, the gloss on NRS 78.140 that Appellant attempts has been rejected by Delaware's courts when evaluating its analogous statute. And, even narrowly construed, the Termination and Stock Option Decisions concerned "contracts" between RDI and its Directors and also constituted "interested director" transactions. Thus, under any plausible reading (including that advocated by Appellant), they fell within the ambit of NRS 78.140 and were thus subject to ratification. This is consistent with the Nevada Supreme Court's decision in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006), which provides that a transaction involving or depending on an interested director shall become "valid" and subject to the business judgment rule following an informed ratification under NRS 78.140.

Even if NRS 78.140 did not apply for statute-specific reasons, the ratifications here still would have been appropriate and effective. Nevada, like other jurisdictions, has long recognized the common-law rule that any act that is not *ultra vires* may be subject to ratification. Because that the Termination and Stock Option Decisions were clearly within the lawful power of the RDI Board, they were eligible for ratification. Indeed, black-letter law establishes that a new board may ratify acts of a former board, and that such ratification may be effective even though it occurs subsequent to the filing of a shareholders' derivative suit. It makes sense that a corporate board may revisit any challenged decision, as this is

precisely what Appellant was asking in his lawsuit and what RDI's Board would have done had Appellant actually made a demand upon it—which he did not.

Second, Appellant contends that the members of the Board who voted in favor of ratification were neither independent nor acting in good faith. Appellant simply misstates the facts and the applicable law. Appellant cites a series of cases in which courts evaluated the decisions of Special Litigation Committees to dismiss derivative actions (and where, unlike here, there had been no judicial determination of independence). Those cases are inapplicable—the ratification vote here was held at a meeting of the *full* Board of Directors, not RDI's Special Independent Committee, and was not a recommendation to dismiss the derivative action but rather to ratify two specific actions. Moreover, the standards in those cases, even if they were applied here (which they cannot be), actually support the District Court's judgment. And the facts, as established through documentary evidence and sworn testimony, completely undermine Appellant's attempted distortions of the record.

Appellant is left with an imagined conspiracy led by RDI's corporate counsel, Greenberg Traurig, and rank speculation about the motives of his fellow Directors. But evidence, rather than assumption and accusation, is required to withstand summary judgment. Appellant has none. His efforts to tar the Directors' reliance on Company counsel are particularly misguided. Nevada law

considers directorial reliance on the advice of counsel to be indicia of good faith and sound business judgment—not the opposite. And Greenberg Traurig's relatively active involvement in the litigation on behalf of RDI was plainly appropriate. Appellant's one-man "derivative" suit endangered RDI's corporate interests by demanding a reorganization, trying to overturn the Company's contracts, and causing RDI to expend over $15 million in defending against his baseless, retaliatory claims. Well-settled law ensures that companies and their directors need not sit idly on the sidelines as stockholder value is squandered, but may instead vigorously defend their threatened welfare under these circumstances, whether by actively assisting the defense or by revisiting the actions challenged and, upon such review, taking steps to ratify such actions.

The District Court's judgment in favor of the remaining defendants following the December 29, 2017 ratifications was entirely warranted and should be affirmed.

ISSUES PRESENTED

1. Was the District Court correct in concluding that a corporate board, comprised of a majority of directors whose independence and disinterestedness has already been legally established, may reconsider and make an informed decision to ratify previous board actions pursuant to NRS 78.140 and other Nevada law, thereby warranting the application of the business judgment presumption and,

following a showing of a rational business purpose behind both the ratification and the previous actions, obtaining the dismissal of claims against directors not participating in such ratification?

2. Was the District Court correct in holding that the Independent Directors had met all of the requirements for a valid, good-faith ratification where they reasonably informed themselves of the merits of two challenged transactions; corporate counsel was present and advised the entire Board of its fiduciary duties under Nevada law; no ratifying director had a personal stake in the derivative litigation brought by Appellant or in the particular transactions ratified; no potentially interested Director voted on ratification; and discussion and debate occurred prior to the final votes at a full Board meeting, with all Directors—including Appellant—afforded the chance to ask questions or make comments?

STATEMENT OF FACTS

I. APPELLANT IS FIRED AFTER A BRIEF, DIVISIVE TENURE AS RDI'S CEO

A. Appellant Becomes CEO of RDI Following His Father's Resignation

RDI is an internationally diversified company, incorporated in Nevada, principally focused on the development, ownership, and operation of cinema exhibition and real property assets in the United States, Australia, and New

Zealand.[1] James J. Cotter, Sr., became RDI's CEO and Chairman in December 2000.[2] Until his death, Mr. Cotter was RDI's controlling stockholder, with the power to vote more than two-thirds (approximately 66.9%) of the outstanding voting stock.[3] Appellant, Mr. Cotter's son, was added to RDI's Board in March 2002, and was later appointed its President.[4] James J. Cotter, Sr., abruptly resigned from the Company on August 7, 2014 for health-related reasons.[5] RDI's Board unanimously appointed Appellant to replace his father as CEO that same day.[6]

Immediately prior to Appellant's appointment as CEO, RDI's Board had nine members: (1) Appellant; (2) James J. Cotter, Sr.; (3) Margaret Cotter, Appellant's sister, who, as an outside consultant, managed RDI's live theater division, supervised certain live theater real estate, and was responsible for redevelopment work on RDI's Manhattan theater properties; (4) Ellen Cotter, Appellant's sister, who, as an RDI employee since 1998, controlled the day-to-day operations of the Company's domestic cinema operations; (5) Edward Kane, who was an experienced tax attorney and health care industry consultant; (6) Guy Adams, who was a registered investment advisor and experienced independent

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1 VIIIJA1833–1834.
2 VIIIJA1980.
3 *Id.*; XIJA2730.
4 VIIJA1673–1684.
5 IXJA2071.
6 *Id.*

director on public company boards; (7) Douglas McEachern, who was previously an audit partner at Deloitte & Touche; (8) Timothy Storey, who was Chairman of a New Zealand-based investment fund specializing in commercial property; and (9) William Gould, who—during his lifetime as a corporate attorney—was a renowned expert on corporate governance issues.[7] Appellant, prior to his appointment as CEO, had supported the nomination and election of each of these individuals to the Board.

James J. Cotter, Sr., ultimately passed away from his illness on September 15, 2014.[8] Consistent with his estate planning, Ellen and Margaret Cotter were left with control over the voting and disposition of the majority of RDI's voting stock through their positions as Co-Executors of the Estate of James J. Cotter, Sr., as well as their control over their father's Living Trust and Margaret's position as sole trustee of his Voting Trust.[9]

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[7] VIIIJA1980–1983. *See, e.g., Wynn Resorts v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 377, 399 P.3d 334, 343 (2017) (quoting Gould treatise regarding Nevada's business judgment rule).

[8] IXJA2011.

[9] IRA21. Appellant asserted, during his tenure and including at the time of his termination, that he was in fact also a trustee of the Living Trust and of the Voting Trust, the voting of the Voting Stock in the Living Trust required his approval, and Ellen and Margaret Cotter did not have voting control over the Company; however, this issue was tried before a California court, which ruled that Appellant was neither a trustee of the Living Trust nor of the Voting Trust. IRA94–96.

B. Significant Problems With Appellant's Managerial Skills Arise

Upon his emergency appointment as CEO, RDI's Board hoped that Appellant would develop on the job, as Appellant "was young" and "didn't have that much experience," including "no real estate experience, no international experience, no management experience, no cinema experience and no live theater experience."[10] Unfortunately, by early 2015, it was clear to RDI's Board that Appellant had numerous leadership deficiencies, including that he was "closed door," unengaged, "very reluctant and slow to make decisions," and unable to "establish teamwork."[11] Moreover, as Appellant has conceded, there was a "perception at Reading by employees" that he had "a volatile temper" and "anger management problem[s]."[12] The Board was particularly troubled by Appellant's "behavior," "temperament," and "anger issues"[13] because his outbursts caused several women in the office to be "afraid" of him and be worried for their "physical safety."[14]

RDI's Directors were also concerned that Appellant, in a key presentation, demonstrated a lack of understanding with respect to costs and margins highly critical to RDI's cinema business; as a result, the Board soon questioned whether

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10 VIIJA1586–1587, 1619–1620.
11 VIIJA1582–1583, 1622, 1636–1637; IXJA2088–2089.
12 VIIJA1708–1710.
13 VIIJA1751–1753.
14 VIIJA1574–1576, 1592–1597, 1626–1628.

Appellant was "really learning the business" and "leading us forward."[15] As Director McEachern later stated in deposition, RDI's business stagnated under Appellant's direction: "from August of 2014 until Jim'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."[16]

In addition, Appellant alienated various key executives at RDI. For instance, he attempted to undermine Ellen Cotter before the Board, first by conducting an incognito examination of RDI's cinema operations in late 2014, without her knowledge or input (or that of any other member of management), and again when he unilaterally tried to hire a food and beverage manager for RDI's cinema operations without her involvement—despite the fact that he had no experience in such matters.[17]

Appellant also estranged Margaret Cotter when, rather than work with her when the producers of the stage show *STOMP* threatened to vacate RDI's Orpheum Theater, he "attack[ed]" Margaret and attempted to use the dispute to "embarrass" her before the Board—an unconstructive step that Director Kane felt was "not what a CEO should do" and did nothing to help the resolution of that

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15 VIIJA1564–1567.
16 VIIJA1641.
17 VIIJA1598–1599, 1620–1621, 1636, 1706–1707.

matter.[18] Similarly, the Directors believed that Appellant threw "hand grenades" into his relationship with Margaret when he advocated against making her a full RDI employee, despite the fact that she had long been performing the responsibilities for which she would be formally hired.[19]

C. RDI's Board Terminates Appellant After Exhausting Alternative Solutions

After taking several measures in the first half of 2015 to try to ameliorate Appellant's deficiencies, which included engaging an ombudsman to assist him,[20] RDI's Board ultimately placed Appellant's "status" as President and CEO on the agenda, and held three separate meetings, lasting a combined thirteen hours, on May 21, May 29, and June 12, 2015, to consider whether to continue his at-will employment.[21] In the face of repeated threats by Appellant to "sue and ruin them financially" if they exercised their business judgment and terminated him,[22] RDI's Board gave Appellant a full opportunity to address his performance[23] and considered several alternatives management structures that would have continued Appellant's employment while temporarily reducing his responsibilities to allow

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[18] VIIJA1600–1601, 1656. The arbitrator in that dispute ultimately vindicated Margaret Cotter when it ruled in favor of RDI, awarding it specific performance, injunctive relief, and attorneys' fees of more than $2.25 million.
[19] VIIJA1638–1640.
[20] VIIJA1502, 1697–1699, XIVJA3347.
[21] IXJA2075–2083, 2101.
[22] VIIJA1578–1579, 1624–1625; IXJA2075–2076.
[23] IXJA2075–2078, 2082.

him to better learn the business and gain the management skills he lacked.[24] Appellant ultimately rejected these attempts by the Board to assist his development.[25]

Absent resolution of the ongoing adversarial management issues, RDI's Board—by a 5–2 vote—decided to remove Appellant from his position as RDI's President and CEO at the Board's June 12, 2015 meeting.[26] Directors Margaret and Ellen Cotter, Adams, Kane, and McEachern voted in favor of Appellant's termination, with Directors Storey and Gould voting against termination based upon their desire to delay a final assessment.[27] Appellant refused to vote.[28] The majority of RDI's Directors concluded that further delay was not "in the best interests of the shareholders" because, due to Appellant, "the company was not moving forward," "[t]here was polarization in the office," and the issue "had to be resolved one way or another."[29] Notwithstanding his termination as CEO, Appellant remained an RDI director until November 7, 2018.[30]

II. IN RETALIATION, APPELLANT BRINGS "DERIVATIVE" CLAIMS AGAINST RDI'S BOARD, THE BULK OF WHICH ARE REJECTED BY THE DISTRICT COURT

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24 IXJA2078, 2080–2082, 2103–2106.
25 IXJA2082–2084.
26 IXJA2084.
27 *Id.*; VIIJA1631, 1635.
28 IXJA2084.
29 VIIJA1555–1557, 1608–1609, 1631, 1635.
30 IIRA422–425.

A. Appellant Pursues This "Derivative" Action for Personal Reasons

Making good on his threats, Appellant filed this action on June 12, 2015—the very day he was fired.[31] Appellant's complaint asserted both direct and derivative claims arising from his termination against all of RDI's seven directors (even Directors Gould and Storey, who had voted not to terminate him at that time).[32] Appellant twice amended his claims as discovery proceeded; he filed his First Amended Verified Complaint on October 22, 2015, and his Second Amended Verified Complaint on September 2, 2016.[33] Appellant never made a demand upon RDI's Board. Instead, he baldly asserted that any demand would be futile because the Directors—except for him "(and in certain instances former director Storey)"—were "unable to exercise independent and disinterested business judgment."[34]

In connection with his amendments, Appellant (i) dismissed Director Storey as a defendant following Storey's October 2015 retirement; (ii) deleted his previously asserted direct claims; (iii) identified five "matters," in addition to his actual termination, that he claimed were "independently entailing or constituting breaches of fiduciary duty"; and (iv) added as defendants to all counts Judy Codding and Michael Wrotniak—both of whom joined RDI's Board in October

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31 IJA1–31.
32 *Id.*
33 IIJA263–312; IIIJA519–575.
34 IIIJA564–565.

2015, and who were not involved in Appellant's termination.[35] Appellant's operative Second Amended Complaint generically pleaded three causes of action against Directors Ellen and Margaret Cotter, McEachern, Kane, Gould, Adams, Codding, and Wrotniak for breach of the fiduciary duties of care, loyalty, good faith, and candor, and a fourth cause of action against Ellen and Margaret Cotter for aiding and abetting the other directors' purported breaches.[36]

B. The District Court Awards Judgment in Favor of Respondents on Most Matters Following Appellant's Complete Failure of Proof

Following extensive discovery, the parties engaged in multiple rounds of summary judgment briefing. Respondents filed separate summary judgment motions specifically directed at each "matter" alleged by Appellant to constitute an independent breach of fiduciary duty, as well as an additional motion for summary judgment on the general issue of director independence and disinterestedness.[37]

Following oral argument on Respondents' motions on December 11, 2017, the District Court determined that there were "no genuine issues of material fact related to the disinterestedness and/or independence" of Directors Kane, McEachern, Gould, Codding, and Wrotniak , and, as such, entered judgment in

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35 IIJA263–312; IIIJA519–575; XXIJA5098–5099.
36 IIIJA565–573.
37 *See, e.g.*, IIIJA576–VIJA1400; VIJA1486–XIVJA3336; XXJA4981–5024; XXIIJA5321–5554.

their favor "on all claims asserted by Plaintiff."[38] Directors Ellen Cotter, Margaret Cotter, and Guy Adams remained in the case, as the District Court concluded that there were "genuine issues of material fact related to the disinterestedness and/or independence of those directors."[39]

As Appellant concedes, "the dismissal of all claims against five directors narrowed down Cotter Jr.'s derivative claims against the three remaining directors to two principal decisions in which they had a determinative say"—*i.e.*, two Board decisions in which (under the District Court's ruling) there remained a genuine issue of fact as to whether a majority of disinterested, independent directors voted in favor of the transaction.[40] The first of these was the Board's June 12, 2015 decision to terminate Appellant (the "Termination Decision").[41]

The second decision that remained at issue involved the exercise of an option by the Estate of James J. Cotter, Sr. (the "Estate"), to acquire an additional 100,000 shares of RDI Class B Voting Stock in September 2015 (the "Option").[42] There is no genuine dispute as to the ownership of the Option.[43] Nor was there any

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[38] XXVJA6065–6071. This ruling by the District Court is the subject of Appellant's related appeal in Case No. 75053. *See* OB11 n.4.

[39] XXV6068.

[40] OB11–12.

[41] *Id.*

[42] *Id.* The 100,000 Class B shares obtained through the exercise of the Option represent approximately 6% of the stockholder voting power in RDI. XIIJA2871.

[43] *See* IIJA266 ("Plaintiff is informed and believes that, on September 17, 2015 . . . EC and MC acted to exercise *an option held by the Estate,* of which they are

dispute that the Option was then exercisable, or as to what the exercise price was. Rather, Appellant contests the good faith of a September 21, 2015 decision by RDI's Compensation and Stock Options Committee ("Compensation Committee"), comprised of Directors Kane and Adams, to allow Ellen and Margaret Cotter, acting as executors of the Estate, to use Class A RDI Common Stock—as opposed to cash—to pay the exercise price of the Option (the "Share Option Decision").[44]

At that time, RDI's 1999 Stock Option plan allowed the exercise of options using Class A shares, with the approval of the Compensation Committee, and the Company had a policy of repurchasing Class A shares when they were available.[45] The Board's Compensation Committee was acting in conformance with and with knowledge of the terms of the Stock Option Plan when evaluating the Estate's option exercise, and the exercise of the Option ultimately had no impact on the election of RDI's Board at the 2015 Annual Shareholder Meeting, as both before and after the exercise, Ellen and Margaret Cotter controlled more than two-thirds

executors") (emphasis added). Moreover, the ownership issue was resolved long ago by the District Court in the context of the separate Estate case; even if it had not been, the ownership question would be fundamentally irrelevant—Ellen and Margaret Cotter control the options under any scenario, as they were both the Co-Executors of the Cotter Estate and the Co-Trustees of the Cotter Estate. XXXIIJA7845.

[44] OB12; XXIJA5098; XIIJA2871.

[45] XIIJA2883; IRA88.

of the outstanding RDI voting power.[46] The value of the Class A Stock tendered by the Estate to purchase the Option also rose from $1,257,000 at the time of the exercise to $1,611,000 at the time of the District Court's decision.[47]

III. RDI'S FULL BOARD REVISITS AND RATIFIES THE TWO DECISIONS THAT REMAIN AT ISSUE

A. RDI's Board Decides to Reexamine the Remaining Decisions

Following the entry of the District Court's initial summary judgment ruling in December 2017,[48] RDI—represented by its counsel, Greenberg Traurig, LLP—filed a Motion to Dismiss for Failure to Show Demand Futility.[49] RDI's motion argued that because the District Court had now determined that there was no genuine issue of material fact as to the independence or disinterestedness of a majority of RDI's Directors (as the Board was constituted, either at the time of Appellant's initial complaint or his subsequent amendments), Appellant's "derivative" action should be dismissed because he could not meet his burden to show that demand upon the Board would have been futile.[50]

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[46] *See id.* Every director elected to the Board received approximately 1.3 million votes, *i.e.*, the votes of more than 75% of the Class B stockholders. The 100,000 shares (6%) obtained by the Estate through the exercise of the Option did not, and could not have made, any difference to the outcome.

[47] IRA89.

[48] XXVJA6081–6091.

[49] XXV6162–6170. RDI had filed or joined similar motions to dismiss for lack of standing upon the service of each iteration of Appellant's complaint. These previous motions were denied by the District Court. *See* XXVJA6167.

[50] XXV6168–6169.

In addition, given that Appellant was asking that the Board's decisions be re-reviewed through this litigation, and RDI's Board would have needed to reevaluate those decisions had Appellant actually made a demand, the Independent Directors requested that the full RDI Board convene a Special Meeting to reconsider both the Termination Decision and the Share Option Decision.[51] The agenda for the proposed meeting was disclosed in advance to all Directors.[52]

The Board's re-review was also taken with eye to the Directors' fiduciary duty to protect stockholder value. By late 2017, RDI had been forced to incur nearly $15,000,000.00 in attorney's fees, both in defense of itself and, due to its statutory and contractual indemnity obligations, in defense of Respondents against Appellant's purported "derivative" claims.[53] However, only one set of RDI stockholders had ever joined Appellant's action. Various investment funds controlled by Whitney Tilson and Jonathan Glaser (collectively, "the T2 Plaintiffs"), which held a sizeable portion of RDI's stock, relied on Appellant's allegations to intervene via their own derivative complaint on August 28, 2015.[54]

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[51] XXVJA6156–6161, 6224A–F. These Directors requested the Special Meeting pursuant to Article II, Section 7 of RDI's Bylaws, which provides: "Upon the written request of a majority of the directors, the Chairman or Vice Chairman of the Board or the President shall call a special meeting of the Board to be held within two days of the receipt of such request." VIIIJA1809.

[52] *Id.*

[53] *See* Case No. 77733, RDI's OB4.

[54] IJA109–126.

But after being provided "extensive discovery," the T2 Plaintiffs voluntarily withdrew all claims on July 12, 2016, with each party executing mutual general releases and agreeing to bear their own fees and expenses.[55] In the ensuing press release, the T2 Plaintiffs stated outright that they "concluded that the Reading Board of Directors has acted in good faith and has been and remains committed to acting in the interests of all stockholders," and that "[c]ontinuing with their derivative litigation would provide no further benefit."[56] The T2 Plaintiffs emphasized that, "[o]ur questions about the termination of James Cotter, Jr. and various transactions between Reading and members of the Cotter family—or entities they control—have been definitively addressed and put to rest."[57] The District Court subsequently approved the T2 settlement as "fair, reasonable, adequate and in the best interests of stockholders."[58]

B. The Remaining Decisions Are Reconsidered and Ratified at a Meeting of the Full RDI Board

As requested, the full RDI Board—including Appellant—met on December 29, 2017.[59] Counsel for the Company was present, and updated the Board both on the status of this litigation as well as the content of Appellant's

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55 IRA52.
56 *Id.*
57 *Id.*
58 IRA72–73.
59 XXVJA6156–6161, 6224A–F.

allegations as to why Adams was purportedly not "independent" with respect to the at-issue decisions.[60] Counsel further informed the Board as to the scope of NRS 78.140 ("Restrictions on Transactions Involving Interested Directors or Officers"), as well as the Board's fiduciary duties under Nevada law, including the duties of due care and loyalty.[61] Without conceding the (lack of) independence or disinterestedness of any directors that remained as defendants, the RDI Board then proceeded to consider the actions taken leading up and including Appellant's termination, as well as the Share Option Decision.[62] Director Adams, as well as Directors Margaret and Ellen Cotter, did not vote on either issue—leaving the ultimate decisions to the remaining directors.[63]

1. The Ratification of the Termination Decision

Following the introduction by RDI's counsel, Lead Independent Director Gould summarized the first issue for consideration: ratification of the actions taken by the Board members relating to the termination of Appellant as President and CEO of RDI.[64] All directors were provided copies of the relevant Minutes of the Board Meetings held on May 21, May 29, and June 12, 2015.[65] In addition to

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60 XXVJA6224C–D.
61 *Id.*
62 *Id.*
63 *Id.*
64 XXVJA6224D.
65 *Id.*

their "thorough" review of the relevant Board materials, Directors Codding and Wrotniak, who were not yet members of the RDI Board at the time of Appellant's termination, stated that they were drawing on their "extensive knowledge about the Board's reasons for the termination of Mr. Cotter, Jr.," including their observations of Appellant's "behavior and demeanor in Board meetings" since each joined over two years earlier, as well as numerous conversations with other Board members regarding "the thinking and rationale for that decision."[66]

Director Codding expressed her view that Appellant "did not possess the knowledge, experience, ability, temperament or demeanor to be chief executive officer of the Company," an opinion with which Mr. Wrotniak concurred.[67] Discussion then ensued regarding the Board materials, including the fact that, during his tenure, Appellant had secretly retained an outside consultant, Highpoint Associates, to assist him in his CEO duties—a fact that he did not disclose to the Board prior to his termination.[68]

Director McEachern then made a motion, seconded by Ms. Codding, as follows:

> BE IT HEREBY RESOLVED that the Board ratifies the actions taken by the Company's board members relating to the termination of James J. Cotter, Jr. as President and CEO as such actions are outlined in the minutes of the Board meetings held on May 21, 2015, May 29, 2015

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66 *Id.*; *see also* XXXIIJA7863–7866, 7870–7874.
67 *Id.*
68 XXVJA6224D–E.

and June 12, 2015.[69]

After debate and further discussion, including an opportunity by Appellant to make comments, the proposed resolution was adopted by Directors Codding, Gould, Kane, McEachern, and Wrotniak, with Appellant casting the sole vote in opposition.[70] Appellant characterized the ratification as simply being a litigation device, despite the fact that the five ratifying Directors were no longer parties to his litigation and had no personal stake in whether the litigation went forward.[71]

2. The Ratification of the Compensation Committee's Share Option Decision

Director Gould then introduced the second issue for consideration: ratification of the September 21, 2015 decision by RDI's Compensation Committee to permit the Estate to use Class A non-voting stock as the means of payment (as opposed to cash) for the exercise of an option to purchase 100,000 shares of Class B voting stock in RDI.[72] Counsel for the Company summarized the information regarding the matter considered by the Compensation Committee in 2015, including the fact that acceptance of stock was within the discretion of the

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69 XXVJA6224E.
70 *Id.*
71 *Id.*
72 *Id.*

Compensation Committee as administrators of the 1999 Stock Option Plan under which the stock option was granted.[73]

RDI's Board members then generally expressed their awareness of the information as well as their review of the relevant Board materials and Compensation Committee minutes, and opened the floor up for debate, including comment by Appellant.[74] The independent directors noted, among other things, that the Compensation Committee had discretion under the 1999 Stock Option Plan to allow the use of Class A Shares to exercise options to acquire Class B Stock, that the Company was at the time buying in its Class A Shares under its stock repurchase plan, that the market price of Class A shares had significantly increased since the date of the transaction, and that, from the point of view of the Estate, the same economic results could have been achieved by the sale of Class A shares into the market and using those sale proceeds to exercise the options to acquire Class B Stock.[75]

A motion was made and seconded, as follows:

> BE IT HEREBY RESOLVED that the Board ratifies the decision of the Compensation Committee of the Company, as outlined in the minutes of its September 21, 2015 meeting, to permit the Estate of James J. Cotter, Sr. to use Class A non-voting stock as the means of payment

[73] XXVJA6224E–F.
[74] XXVJA6224E.
[75] XXVJA6224E–F.

> for the exercise of an option to purchase 100,000 shares of Class B voting stock of the Company.[76]

The proposed resolution was then adopted by Directors Codding, Gould, Kane, McEachern, and Wrotniak, with Appellant casting the sole vote in opposition.[77] Appellant failed to offer any substantive or material objection to the ratification, complaining simply that it was taken for a "litigation purpose."[78] The Board then moved, without objection, that its resolutions include the "authorization to take such other actions as may be necessary to accomplish the matters approved."[79]

IV. THE DISTRICT COURT GRANTS SUMMARY JUDGMENT ON APPELLANT'S REMAINING CLAIMS BASED ON RATIFICATION

Following the RDI's Board's December 29, 2017 ratifications, Respondents filed a motion for summary judgment as a matter of law in which they argued that, as a result of the recent approval of the Termination Decision and Share Option Decision by a majority of independent, disinterested directors, the business judgment rule now attached to those transactions, which Appellant could not overcome.[80] The District Court subsequently denied Respondents' motion, as well as RDI's contemporaneous demand futility challenge, "without prejudice" and with potential "leave" to renew because the motions were not timely filed by the

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76 XXVJA6224F.
77 *Id.*
78 XXVJA6224E–F.
79 XXVJA6224F.
80 XXV6192–6224.

November 9, 2017 deadline for dispositive motions—despite the fact that such motions were contingent upon and not even ***possible*** until the District Court's December 11, 2017 ruling on director independence.[81]

Trial on the Termination Decision and the Share Option Decision with the remaining three Directors (Ellen Cotter, Margaret Cotter, and Guy Adams) as defendants was then set to begin on January 8, 2018.[82] However, one day before trial, Appellant requested an emergency stay due to an alleged "serious medical condition" he actually discovered six-and-a-half weeks prior.[83] The District Court ultimately granted Appellant's requested continuance, although subsequent evidence cast severe doubt on his representations (and indicated, instead, that Appellant's request may have been motivated by the fact that the bulk of his experts were not going to appear at trial due to his repeated nonpayment of their fees, which would have likely triggered a directed verdict in favor of Respondents).[84] Trial was then rescheduled for July 2018, and the District Court allowed the parties 75 days to conduct discovery on the December 29, 2017 ratifications and any demand futility issues.[85]

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81 XXV6273–74.
82 IRA181.
83 IRA183–188.
84 IRA181–194.
85 XXV6284, 6290–6291.

Following this discovery, Respondents filed another motion for summary judgment based on ratification on June 1, 2018, while RDI renewed its demand futility challenge.[86] The District Court held oral argument on these motions, as well as other discovery-related motions, on June 19, 2018.[87] Due to issues encountered by RDI with respect to its claims of privilege over certain documents and the timeliness of its ratification-related document production, the District Court imposed an evidentiary sanction for the purposes of pretrial motions: "a rebuttable presumption that the docs, if timely produced, would support the plaintiff's position that the ratification was a sham or fraudulent exercise."[88]

However, the District Court determined that, taking "into consideration the inferences, the rebuttable presumption, as well as the evidence that has been submitted," the remaining defendants (Ellen Cotter, Margaret Cotter, and Guy Adams) had overcome the rebuttable presumption and thus the ratification of the Termination and Share Option Decisions by a majority of disinterested, independent directors protected those decisions under Nevada's business judgment rule, which Appellant had not adduced sufficient evidence to surmount.[89]

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86 XXIXJA7173–7221; IRA97–128.
87 XXXIVJA8343–8394.
88 XXXIV8377.
89 XXXIV8389.

On August 14, 2018, the District Court memorialized its ruling in Findings of Fact and Conclusions of Law and entered judgment in favor of the remaining three Directors.[90] In its formal decision, the District Court determined that "all of the requirements for the application of NRS 78.140" and ratification under Nevada law were met, including that the "[t]he December 29, 2017 ratification vote was 'in good faith'"; the Directors had "reasonably informed themselves of the relative merits" of the re-reviewed decisions; no Director voting on the at-issue decisions was interested "in the particular transaction ratified"; and the Board had been appropriately advised by "qualified and experienced" corporate counsel (Greenberg Traurig) as to their "fiduciary duties under Nevada law, as well as the history of each decision."[91]

Accordingly, the District Court concluded that the challenged transactions were "valid interested director transactions" under NRS 78.140(2), there was a "rational business purpose" for those transactions, and that the Board's decisions were protected by "their good faith business judgment."[92] Appellant subsequently

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[90] XXXIVJA8401–8425. The District Court denied without prejudice RDI's Motion to Dismiss Pursuant to NRCP 12(b)(2) or, in the Alternative, NRCP for Lack of Standing (due to Appellant's inability to show demand futility), as it concluded that RDI's motion was mooted by its ruling in favor of Respondents. XXXIV8424.

[91] XXXIV8422–23.

[92] XXXIV8422.

filed his Notice of Appeal on September 13, 2018.[93]

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE TERMINATION AND SHARE OPTION DECISIONS COULD BE RATIFIED UNDER NEVADA LAW

A. The Challenged Decisions Fall Within NRS 78.140 and Are Subject to Ratification Under the Statute

The District Court's determination that the Termination and Share Option Decisions were eligible for ratification under Nevada Law pursuant to NRS 78.140 was fully consistent with both the text of the statute and established case law.[94]

NRS 78.140 provides, in relevant part, that a "contract or other transaction" by a Nevada corporation such as RDI "is not void or voidable" because an interested or non-independent director is present during a meeting or joins in a board resolution approving the transaction if "[t]he fact of the common directorship, office or financial interest is known to the board of directors or

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[93] XXXVIIJA9108–9110.

[94] XXXIVJA8409–8410. In taking this ratification action and making this argument, Respondents do not concede that the Termination Decision or Share Option Decision were properly subject to a derivative challenge by Appellant. As set forth in their Answering Brief in Case No. 75053, this entire ratification analysis should be unnecessary because these "core operational decisions" are not—and should not be—subject to derivative challenge under Nevada law and, even if such decisions could be, Appellant should not have been afforded standing as a representative plaintiff. *See* Case No. 75053 AB28–40. Rather than repeat them, Respondents incorporate by reference these arguments into this Answering Brief. Nor do Respondents concede that Mr. Adams, Ellen Cotter, or Margaret Cotter were interested or not independent with respect to any at-issue transaction.

committee, and the directors or members of the committee, other than any common or interested directors or members of the committee, approve or ***ratify*** the contract or transaction in good faith." NRS 78.140(2)(a) (emphasis added). Citing NRS 78.140, the Nevada Supreme Court has made clear that the business judgment rule applies "in the context of ***valid*** interested director action, or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties." *Shoen*, 122 Nev. at 636, 137 P.3d at 1181 (emphasis added).

Here, the full RDI Board revisited two interested director transactions, which the Independent Directors—consisting of a majority of the Board—then ratified pursuant to NRS 78.140 after investigation and debate. As the District Court correctly concluded,[95] pursuant to *Shoen*, the "disinterested directors" were thus entitled to "invoke the business judgment rule's protections" on behalf of the entire Board with respect to the challenged decisions. *Shoen*, 122 Nev. at 637, 137 P.3d at 1181; *see also Cooke v. Oolie*, No. Civ. A. 11134, 2000 WL 710199, at *13 (Del. Ch. May 24, 2000) ("The disinterested directors' ratification cleanses the taint of interest because the disinterested directors have no incentive to act disloyally and should be only concerned with advancing the interests of the corporation."); *In re W. Nat'l Corp. S'holders Litig.*, No. 15927, 2000 WL 710192, at *26 (Del. Ch. May 22, 2000) (business judgment rule applies to decision of

[95] XXXIVJA8408–8409.

"disinterested, independent and informed directors . . ., even if other directors on the board may have actual or potential conflicts of interest, where the board as a whole follows and accepts the committee's good faith recommendation"); *Kahn v. Roberts*, No. C.A. 12324, 1995 WL 745056, at *5 (Del. Ch. Dec. 6, 1995), *aff'd* 679 A.2d 460 (Del. 1996) ("The business judgment rule will shelter a transaction from shareholder challenge if a panel of independent directors approves it."); *In re Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 365 & n. 34 (Del. 1993) ("an approving vote of a majority of informed and disinterested directors shall remove any taint of director or directors' self-interest in a transaction"). Appellant thus faced a "heavy burden" to overcome the business judgment presumption—which he could not meet. *Shoen*, 122 Nev. at 637, 137 P.3d at 1181.

Appellant attempts to avoid this result, which terminated his lengthy litigation driven by personal animus, by making two challenges to the underlying ability of the RDI Board to legally ratify the Termination and Share Option Decisions pursuant to NRS 78.140. Neither has any merit.

1. The At-Issue Board Decisions Fall Within the Parameters of NRS 78.140

Appellant begins by making the self-defeating argument that the matters ratified by RDI's Board on December 29, 2017 were "not 'contracts or

transactions' capable of being ratified under NRS 78.140."[96] Relying on a distorted reading of the plain text of NRS 78.140, Appellant claims that because the Board ratified "two *decisions*" made in which there were not a majority of independent, disinterested directors originally in favor—and not "any 'contract or transaction' between RDI and an interested director, such as Ellen Cotter or Guy Adams"—the decisions fall outside of the possible protections of NRS 78.140.[97] Appellant's argument has two critical flaws.

[96] OB26, 28–33.
[97] OB31.

(a) No Distinction Exists Between a Board Decision and a Corporate Transaction for Ratification Purposes

First, Appellant's argument relies upon a false dichotomy between board "decisions" and corporate "transactions." Appellant cites no case affirmatively recognizing such a division. This is not surprising; no such distinction exists as a matter of Nevada law. As RDI's Bylaws explicitly provide, board decisions are corporate transactions. Article II, Section 8 of the Bylaws, which governs the "Business of Meetings" held by the RDI Board, states in relevant part: "The ***transactions*** of any meeting of the Board of Directors, however called and noticed or wherever held, shall be valid as though had at a meeting duly held after regular call and notice, if a quorum be present. . . ."[98]

Nevada courts have also not recognized a distinction between board "decisions" and corporate "transactions." For instance, the Nevada Supreme Court in *Shoen* referred to "valid interested director ***actions***" in the context of NRS 78.140, and noted that any "business ***decision***" is eligible for protection under the business judgment rule. 122 Nev. at 636–37 & n.34, 137 P.3d at 1181 (emphasis added). Similarly, NRS 78.0296(1), which now provides for another statutory avenue for the "ratification or validation of noncompliant corporate

[98] VIIIJA1809.

acts,"[99] makes clear that, in Nevada, "***any corporate act*** . . . may be ratified or validated," which it defines to include "[a]ny act or purported act of the board of directors" or "any other act or transaction taken or purportedly taken by or on behalf of the corporation." NRS 78.0296(7)(a)(1), (a)(3) (emphasis added).

Accordingly, the fact that the RDI Board was re-reviewing two of its prior decisions, as opposed to weighing in on matters of first impression or potential transactions yet to be undertaken, is irrelevant to Respondents' ability to ratify.

(b) The Termination and Share Option Decisions Were "Contracts" Between RDI and Its Directors and "Interested Director" Transactions

Second, the original decisions being ratified were clearly susceptible to ratification under NRS 78.140. The Termination and Share Option Decisions fall within the ambit of the statute because they were each a "contract or transaction . . . between a corporation and one or more of its directors or officers." NRS 78.140(a)(1). The Termination Decision involved a "contract" between Appellant (at the time, a director and officer) and RDI. Similarly, the Share Option Decision, which involved the approval of the use of Class A Non-Voting Common Stock to

[99] As a technical matter, NRS 78.0296 does not apply to this lawsuit; it governs cases filed "on or after October 1, 2015" while this action was originally filed on June 12, 2015. However, to a large extent, NRS 78.0296 merely codified existing Nevada common law. Moreover, the statute itself recognizes that it is "not . . . the exclusive means by which a corporate act may be ratified" and that Nevada boards enjoyed the flexible authority "to act, or to consent to an action" that amounts to ratification in various ways predating its enactment. *See* NRS 78.0296(1)(a).

exercise a previously awarded 100,000 share option, also concerned a "contract"—one between the Estate, controlled by Ellen and Margaret Cotter (each of whom are directors), and RDI.

However, Appellant engages in a convoluted statutory analysis to suggest that NRS 78.140(a)(1) requires more. According to his theory, the "contract or transaction" being ratified under subsection 1 must itself involve an "interested director."[100] But Delaware courts addressing 8 Del. C. § 144(a)—which Appellant agrees is the analog to NRS 78.140(a) and relevant to the Nevada statute's interpretation[101]—have not interpreted Delaware's statute in such a manner. Instead, these courts have followed the "plain terms" of the statute and have emphasized a distinction between any "contract or transaction [1] between a corporation and 1 or more of its directors and officers" and "[2] between a corporation and any other corporation . . . in which 1 or more of its directors or officers, are directors or officers, or have a financial interest" rather than transposing subsection 2's "interested director" language on subsection 1. *Cambridge Ret. Sys. v. Bosnjak*, C.A. No. 9178–CB, 2014 WL 2930869, at *5 (Del. Ch. June 26, 2014); *see also Marino v. Patriot Rail Co.*, 131 A.3d 325, 335 (Del. Ch. 2016) (noting that "the literal language of Section 144 . . . encompasse[s]

100 OB28–32.
101 OB30.

any 'contract or transaction between a corporation and 1 or more of its directors or officers'").

However, even assuming *arguendo* that Appellant's interpretation of NRS 78.140(a)(1) is correct, his "requirement" is satisfied here. Appellant, himself a director and stockholder of RDI, sued various other RDI directors because he contends they were personally interested in the outcome of various transactions the Board or its committees voted on *involving him or other directors*. Appellant's firing was a corporate "transaction" that he claims inured to the benefit of two other directors, Ellen and Margaret Cotter, by allowing them—in his mind—"to wrongfully seize control of RDI and to perpetuate that control" and "to protect and further their personal financial and other interests."[102] And Appellant has asserted that the Share Option Decision resulted in a "transaction" (the purchase of additional voting shares) which inured to the benefit of Ellen and Margaret Cotter by "perpetuat[ing] their control of RDI."[103] Appellant has long claimed that Ellen and Margaret Cotter "lack disinterestedness and lack independence" as to these issues, as they benefit from a favorable resolution of each,[104] and has similarly argued that Director Adams exhibited a "lack of

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[102] IIIJA520. Appellant himself was also an "interested director" for the purposes of the Termination Decision.
[103] IIIJA552.
[104] XVII4128–4129.

disinterestedness" on these matters due to a purported financial dependency on Ellen and Margaret Cotter.[105]

Accordingly, the District Court's decision was appropriate even if Appellant's gloss on NRS 78.140(1)(a) applied because the Termination and Share Option Decisions were "interested director" transactions. *See Shoen*, 122 Nev. at 638, 137 P.3d at 1182 ("a director who has divided loyalties in relation to, or who has or is entitled to receive specific financial benefit from, the subject transaction, is an interested director"); *Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009) ("A transaction is interested where directors appear on both sides of a transaction or expect to derive a financial benefit from it that does not devolve upon the corporation or all stockholders generally.") (citation omitted).

Indeed, Appellant's new contention that the at-issue decisions fall outside of the parameters of NRS 78.140 is contrary to the entire premise of the derivative suit he has pursued for the last three years. Simply, if the decisions ratified at the December 29, 2017 meeting were not matters which required independence on the part of RDI's Directors, then Appellant's "derivative" challenge to directorial independence is irrelevant; if those decisions did require independence, then—as a matter of law—they can be ratified by the Independent Directors.

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105 XVII4129.

2. NRS 78.140 Allows Ratification of Previous Board Decisions That Are the Subject of Ongoing Litigation

Appellant also asserts that "NRS 78.140 does not permit ratification of actionable conduct" and cannot be applied to the review of previous "board decisions made by a majority of directors who lacked independence."[106] This is not correct. Appellant's entire argument is premised upon an unsupportable leap of logic: having selectively cited a subset of cases that address certain kinds of ratification (*e.g.*, pre-incorporation contracts or loans extended to a corporation's agents), Appellant tries to infer the general parameters of ratification under NRS 78.140 from the mere ***subject*** of those few cases—even though those cases themselves do not affirmatively announce such rules or restrictions.[107] Instead, other authority, ignored by Appellant, has decisively rejected his position.

In fact, contrary to Appellant's assumption, it is a long-standing rule that "[a] board may ratify acts of a former board" and "the ratification by the directors of previous corporate acts may be effective even though it occurs subsequent to the filing of a shareholders' derivative suit questioning the validity of such acts." 2A Fletcher Cyc. Corp. § 762 ("Who May Ratify—Directors") (Sept. 2019); 2 Fletcher Cyc. Corp. § 429 ("Effect of Irregularity or Illegality—Ratification by

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106 OB32–35.

107 *Id.*

Directors or Shareholders") (Sept. 2019) (same); *Blish v. Thompson Automatic Arms. Corp.*, 30 Del. Ch. 538, 583–85 (Del. 1948) (same).

Accordingly, as in this case, courts have recognized that a "newly elected board of directors" can "ratify" the "termination" of an officer by a previous board, and that such "ratification would have retroactive effect, making the ratified action valid as of the original decision date." *Mates v. N. Am. Vaccine, Inc.*, 53 F. Supp. 2d 814, 826 (D. Md. 1999). They have also held that "ratification" may not only "be directed to lack of legal authority of an agent" (an example focused on by Appellant)[108] but may also "relate to the consistency of some authorized director action with the equitable duty of loyalty" or "a director conflict transaction." *Lewis v. Vogelstein*, 699 A.2d 327, 335 (Del. 1997).

And they have further concluded that a later board may "cure retroactively" any corporate action "that falls within the board's *de jure* authority" but that happens to be "defective." *Kalageorgi v. Victor Kamkin, Inc.*, 750 A.2d 531, 539 (Del. Ch. 1999) (majority of disinterested directors on later board can ratify previous, problematic stock issuance); *see also Adams v. Calvarese Farms Maint. Corp.*, C.A. No. 4262–VCP, 2010 WL 3944961, at *9 (Del. Ch. Sept. 17, 2010) (later, properly constituted board's "review and tacit approval" of earlier business decision cured any deficiency); *Bd. of Educ. Sch. Dist. No. 67 v. Sikorski*, 214 Ill.

[108] OB34.

App. 3d 945, 952 (1991) ("the Board's subsequent actions . . . ratified and cured the Board's previous decision" that, absent ratification, would have been rendered void by a state procedural law).

The ability of a board to cure actual or potential defects with previous corporate actions—including board decisions—is consistent with Nevada policy. For instance, Nevada requires that prospective derivative plaintiffs "make a demand on the board of directors" because the board has the statutory "power to manage the corporation's affairs." *Shoen*, 122 Nev. at 633, 137 P.3d at 1179. As the Nevada Supreme Court has emphasized, a demand gives the board "an opportunity to correct improper conduct or actions" prior to litigation, it discourages "unnecessary, unfounded, or improper shareholder actions," and it allows for the acts to "be subject to ***ratification*** . . . thus precluding the necessity of a suit." *Id.* (emphasis added). If the demand requirement allows a majority of independent, disinterested directors on a corporate board to "correct" or "ratify" an act for which there would otherwise be an "immediate recourse to litigation" via a derivative suit, *id.*, it makes logical and practical sense that a majority of independent, disinterested directors can also revisit acts that are currently the subject of litigation to "correct" or "ratify" them—especially where, as here, Appellant never bothered to make a demand upon RDI's Board.

B. Even if NRS 78.140 Did Not Apply, the At-Issue Decisions Were Eligible for Ratification Under Nevada Law

Even if Appellant were correct that the Termination and Share Option Decision could not be ratified pursuant to NRS 78.140 for technical reasons specific to the statute, the District Court's decision would still be supportable on an alternative basis. Nevada law has long recognized a variety of "nonexclusive procedures by which a corporate act that is not in compliance with applicable law or the articles of incorporation may be ratified or validated by the directors." Laws 2015, c. 514 § 1, eff. Oct. 1, 2015; *see also In re Amerco Deriv. Litig.*, 127 Nev. 196, 217, 252 P.3d 681, 697 n.6 (2011) (recognizing that ratification may occur even outside of the NRS 78.140 context).

In fact, nearly 100 years ago (prior to the enactment of NRS 78.140), the Nevada Supreme Court acknowledged a "well established" principle at common law "that acquiescence with knowledge of the facts, by the stockholders or directors of a corporation in illegal proceedings of a board of directors, or some of them, may operate as a ratification or confirmation of such proceedings if the acts done or authorized were within the powers of the governing board in the first instance." *Clark Realty Co. v. Douglas*, 46 Nev. 378, 212 P. 466, 468 (1923); *see also Fed. Mining & Eng'g Co. v. Pollak*, 59 Nev. 145, 85 P.2d 1008, 1011–12 (1939) (same); *European Motors, Ltd. v. Oden*, 75 Nev. 401, 403–04, 344 P.2d 195, 197 (1959) (same). Delaware has similarly concluded that "disinterested

directors' ratification" will "signal[] that the interested transaction furthers the best interests of the corporation despite the interest of one or more directors" and lead to the application of the business judgment rule even where "Section 144 of the Delaware General Corporation Law does not explicitly apply," because "the policy rationale behind the provision's safe harbor" extends to contexts beyond the statute. *Cooke*, 2000 WL 710199, at *13 (validating ratification by disinterested directors even though the "actions do not fall explicitly within § 144"); *see also Marciano v. Nakash*, 535 A.2d 400, 403 (Del. 1987) ("We agree that section 144(a) does not provide the only validation standard for interested transactions."); *Toedtman v. TurnPoint Med. Devices, Inc.*, C.A. No. N17C–08–210, 2019 WL 328559, at *8 (Del. Super. Ct. Jan. 23, 2019) ("It would be incorrect to say that § 144 offered the exclusive means of validating interested director transactions.").

Neither the Termination Decision nor the Share Option Decision were *ultra vires* acts. *See Shoen*, 122 Nev. at 643, 137 P.3d at 1185–86. Acts that are *ultra vires* "go[] beyond the powers allowed by state law or the articles of incorporation" and are not subject to ratification. *Id.* In contrast, an act is eligible for ratification if it "was within the corporate powers, but was performed without authority or in an unauthorized manner." *Id.*; *see also Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch. 2005) (same).

Here, Article IV, Section 10 of RDI's Bylaws gave the Board the unfettered right to remove Appellant "at any time, with or without cause, . . . by a vote of not less than a majority of the entire Board."[109] *See also* NRS 78.120(1) ("the board of directors has full control over the affairs of the corporation"); NRS 78.130(3) (officers' terms determined by bylaws or directors). Similarly, Article II, Section 10 (providing for the use of committees)[110] and the authority granted by RDI's Executive Committee[111] provided the Compensation Committee with the right to "review, evaluate, revise, and recommend" policy with respect to employee compensation and the exercise of stock options.[112] *See also* NRS 78.125(1) (recognizing that committees "may exercise the powers of the board of directors in the management of the business and affairs of the corporation" to extent provided in the company's resolutions or bylaws).

Because both decisions were well within the authority of RDI's Board and were, at most, potentially problematic for procedural reasons (arising from directorial interest), reconsideration and ratification of them by RDI's Board was entirely consistent with established Nevada law even outside of the NRS 78.140 context. Accordingly, even if that specific statute did not apply (contrary to the

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109 VIIIJA1813–1814.
110 VIIIJA1810
111 XIIIJA3211.
112 *Id.*

District Court's belief), the December 29, 2017 ratifications would still be legally effective.

II. ALL OF THE PRECONDITIONS FOR A VALID RATIFICATION WERE MET

Not only were the Termination and Share Option Decisions eligible for ratification under Nevada law (including pursuant to NRS 78.140), the District Court correctly determined that "all of the preconditions" for a valid ratification were actually met.[113] As required by NRS 78.140(2)(a), the entire RDI Board was well aware—at the time the ratification votes occurred—of Appellant's claims that Mr. Adams, Ellen Cotter, and Margaret Cotter were interested or not independent in light of their financial interests. Appellant made such allegations at the time of his termination in June 2015, and in every iteration of his complaints; indeed, Appellant has not alleged that the purported conflicts of Ellen Cotter, Margaret Cotter, and Guy Adams were not "known," but rather that RDI's directors went forward in the face of these known conflicts.[114] The RDI Board also repeatedly discussed Appellant's allegations at various board meetings, including at the December 29, 2017 Special Meeting.[115]

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113 XXXIVJA8422.
114 IIIJA520, 522, 527, 531–532, 535, 538–539.
115 XXVJA6224C–D.

Moreover, as required by NRS 78.140(2)(a), the RDI Board ratified the Termination and Share Option Decisions by a 5-1 vote, counting only the votes of those Directors whose disinterestedness and independence Appellant could not reasonably challenge.[116] And the December 29, 2017 ratification vote was certainly "in good faith": the Directors who were not present at the time these matters were initially decided, Wrotniak and Codding, reasonably informed themselves of the relative merits of the decisions, including by reviewing contemporaneous materials and drawing on their personal knowledge gleaned in their two years of Board service; corporate counsel was present and advised the entire Board of its fiduciary duties under Nevada law, as well as the history of each decision; no ratifying director still had a personal stake in the derivative litigation brought by Appellant or in the particular transaction ratified; and discussion and debate occurred prior to the final votes, with all Directors—including Appellant—afforded the chance to ask questions or make comments.[117]

Nevertheless, relying on a hodgepodge of red herrings, legal distortions, and incorrect statements of fact, Appellant claims that the December 29, 2017 ratifications were not "in good faith" and thus not effective.[118] None of Appellant's arguments are supportable.

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116 XXVJA6224D–F.
117 XXVJA6224C–F.
118 OB35–49.

A. The Full RDI Board Debated and Ratified the At-Issue Decisions, Not a Special Litigation Committee

Appellant cites a series of cases that relate specifically to the process engaged in by a ***special committee*** of a board of directors ***whose independence was in question***.[119] Neither of those circumstances existed here. The ratification votes were undertaken at a meeting of RDI's full Board of Directors on December 29, 2017, not by a subset of directors in a "special litigation committee." Moreover, in contrast to cases involving special litigation committees, the District Court had already determined by the time of the ratifications that there was no genuine issue of material fact as to the independence or disinterestedness of the five Directors who voted in favor of ratification. And the actions taken by the Independent Directors at that meeting did not constitute a recommendation to dismiss Appellant's derivative action (as occurs with special litigation committees); instead, they simply reconfirmed that Nevada's business judgment standard should attach to two earlier board decisions. Appellant tilts at windmills in his attempt to conjure some type of improper conspiracy or influence.

RDI did have a Special Independent Committee ("SIC"), comprised of Directors Gould, McEachern, and Codding.[120] But, as Gould (its then-Chairman) explained, the SIC was not like the special litigation committees in the cases cited

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119 *Id.*

120 XXXIIJA7976.

by Appellant; RDI's committee did not "have different objectives" from the rest of the Board, and it was never involved in "a situation where the committee felt that there could possibly be any conflict."[121] Indeed, RDI's SIC was not focused on investigating or exonerating certain directors, nor did it engage with any of the director-defendants in an adversarial manner. Rather, as its counsel, Mike Bonner of Greenberg Traurig, confirmed, the SIC meetings, of which "there were several of them, were basically updates."[122] The SIC meetings "were merely update status calls" where the committee "was getting updates on the status of some potential settlements of either this action or related actions" and discussing "significant concerns about the timing of the trial."[123]

The SIC played virtually no role in the ratification decision at issue. Contrary to Appellant's unsupported aspersions, the SIC held no votes on any ultimate issue of liability, generated no reports (draft or final), and made no recommendations that any directors be exonerated.[124] As Bonner testified under oath before the District Court on May 2, 2018 (when explaining his delay in preparing minutes for the insignificant SIC meetings as opposed to the critical Minutes of the RDI Board of Directors Meeting on December 29, 2017): "***[T]here***

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121 XXXIIIJA8060–8063.
122 XXXIIJA7996–7997.
123 *Id.*
124 XXXIIJA7847–7849.

was no formal action taken in any of these [SIC meetings], so ***they didn't have any particular consequence***. . . . The special independent committee meetings were merely update status calls, if you will."[125] Indeed, Mr. Bonner confirmed—contrary to Appellant's baseless assertions—that the scheduling emails calling for a full RDI Board meeting to vote on possible ratification in late December 2017 were not "prepared as a result of what happened at the special independent committee's meeting in December."[126]

Thus, unlike the cases cited by Appellant, such as *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130 (Del. Ch. 2006), *In re Oracle Sec. Litig*., 829 F. Supp. 1176 (N.D. Cal. 1993), or *In re Par Pharm., Inc. Deriv. Litig*., 750 F. Supp. 641 (S.D.N.Y. 1990), this was not a situation where a special litigation committee, comprised of a subset of directors and cordoned off from the full board, exercised its powers in secret to itself extinguish a litigation. Rather, the December 29, 2017 ratifications were openly driven by the five Independent Directors. It was these Directors, "who together constitute a majority of the Board," that formally asked Ellen Cotter in her capacity as CEO and President of RDI to call a full Board meeting to discuss the possibility of ratification.[127] These Directors specifically invoked "Reading

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125 XXXIIJA7996–7997.
126 XXXIIJA7990.
127 XXVJA6350A.

International, Inc. Bylaws, Art. 2, Section 7" in making this request.[128] That provision explicitly requires "the written request of a majority of the directors" to call a special meeting—any request by a three-person committee (such as the SIC) would have been insufficient.[129]

The agenda for the December 29, 2017 full Board meeting, circulated by Ellen Cotter's assistant on December 27, 2017, also reflects that ratification was to be discussed "[p]ursuant to a request by a majority of the Directors (Judy Codding, William Gould, Edward Kane, Douglas McEachern, and Michael Wrotniak)," as does an email sent by Ellen Cotter on December 28, 2017.[130] And, of course, the minutes from the December 29, 2017 RDI Board meeting, where ratification was discussed and approved, show that the request came "by a majority of the directors"—not the SIC.[131] As Mr. Bonner confirmed, it was the December 29, 2017 full Board meeting where "[t]here's a formal action of the board taken, so there's a legal consequence to what that board did."[132] Appellant's distortion of the process leading up to the ratifications (including his descriptions of the SIC) is nothing more than a frolic-and-detour from the material facts actually relevant to the legal effectiveness of the Board's December 29, 2017 decisions.

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128 *Id.*
129 XXXIIIJA8090.
130 XXXIIJA7940.
131 XXXIIJA8102–8107.
132 XXXIIJA7997.

B. The RDI Board Was Entitled to Consider the Potential Litigation Effect of Ratification

Appellant also claims that because "[n]ot a single director" called for ratification "until trial against the Cotter sisters and Adams was imminent," and Director Gould testified that, in part, "the ratification might be a litigation strategy" the ratifications were somehow tainted.[133] Appellant's argument is nonsensical.

Once again, Appellant ignores the actual facts. That no directors asked for reconsideration of the Termination and Share Option Decisions until late December 2017 is not surprising. Until the District Court concluded at the December 11, 2017 hearing that Appellant had not established a genuine issue of material fact as to the independence or disinterestedness of Directors Kane, McEachern, Gould, Codding, or Wrotniak, ratification was not even a possibility, as Appellant had claimed that RDI's entire Board—except for him—was legally compromised and thus unable to exercise their business judgment. Potential reconsideration of the Termination and Share Option Decisions prior to the District Court's initial summary judgment order would not have accomplished anything, and was thus sensibly delayed.

With respect to his contention that Director Gould confirmed that "litigation strategy" played a critical role in the December 29, 2017 ratification process,[134]

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133 OB36; XXXJA7508.

134 OB36.

Appellant ignores that Gould affirmatively rejected this inference. Gould actually testified "that the effect the ratification might have on the pending derivative lawsuit" certainly "had some bearing in [his] mind, but that was not one of the key factors behind his decision"; instead, the "key factors" occurred in 2015, when—for instance—Appellant's performance as CEO and President repeatedly proved unsatisfactory.[135] Regardless, any consideration by Gould or any other Director of the potential legal ramifications of ratification was entirely appropriate.

Appellant's attempt to create a false dichotomy between a "litigation strategy" and a "business judgment" is not supported by any authority, nor does it make logical sense. Instead, it is settled under Nevada law, in both the demand and special litigation committee contexts, that a board may take certain actions to evaluate a potential derivative lawsuit and either refuse to proceed with it or dismiss it if it believes the charges are unmerited or its pursuit is not in the best interests of the company. *See Shoen*, 122 Nev. at 633, 137 P.3d at 1179 (noting that "the demand requirement protects clearly discretionary directorial conduct and corporate assets by discouraging unnecessary, unfounded, or improper shareholder actions"); *Matter of DISH Network Deriv. Litig.*, 133 Nev. 438, 443, 401 P.3d 1081, 1087–88 (Nev. 2017) (in context of a special litigation committee, holding that "courts should defer to the business judgment of an SLC that is empowered to

[135] XXXJA7508.

determine whether pursuing a derivative suit is in the best interest of a company where the SLC is independent and conducts a good-faith, thorough investigation"); *Amerco*, 127 Nev. at 232, 252 P.3d at 705 (Pickering, J., concurring in part, dissenting in part) ("Among the matters entrusted to a corporation's directors is the decision to litigate or not to litigate a claim by the corporation."). Any decision by a board or portion thereof to weigh whether to pursue or dismiss a lawsuit, or take steps and position itself so that it may have this authority, inherently involves the combination of a "litigation strategy" and a "business judgment." Separating the two concepts is a practical impossibility.

Here, a majority of Independent Directors of RDI came to believe, based on their judgment and first-hand knowledge from their interactions with Appellant on the Board of Directors of RDI, that the few challenged transactions in this case for which the business judgment rule would not automatically apply under the District Court's rulings were actually appropriate and justified, and it was not in the Company's best interest to continue to waste stockholders' money pursuing Appellant's baseless charges motivated by personal animus.[136]

The RDI Board was not somehow required to sit on their hands in the face of a lawsuit the Independent Directors considered to be an unnecessary drain on substantial Company resources. By late December 2017, Appellant's "derivative"

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[136] IRA137–138.

suit had already cost RDI nearly $15 million. No stockholders other than the T2 Plaintiffs had ever joined Appellant's action, and the T2 Plaintiffs had ultimately rejected Appellant's claims and concluded that "continuing" with litigation would "provide no further benefit."[137] It would have been a dereliction of duty for the Directors not to have considered the costs and benefits of Appellant's litigation—including how to minimize the ongoing damages inflicted by Appellant—when ratification became an option.

This is especially true given that, after the District Court's initial summary judgment order, Appellant could show little to no damages to RDI arising from the two at-issue decisions that remained: the Class A stock tendered by the Estate to exercise the challenged stock option had increased in price (meaning that RDI made money from the transaction and rescission would not be in the best interests of RDI's stockholders); Appellant's challenge to his termination focused largely on equitable relief (his reinstatement), which the Directors did not support as in RDI's best interest;[138] and Appellant had been left with no expert testimony to support his generic claims of "injury to RDI's reputation and goodwill" and "diminution in value" arising from the two decisions.[139] Indeed, the costs RDI incurred solely as a result of Appellant's last-minute delay of the scheduled January 2018 trial

137 IRA52
138 XXIXJA7143.
139 XXIXJA7140; IRA181, 186–187.

"actually approach[ed]" or were "in excess of the claimed 'waste' and 'monetary damages'" that he was seeking in his lawsuit.[140]

Accordingly, the Independent Directors were entirely entitled to consider the potential ramifications of their decision on Appellant's vexatious litigation when, in their business judgment, they were determining the best result for RDI and its stockholders. To artificially restrict what a board may weigh, as Appellant seeks, would contravene "the fundamental precept that directors manage the business and affairs of corporations." *Shoen*, 122 Nev. at 634, 137 P.3d at 1179.

C. The Board's Consultation With Greenberg Traurig, Counsel for RDI, Does Not Somehow Invalidate the Ratification Vote

Appellant makes much of the fact that the Directors received advice from Company counsel at Greenberg Traurig regarding ratification, and suggests that this alone voids the ratification vote and should have defeated Respondents' motion for summary judgment.[141] Appellant is incorrect, and his argument misconstrues both the facts and various inapposite authorities.

As an initial matter, that members of the Board sought advice from RDI's counsel with respect to ratification does not show bad faith on their part—***it shows the opposite***. It would be unfathomable for a member of any board of directors, acting in good faith, to decline to seek advice from corporate counsel regarding a

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140 IRA179.

141 OB38, 40,44–49.

vote to ratify a decision that had been the subject of extensive litigation. Instead, Nevada law expressly permits directors to seek out and rely on advice from counsel in connection with their decision-making, *see* NRS 78.138(b)(2) ("In exercising their respective powers, directors and officers may, and are entitled to, rely on information, opinions, reports, books of account or statements, . . . that are prepared or presented by . . . [c]ounsel . . . as to matters reasonably believed to be within the preparator's or presenter's professional or expert competence."), and Nevada law considers requests for "legal advice on the issues raised by the matters under investigation" to be indicia of good faith and informed decision-making by corporate board. *DISH*, 133 Nev. at 450, 401 P.3d at 1092.

Appellant's numerous attempts to impugn Greenberg Traurig are also unsupportable. For instance, while Appellant makes much of the fact that the firm "personally discussed ratification" with Ellen and Margaret Cotter before doing so with the SIC on December 21, 2017,[142] he avoids that this was logistically necessary. Ellen Cotter, as RDI's CEO and President, was tasked under its Bylaws with calling full Board meetings,[143] and thus had to be provided advance notice of a possible request for a meeting by other Directors. Margaret Cotter is another officer and fellow Director on RDI's Board. She, collectively with Ellen Cotter,

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142 OB38.

143 VIIIJA1811.

controls the majority of RDI's voting stock, and thus also needed to be apprised in advance of any potentially material corporate action. Of course, neither Ellen nor Margaret Cotter actually cast a vote at the December 27, 2017 Board meeting,[144] which renders these innocuous conversations even more irrelevant.

Appellant's related criticism that Greenberg Traurig initially raised the idea of potential ratifications, rather than any director coming to the idea "on their own,"[145] is also nonsensical. Directors are not typically lawyers (here the majority were not); they depend upon company counsel to inform them of the parameters of Nevada law in exercising their duties. That such counsel raised an array of possibilities—including ratification under NRS 78.140—for consideration by the Board is simply diligent representation. Authority always remained with the Independent Directors to weigh this advice and pursue any course they chose.

Appellant's effort to paint Greenberg Traurig as improperly "conflicted" is similarly misplaced. While Appellant notes that in "shareholder derivative actions, courts have consistently recognized that the 'law forbids dual representation of a corporation and directors in a shareholder derivative suit,'" *Natomas Gardens Inv. Grp. LLC v. Sinadinos*, No. Civ. S–08–2308, 2009 WL 3055213, *6 (E.D. Cal. Sept. 14, 2009),[146] he downplays that this required separation occurred here, as the

144 XXVJA6224A–F.
145 OB48.
146 OB40.

Director Defendants have been represented by Quinn Emanuel and Cohen Johnson, while RDI has been separately represented by Greenberg Traurig.

Appellant is left with his assertion that Greenberg Traurig improperly involved itself in his "derivative" lawsuit by joining certain motions and "asserting positions available only to individual directors," such that RDI wrongfully "stepped out of its neutral position as the nominal defendant and into the shoes of a partisan litigant" through the firm's relatively active involvement.[147] But none of the cases cited by Appellant are relevant; they all relate to the inapposite "special litigation committee" context.[148]

Where such committees are not involved, as here, courts have instead emphasized that, "just as it should be recognized that the corporate entity has a legitimate interest in recovering the fruits of past management or fraud on the part of its directors, so too, it has a legitimate interest, and perhaps a role to play, in the defense of actions which have been frivolously or even wrongfully brought against its directors." *Messing v. FDI, Inc.*, 439 F. Supp. 776, 782 (D.N.J. 1977) (approving of "active stance" by corporation in derivative litigation); 13 Fletcher Cyc. Corp. § 6025 (Sept. 2019) (noting that the corporation need not even obtain independent counsel "in patently frivolous cases"). In derivative actions, "the

147 OB47–48.
148 OB44–49.

corporation is sometimes treated as a plaintiff, but more frequently as a nominal or ***active*** defendant. Sometimes it has assisted the plaintiff, but at other times the defendant. No single criterion appears capable of concretizing its true role." *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Hoffa*, 242 F. Supp. 246, 252–53 (D.C. Cir. 1965) (emphasis added).

However, where it is "clear that if the corporation's own interests are drawn into the controversy, it may aggressively defend them," including where the suits seeks "to set aside a corporation reorganization" or "to enjoin the performance of contracts." *Id.* at 253; *see also Domanus v. Lewicki*, 891 F. Supp. 2d 929, 932 (N.D. Ill. 2012) (recognizing corporation interest exception); *Swenson v. Thibaut*, 39 N.C. App. 77, 99–100, 250 S.E.2d 279, 293–94 (1978) (corporation can be "more than a nominal defendant" where suit seeks "to enjoin the performance of a contract by the corporation" or "interfere with internal management"); *Alleghany Corp. v. Kirby*, 218 F. Supp. 164, 186 (S.D.N.Y. 1963) (corporation is permitted "to expend funds in defense of a derivative action presumptively brought on its behalf when some interest of the corporation is threatened"); *Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35, 37 (Tex. Civ. App. 1959) ("If the derivative action threatens rather than advances the corporate interests, the corporation may actually defend the action."); *Fuller v. Am. Mach. & Foundry Co.*, 91 F. Supp. 710, 711 (S.D.N.Y. 1950) ("The corporation can actively defend where the interest of

the corporations are threatened with injury by the relief sought in the complaint."); *Blish*, 64 A.2d at 607 (corporation could defend derivative action threatening to cancel shares); *Kirby v. Schenck*, 25 N.Y.S.2d 431, 432–33 (N.Y. Sup. Ct. 1941) (corporation could defend derivative suit seeking to enjoin performance of contracts); *Weiland v. N.W. Distilleries*, 203 Minn. 600, 601, 281 N.W. 364, 365 (1938) (corporation could defend derivative suit seeking to cancel stock shares); *Corey v. Indep. Ice Co.*, 226 Mass. 391, 115 N.E. 488, 489–90 (1917) (corporation could defend itself in derivative action seeking to overturn corporation reorganization and threatening refund of stock sale proceeds).

Here, this is precisely what occurred. Appellant brought a "derivative" action that (1) threatened a corporate reorganization, which would interfere with RDI's internal management (by seeking a court order compelling the termination of Ellen Cotter and his reinstatement as RDI CEO and President); and (2) sought to enjoin the performance of one of RDI's contracts (its stock option agreement), which would result in the cancellation of stock issued over four years ago to a stockholder (the Estate).[149] Under long-settled law, Greenberg Traurig—as counsel for RDI—was therefore justified in taking a more active stance in this patently frivolous derivative litigation to protect the interests of the corporation, which were threatened by Appellant's lengthy, expensive, and unpopular

[149] XXIXJA7143.

"derivative" suit brought in retaliation against his sisters and those he blamed for his many performance failures. Under these circumstances, the actions of Greenberg Traurig did not create some improper "conflict" that jeopardized the effectiveness of the Independent Directors' well-considered ratification decisions.

D. The Directors Voting in Favor of Ratification Were Disinterested and Independent as a Matter of Law

Relying on insufficient inference rather than any evidence, Appellant insinuates that the Independent Directors were not legally "independent." He intimates that the Independent Directors were somehow subservient to "the Cotter sisters' influence" because they undertook ratification (which ultimately benefited Ellen and Margaret Cotter), and suggests that the majority did so because they "were dependent on the sisters to continue their employment as directors of RDI."[150] And Appellant further claims that the District Court in December 2017 held only that he failed to raise a genuine issue of material fact as to their independence, not that they actually were independent, and suggests that the Directors had the burden of this showing on their ratification motion.[151]

None of this is accurate. In its Opinion, the District Court emphasized that "the five affirmative votes" in favor of ratification were from "those directors whose disinterestedness and independence the Court ***had previously determined*** in

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150 OB47–49.
151 OB43–44.

its December 11, 2017 ruling and December 28, 2017 order."[152] Even if the District Court had not so held, the burden as to showing lack of independence would remain with Appellant. There is "a presumption that directors are independent." *In re MFW S'holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013); NRS 78.138(3) (directors "are presumed to act in good faith"). Appellant provides no explanation why this burden would shift to the Directors in the context of a decision by the full Board to revisit two past transactions, especially where such burden-shifting does not appear in NRS 78.140.

Regardless, the Directors have provided overwhelming evidence that Kane, McEachern, Gould, Codding, and Wrotniak were both independent and disinterested with respect to the at-issue transactions.[153] Appellant's latest arguments to the contrary are nonstarters. It is black-letter law that the fact that a director is compensated for board service does not render him or her unable to exercise independent judgment, especially where—as here—there is no evidence that the compensation was economically material. *See Khanna v. McMinn*, No. Civ. A. 20545–NC, 2006 WL 1388744, at (Del. Ch. May 6, 2006) ("the mere fact that a director receives compensation for her service as a board member adds little or nothing" to the independence analysis); *Grabow v. Perot*, 539 A.2d 180, 188

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152 XXXIVJA8422 (emphasis added).
153 *See* Case No. 75053 AB40–52.

(Del. 1988) (allegations that the director receives compensation from the corporation "do not establish financial interest"). Similarly, mere agreement among the Directors as to the appropriateness of a corporate action or strategy is legally insufficient to establish their lack of independence from Ellen and Margaret Cotter. *See Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984) ("The director's approval, alone, does not establish control, even in the face of Fink's 47% stock ownership."). Appellant's renewed challenge to the Independent Directors' disinterestedness and independence is untenable.

E. The Ratifications Ensured the Application of the Business Judgment Rule, Which Appellant Cannot Overcome

Appellant closes with the argument that, even if the ratifications were effective, "NRS 78.140(2)(a) does not necessarily protect the directors from a breach of fiduciary duty claim."[154] This is a non-issue. The District Court did not hold that the December 29, 2017 ratification votes alone extinguished Appellant's remaining claims. Instead, the District Court first concluded that "all of the necessary preconditions for a 'valid interested director' transaction' under NRS 78.140(2)(a) are present," and then held that summary judgment was warranted because the "independent majority of RDI's Board who voted in favor of ratification . . . had a rational business purpose for doing so and exercised their

[154] OB50.

good faith business judgment."[155] In short, per the District Court, the ratifications triggered the business judgment rule, which Appellant could not overcome.

This is entirely consistent with established precedent, which holds that "the 'cleaning effect'" of ratification "is to subject the challenged director action to business judgment review, as opposed to 'extinguishing' the claim altogether (*i.e.*, obviating all judicial review of the challenged action)." *Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) (citation omitted); *Harris Trust & Sav. Bank v. Joanna-W. Mills Co.*, 53 Ill. App. 3d 542, 556, 368 N.E.2d 629, 639 (1977) ("[T]he court must then at least determine that the agreement conformed to the 'business judgment rule,' namely that the directors' 'ratification' can be attributed to any rational business purpose.").

This is exactly what the Delaware Court of Chancery contemplated in the case upon which Appellant relies, *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150 (Del. Ch. 2005). *See id.* at 174 (analyzing director interest following attempted ratification under 8 Del. C. § 144(a)(1) to see if "the business judgment rule" was triggered). The Delaware Supreme Court's subsequent decision in *Benihana* following appeal made this connection explicit; it held that "Section 144 of the Delaware General Corporation Law provides a safe harbor for interested

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[155] XXXIVJA8422; *see also id.* XXXIVJA8423 ("the business judgment rule applies 'in the context of valid interested director action'").

transactions" such that, "[a]fter approval by disinterested directors, courts review the interested transaction under the business judgment rule." *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006). This analysis is also consistent with *Shoen*, in which this Court noted that the business judgment rule applies "in the context of valid interested director action." 122 Nev. at 636, 137 P.3d at 1181.

Here, Appellant does not even attempt to challenge the rational business purposes behind ratification or the underlying Termination or Share Option Decisions.[156] Nor, in the face of all of the evidence, can he.[157] As such, the District Court's ratification ruling should be affirmed.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court affirm the District Court's judgment in their favor. In the alternative, Respondents request that the Court grant judgment in their favor on the grounds that Appellant's action should have been dismissed pursuant to NRCP 12(b)(2) or, in the alternative, NRCP 12(b)(5) for lack of standing due to Appellant's failure to make a demand on RDI's Board and his inability to show demand futility.

Dated this 27th day of November 2019.

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156 OB50–52.

157 *See* Case No. 75053 AB9–17, 54–58.

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 13,787 words.

3. I further certify pursuant to NRAP 28.2 that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of COHEN|JOHNSON|PARKER|EDWARDS, that in accordance therewith, I caused a copy of **RESPONDENTS' ANSWERING BRIEF** to be served as indicated below, on the date and to the addressee(s) shown below:

VIA THE COURT'S ELECTRONIC MAIL SYSTEM ON NOVEMBER 27, 2019

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