IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES J. COTTER, JR., DERIVATIVELY ON BEHALF OF READING INTERNATIONAL, INC., Appellant, v. EDWARD KANE, DOUGLAS MCEACHERN, MARY ANN GOULD, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM GOULD, JUDY CODDING, AND MICHAEL WROTNIAK, READING INTERNATIONAL, INC., A NEVADA CORPORATION, Respondents.	Supreme Court Case No.: 75053 Coordinated with Cases Nos: 76981, 77648, 77333

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ANSWERING BRIEF OF RESPONDENT READING INTERNATIONAL, INC. FOR CASE NO. 76981

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CORPORATE DISCLOSURE STATEMENT

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

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

Greenberg Traurig, LLP.

Dated this 27th day of November 2019.

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

INTRODUCTION

This is the second of three appeals brought by James J. Cotter, Jr. ("Cotter, Jr."), all stemming from his loss on all claims in the litigation wherein he, a former Reading CEO who had served less than a year before his dismissal, masqueraded as a derivative plaintiff in hopes of winning his own reinstatement. Each of his claims were premised on the theory that his two sisters, Ellen Cotter and Margaret Cotter (who together control the majority of the Company's voting shares) had persuaded the other directors to vote on various internal governance issues to suit their own personal interests, rather than the interests of the Company. His suit was primarily focused on the termination of his own employment and his hopes of being reinstated. Despite such focus, Cotter, Jr. challenged a multitude of corporate decisions. He also included as defendants all of the other directors of the Company, including those who had voted against his termination, and adding those appointed subsequently. He could then point to the pending claims against the directors, and their purported lack of independence, to explain his failure to make demand.

In the years since he filed his complaint, he engaged in continual assaults, made incessant demands for discovery and repeated depositions of the same witnesses, and amended his complaint to add newly appointed directors and to challenge new board decisions, all the time costing the Company millions of dollars.

But Cotter, Jr.'s hopes were dashed in December 2017, when the District Court finally acknowledged that, as to at least five of the eight Director Defendants, he was unable to substantiate his claims that they lacked independence. Judgment in favor of those five directors led inevitably to the conclusion that any corporate decisions approved by those five independent directors could not form the basis of a breach of fiduciary duty claim against the remaining three directors. Out of the myriad decisions challenged by Cotter, Jr., only two remained: the decision to terminate Cotter, Jr. (the "Termination Decision"), and a decision (made by the Board's Compensation Committee) that the Estate of James J. Cotter, Sr. (the "Estate") could use nonvoting stock to pay for the exercise of an option to purchase voting stock ("the Option Decision").

The five directors who were found to be independent subsequently voted to ratify the Termination and Option Decisions (the "Ratification Decision"). Because, under Nevada law, an action involving purportedly interested directors cannot be voided based on solely such interest if a majority of the non-interested

directors have ratified the action, and because the only basis for Cotter, Jr.'s attacks on the decisions had been made to further the personal interests of the remaining directors, Cotter, Jr.'s sham derivative suit was finally brought to a halt. Because the suit was halted, Reading, which has been required to foot the bill for the defense of the directors, was saved the expense of a trial from which it could receive no benefit. After the exhaustion of a $10 million insurance policy, and expenditure of millions more, the assault on Reading was ended. Except of course, for this appeal.

Unable to accept that his vendetta against Reading has finally been stopped, Cotter, Jr. now attempts to reinvent Nevada corporate law. He proposes that an entire category of board decisions that do not qualify for his narrow interpretation of the term "transaction" *cannot* be ratified by subsequent boards. Cotter, Jr.'s theories as to Nevada corporate law are wholly inconsistent with the broad authority that Nevada law grants to corporate boards, the broad deference Nevada law requires be given to director decisions, and the scope of the business judgment rule that Nevada has deliberately embraced.

His stance is not surprising: throughout this litigation, Cotter, Jr. has attempted to impose upon Nevada's corporate law a doctrine that admittedly does prevail in Delaware, but is anathema to NRS Chapter 78—the requirement of "entire fairness" of any corporate actions that could arguably inure to the personal

benefit of majority stockholders. The entire fairness doctrine, and indeed, any "enhanced scrutiny" type of analysis is, however, wholly inconsistent with Nevada's express statutory corporate law.

Significantly, in 2017, the Nevada legislature *clarified* that the Nevada corporate law statutes mean what they say—*i.e.*, that the business judgment rule applies in *all* circumstances, absent a contrary provision in a corporation's organization documents, or with respect to changes to voting rights to appoint or reject directors. With such modifications effective July 1, 2017, it is therefore clear that the ratification, which occurred on December 29, 2017, is itself a decision that is protected by the business judgment rule—a truth that Cotter, Jr. has chosen to ignore.

Cotter, Jr. contends that the Ratification Decision was nothing more than a "litigation strategy," as though being a "litigation strategy" could itself somehow negate the effect of the ratification. Cotter, Jr. goes to great lengths to "prove" what Reading itself freely admits—that the *corporate* "purpose" of the Ratification Decision was to put an end to Cotter, Jr.'s sham derivative suit. However, such a purpose does not alter the fact that each of the five directors considered the propriety of the decision to be ratified in the context of the time that the decisions were made, and they voted accordingly. Cotter, Jr.'s efforts to distort and twist the testimony of the directors is to no avail.

Cotter, Jr. asks this Court to create new Nevada corporate public policy that disregards NRS Chapter 78, but it is the legislature that determines public policy, and Nevada's legislature has spoken, repeatedly, on this topic. The directors of a corporation are entitled to great deference when they make decisions on behalf of a company. Reading asks this Court to honor Nevada's public policy and affirm the judgment that put a halt to Cotter, Jr.'s assault on the Company.

JURISDICTIONAL STATEMENT

Respondent Reading agrees that this Court would have jurisdiction pursuant to NRAP 3A(b)(1), allowing an appeal to be taken from the final judgment in an action. However, as set forth in Reading's Answering Brief in Case 75053, the *District Court* herein did not have jurisdiction over the case below, as Cotter, Jr. never properly pleaded demand futility, and never showed that demand was, in fact, futile. Reading incorporates the arguments requesting dismissal for lack of jurisdiction set forth in its Answering Brief in Case No. 75053, as though set forth herein in their entirety.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY GRANTED JUDGMENT IN FAVOR OF THE RESPONDENTS, WHERE THE REMAINING CHALLENGED DECISIONS HAD BEEN RATIFIED BY A MAJORITY OF INDEPENDENT DIRECTORS.

II. THE COURT PROPERLY DETERMINED THAT THE TERMINATION AND OPTION DECISIONS COULD BE RATIFIED.

STATEMENT OF RELEVANT FACTS[1]

Background

Reading International, Inc. 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. **VIII JA1833–1834**. For years it had been led by James J. Cotter, Sr., who was also Reading's controlling stockholder, with the power to vote with more than two-thirds (approximately 66.9%) of the outstanding voting stock. ***Id.*; XI JA2730**. In August 2014, after Cotter, Sr. had resigned for health reasons, Cotter, Jr. was appointed as his father's replacement. **VII JA1673–1684; IX JA2071**. Sadly, he could not fill his father's boots.

At the time of Cotter, Jr.'s appointment, the Board of Directors consisted of Cotter, Jr.; his sister, Margaret Cotter, 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; his

[1] The facts presented here have been narrowed to those that are specifically relevant to the ratification. Reading has provided statements of the facts detailing the events in this litigation in greater detail in its Answering Brief in Case No. 75053 and its Opening Brief in Case No. 77733. Such statements are incorporated herein as though set forth in their entirety. Additionally, Reading joins in the Answering Briefs filed by Respondents Adams, Codding, Ellen Cotter, Margaret Cotter Gould, Kane, McEachern, and Wrotniak in this appeal, as well as those in Case Nos. 75053 and 77648, and in their Opening and Reply Briefs in Case No. 77733, including in the Statements of Facts.

other sister Ellen Cotter, who, as an RDI employee since 1998, controlled the day-to-day operations of the Company's domestic cinema operations; and five non-Cotter directors: (1) Edward Kane, who was an experienced tax attorney and health care industry consultant; (2) Guy Adams, who was a registered investment advisor and experienced independent director on public company boards; (3) Douglas McEachern, who was previously an audit partner at Deloitte & Touche; (4) Timothy Storey, who was Chairman of a New Zealand-based investment fund specializing in commercial property; and (5) William Gould, who, during his lifetime as a corporate attorney, was a renowned expert on corporate governance issues.[2] **VIII JA1980–1983**. Prior to his appointment as CEO, Cotter, Jr. 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. **IX JA2011**. As Co-Executors of the Estate of James J. Cotter, Sr., and through their control of their father's Living Trust and Margaret's position as sole trustee of his Voting Trust, Ellen and Margaret Cotter possess voting control over Reading.

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[2] *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).

Cotter, Jr. Fails as CEO

Following Cotter, Jr.'s abrupt appointment, members of the Board quickly recognized that Cotter, Jr. had various problems, leading to, among other measures, Director Storey to take on a coaching position. **VII JA1586–1589, 1619–1620**. However, by early 2015, it was clear to RDI's Board that Cotter, Jr. lacked numerous leadership qualities, was "closed door," unengaged, "very reluctant and slow to make decisions," and unable to "establish teamwork." **VII JA1582–1583, 1622, 1636–1637; IXJA2088–2089**. Additionally, Cotter, Jr., had "a volatile temper" and "anger management problem[s]," with his outbursts causing employees to be "afraid" of him and be worried for their "physical safety." **VII JA1574–1576, 1592–1597, 1626–16281708–1710, 1751–1753**. Additionally, having observed Cotter, Jr.'s lack of understanding of key issues critical to the cinema industry, the Board questioned whether Appellant was "really learning the business" and "leading [the Company] forward." **VIIJA1564–1567**. Additionally, Cotter, Jr. alienated key executives, including his sisters, with attempts to undermine them before the Board, including using a dispute with a tenant of a New York theater property to attack Margaret Cotter. [3] **VIIJA1598–1599, 1620–1621, 1636, 1706–1707, VIIJA1598–1599, 1620–1621, 1636, 1706–1707**.

[3] In that dispute, the arbitrator ultimately vindicated Margaret Cotter when it ruled in favor of Reading, awarding it specific performance, injunctive relief, and

Cotter, Jr. Fails Despite Efforts to Assist Him and Is Terminated

Reading attempted to assist Cotter, Jr., engaging a Director to serve as an ombudsman to help him along. **VII JA1638–1640**. But his performance did not improve, and the 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. **IX JA2075–2083, 2101**. Rather than taking advantage of the opportunity to make a case for his own continued employment, Cotter, Jr. instead spent the time threatening the board members with financial ruin through a lawsuit. **VII JA1578–1579, 1624–1625; IX JA2075–2078, 2082**. Cotter, Jr. rejected proposals that would have allowed him to keep the title of CEO his title while reducing his responsibilities, thereby allowing him to grow into the position while ensuring he could not harm the Company. **IX JA2082–2084; IX JA2078, 2080–2084, 2103–2106**. Finally, 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. **IX JA2084**. 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

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attorneys' fees of more than $2.25 million, but Cotter, Jr. continued to refer to the matter as a "debacle" in his pleadings.

assessment. ***Id.*; VIIJA1631, 1635**. Notwithstanding his termination as CEO, Appellant remained an RDI director until November 7, 2018. **II RA422–425**.

Cotter, Jr. Seeks Vengeance Through His "Derivative" Action.

As he had threatened, on the very day of his termination, Cotter, Jr. filed this action, bringing claims of breach of the fiduciary duties of care, loyalty, and candor against all other members of the Board of Directors, plus a claim of aiding and abetting such breaches against his sisters; he would later include board members who had been appointed in the fall of 2015 in his breach of fiduciary duty claims. **I JA 0001; II JA263; III JA 519**. His requested relief included orders requiring Reading to take certain actions, such as reinstating Plaintiff to an executive position; terminating Reading's chosen CEO and President; imposition of specific qualifications for appointment to Reading's Board of Directors; interfering with Reading's contractual relationships; and prohibiting Reading from making use of certain Board committees, thereby, requiring a change in Reading's Bylaws. **I JA 0029-0030; I JA310-311; III JA 573-574**. Cotter, Jr. made no demand on the Board, claiming that such demand was futile due to the influence of his sisters. **III JA564–565**.

On December 11, 2017, after extensive discovery, including nearly 30 depositions devoted to this litigation alone (plus additional depositions due to an intervening set of derivative plaintiffs), and the production of thousands of pages

of documents, and following oral argument on Respondents' motions, 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, the District Court entered judgment in their favor "on all claims asserted by Plaintiff." **XXVJA6065–6071**.[4] 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." **XXV JA6081–6091**.

Cotter, Jr. concedes that "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.,* the Termination Decision and the Option Decision. Opening Brief, pp. 11-12.

The Option Decision involved the Estate's September 2015 exercise of an option to acquire 100,000 shares of RDI Class B Voting Stock, using an equal value of Class A Non-Voting Stock as payment. The applicable stock option plan allows for payment in such manner with the approval of the Compensation Committee. **XII JA2883**. Cotter, Jr. did not challenge the Estate's ownership of the stock, the stock price, or whether the option was exercisable. Instead, his sole

[4] This ruling by the District Court is the subject of Appellant's related appeal in Case No. 75053.

complaint was the Compensation Committee's approval of the payment method, despite the fact that Reading was, at the time, engaged in a buyback of its Class A stock. **XII JA2871, 2883. XXI JA5098**. The payment method was approved by Adams and Kane; Storey, the third member of the Compensation Committee, did not attend the meeting. *Id.*

There is no genuine dispute as to the ownership of the option, as to whether the Option was then exercisable, or as to what the exercise price was. *See* **II JA266** ("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 executors.") (emphasis added). Instead, Cotter, Jr. contests the good faith of a September 21, 2015 decision by RDI's Compensation and Stock Options Committee ("Compensation Committee")—which committee was comprised of Directors Kane, Adams, and Storey—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. **OB12; XXI JA5098; XII JA2871**. Storey did not attend the meeting; Kane and Adams approved the exercise. *Id.* Although Cotter, Jr. contended that the Option Decision was intended to "entrench" the voting power of Margaret and Ellen Cotter, the exercise of the option had no impact on the election of RDI's Board at the 2015 Annual Stockholder Meeting, as even before the exercise, Ellen and Margaret Cotter together controlled more than two-

thirds of the outstanding RDI voting power, though their positions as co-executors of the estate, and trustees of Cotter, Sr.'s Living Trust and the voting trustee therein.

The Board Revisits and Ratifies the Termination and Option Decisions

Once the District Court's first grant of summary judgment was entered, Reading filed a Motion to Dismiss for Failure to Show Demand Futility, renewing the prior motions on the basis of the District Court's determination that Cotter, Jr. could not show a lack of disinterest as to any of the five directors. **XXV JA6162–6170**. Additionally, the five directors who had been dismissed from the litigation requested that the full RDI Board convene a Special Meeting to reconsider both the Termination Decision and the Option Decision. **XXVJA6156–6161, 6224A–F**. The agenda for the proposed meeting was disclosed in advance to all Directors, including Cotter, Jr. *Id.*

While Cotter, Jr. describes the events related to the Ratification Decision as though it were the product of a vast conspiracy, the true circumstances are mundane. Three of the five directors whose independence had been determined were members of a Special Independent Committee ("SIC") that had been formed in August 2017,[5] whose charge it was to monitor the events in the varying

[5] Contrary to Cotter, Jr.'s suggestions, the SIC was not a special litigation committee charged with reviewing a derivative action and making a

litigations among the Cotter siblings. Receiving advice of Reading's counsel following the District Court's grant of summary judgment to the five directors, the committee members informally agreed that they and the other two directors included in the Court's grant of summary judgment should request that the Board of Directors discuss the issue of ratifying the two remaining challenged decisions. **XXXIIJA7847–7849**. This was the sum of the participation of the SIC in the Ratification Decision events. **XXXII JA7996–7997**.

Directors Kane and Wrotniak, who were not members of the SIC, also consulted with counsel in late December 2017. William Gould, the Lead Independent Director, on behalf of the five directors, requested, via email, that a special meeting be called, and that the ratification issue be placed on its agenda. RDI-SUPP **JA7568-A [filed under seal].** [6] The email was simply stated, requesting that the agenda include ratification of the actions taken by the board with respect to the termination of Cotter, Jr and the exercise of the option, giving the dates each of those transactions had occurred. *Id.* The letter (sent by Mr.

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recommendation as to whether the Company should proceed or not. The Committee's formation and purpose were disclosed in SEC filings. **XXII JA5438.**

[6] This email, described as "December 27, 2017 Email" was contained in the record below as Ex. 6 to Cotter, Jr.'s June 8, 2018 Motion to Compel; it had been filed under seal. XXIX JA7252. Significantly, despite the importance he attaches to it, Cotter, Jr. did *not* include is document his 57-volume appendix, even among the those documents filed under seal. Accordingly, Reading is submitting a Motion to File Appendix under Seal, containing this document.

Gould's assistant) was directed to Ellen Codding, Reading's CEO, and was copied to Reading's GC and to Michael Bonner, reading's corporate counsel. *Id.*

As shown in the minutes of the Board Meeting, the proceedings involving the ratification included a recitation of the allegations made by Cotter, Jr. regarding the lack of independence of Guy Adams (whose vote in favor of the Cotter, Jr.'s termination was challenged by Cotter, Jr.). **XXV JA 6159**. The Board members were provided with copies of the minutes from the board meetings wherein Cotter, Jr.'s termination was discussed and voted upon. Additional information, unknown at the time of the termination, regarding Cotter's Jr.'**s** secret employment of a coaching firm, Highpoint, at Reading's expense, was also provided to the Board Members. ***Id.*** A motion to ratify the termination was made and seconded. ***Id.*** **at JA6160**. Cotter, Jr. was invited to provide his thoughts to the Board. He expressed his view that the purpose of the ratification was to support the "position of the Company and the Board in the ongoing Derivative Litigaiton. [sic]" ***Id.*** Directors Codding, Gould, Kane, McEachern, and Wrotniak voted in favor; Director Cotter, Jr. voted against; and Directors Adams, E. Cotter, and M. Cotter abstained. ***Id.***

The Board then addressed the issue of the Option Decision. **XXV JA 6160**. The Board were given the extensive record prepared by the Compensation Committee. Reading's counsel summarized the issue and noted that the 1999 Stock Option Plan gave the committee the discretion to authorize the payment

method of the stock. Board members expressed their understanding. ***Id.*** Cotter, Jr. expressed his view that the ratification was a "litigation device" and stated that he did not agree with some statements made. ***Id.*** McEachern stated his opinion that Cotter, Jr.'s allegations had caused waste by the Company, because it was obvious that neither the Cotter sisters nor the Estate had gained any advantage from this method, as the Estate could have sold the stock and used the case to exercise the option; he saw no harm to the company. ***Id.*** **at JA6260-6061**. A motion to ratify the Option Decision was made, and seconded, and again Directors Codding, Gould, Kane, McEachern, and Wrotniak voted in favor; Director Cotter, Jr. voted against; and Directors Adams, E. Cotter, and M. Cotter abstained. ***Id.*** **at JA6061**.

Summary Judgment Is Granted on the Remaining Claims

On January 3, 2019, fewer than five days after the entry of the written order that determined that five of the Defendants were independent, Reading filed a Motion to Dismiss for lack of demand futility, based on that now-determined independence. **XXV JA 6162**. On January 3, 2018, the remaining Director Defendants filed a Motion for Summary Judgment on all remaining claims, based on the Ratification. **XXV JA 6225**. The District Court denied both motions as *untimely because*, even though each was based on events that had occurred mere days before their filing, they had been filed after the deadline for dispositive motions. **XXV JA6281-6294**.

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

Cotter, Jr. sought and received the opportunity to pursue still more discovery, including the depositions of the directors who had voted in favor of the ratification, as well as the production of documents that required still more costly e-discovery. *See* **XXXII 7881-7886** (detailing discovery obtained by Cotter, Jr. in the spring of 2018, and his persistent demands for still more discovery). Additionally, while this discovery was occurring, it was learned that Cotter, Jr. would not have been able to present certain of his designated expert witnesses if trial had proceeded in January, as he had failed to pay their fees. **VI RDI-A 9633-9773**. Ordered to produced current billing statements for all experts who would testify at trial, Cotter, Jr. was forced to concede that, for the trial now scheduled for July 2018, he would not present any expert on damages suffered by the Company. **VII RDI-A 9625:11-16; VIII RDI-A 10667, 10730**.

During the discovery that had been ordered, Reading—who, due to the broad

[7] Given that the *actual* reason that the scheduled trial did not occur in January 2018 was due to Cotter, Jr.'s request, Cotter, Jr.'s references to the ratification as a strategy to "avoid trial" are, at best, disingenuous.

search terms on which Cotter, Jr. insisted, had been forced to attempt to review many thousands of pages for both responsiveness and privilege—encountered difficulties in responding to the production demands. **XXVII JA 6600-6698**. As a result, 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." **XXXIV8377**.

Despite this evidentiary presumption, the District Court granted judgment in favor of the remaining director defendants on their renewed Motion for Summary Judgment. **XXIX JA7173–7221; XXXIV JA8389**. Specifically, the District Court, after considering **"**the inferences, the rebuttable presumption, as well as the evidence that has been submitted," that the Ratification had met the requirements of NRS 78.140, and that, because of the Ratification Decision, the challenges to the Termination and Option Decisions would have to overcome the business judgment rule, which Cotter, Jr. had been unable to do. **XXXIV JA8389; XXXIV JA8401–8425**. Reading's Motion to Dismiss on the basis of standing due to lack of demand futility was denied as moot. **XXXIV JA8424**.

SUMMARY OF THE ARGUMENT

The District court properly granted judgment against Cotter, Jr. on all remaining claims. The Ratification Decision is a corporate decision protected by

the business judgment rule, as it does not fall within any exception to the application of the business judgment rule created by the legislature. Cotter, Jr. was unable to present evidence sufficient to overcome the presumption of good faith established by the business judgment rule, and his contention that NRS 78.140 does not apply to the challenged decisions here is belied by the plain language of the statute. Cotter, Jr. was unable to present evidence sufficient that any decision by the remaining three directors—which decisions have all now been approved by a majority of Reading's directors, the independence of whom Cotter, Jr. has been unable to disprove—caused any harm to the Corporation. As Cotter, Jr. is unable to present evidence sufficient to show that there are material issues of fact as to an element of his claim (*i.e.,* causation), summary judgment was properly granted.

LEGAL ARGUMENT

Reading was within its rights as a Nevada corporation to ratify the challenged decisions and put an end to this litigation. Cotter, Jr.'s insistence that such ratification is impermissible is not supported by any authority that is consistent with the deference Nevada affords corporate decisions. Moreover, even though the District Court applied a level of scrutiny that is inapplicable under express statutory law—and indeed, even gave Cotter, Jr. the benefit of a presumption as a sanction against Reading—Cotter, Jr. was unable to present any evidence to support his claim that the Ratification Decision was not the product of

independent and the informed decision-making of the five directors who voted in its favor.

I. THE DISTRICT COURT PROPERLY GRANTED JUDGMENT IN FAVOR OF THE RESPONDENTS, WHERE THE REMAINING CHALLENGED DECISIONS HAD BEEN DULY RATIFIED BY A MAJORITY OF INDEPENDENT DIRECTORS, THUS PRECLUDING ANY POTENTIAL RELIEF ON COTTER, JR.'S CLAIMS.

Cotter, Jr. has taken great pains to distort the facts comprising the chronology of events leading up to the December 29, 2017 Ratification Decision, but his efforts to transform a committee devoted to nothing more than remaining informed of events in the varying litigation among the Cotter siblings into a "Special Litigation Committee" charged with investigating derivative actions are for naught. Similarly, his labored attempts to twist Reading's counsel's representation of the Company into a contrived conflict are fruitless, and his efforts to impose inapplicable standards of proof and to shift the burden of persuasion as to the validity of the Ratification Decision are futile.

Nevada law is very clear as to the standards that apply to a corporate decision that was made on December 29, 2017. Pursuant to NRS 78.138(8), which became effective on July 1, 2017, the business judgment rule applies to that decision—period. Despite Cotter. Jr.'s smoke and mirrors, that simple fact is inescapable. And because Cotter, Jr. did not, and could not present evidence to show that any one of the five directors failed to exercise independent judgment,

failed to make an adequately informed decision, or failed to act with the interests of the Company in mind sufficient to overcome the statutory presumption that arises with the business judgment rule, Ratification Decision must stand.

Because the Ratification Decision stands, the District Court's grant of summary judgment in favor of Ellen Cotter, Margaret Cotter, and Guy Adams must be affirmed. With the ratification of the remaining challenged decisions, there was no possibility that the decisions could be voided, and therefore, Cotter, Jr. could not achieve his claimed relief, nor could he prove any damages from the claimed breaches of fiduciary duty. Therefore, the District Court's grant of summary judgment on all remaining claims was proper.

A. Nevada's Business Judgment Rule Governs the Ratification Decision.

In 2017, the Nevada Legislature amended NRS Chapter 78 in numerous ways. The most critical amendments, as relevant here, were those to NRS 78.138, which now states, in pertinent part:

> 1. The fiduciary duties of directors and officers are to exercise their respective powers in good faith and with a view to the interests of the corporation.
>
> 2. ***In exercising their respective powers, directors and officers may, and are entitled to, rely on information, opinions,*** reports, books of account or statements, including financial statements and other financial data, that are prepared or *presented by:*

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) ***Counsel,*** public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

➥ but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ***Except as otherwise provided in subsection 1 of NRS 78.139, directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.*** A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.

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5. Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation.

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8. ***This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.***

NRS 78.138 (emphasis added). In addition to changes to assorted words or phrases in other subparts of NRS 78.138, the 2017 amendments added the first clause to Subparagraph (3) and also added the entirety of Subparagraph (8). These additions make it absolutely and unequivocally clear that the business judgment rule, which in Nevada creates a statutory presumption of good faith, applies in *all "*cases, circumstances and matters." There are but two exceptions. The first, is where directors take an action that impedes the exercise of stockholder rights to vote for or against directors. NRS 78.138(3), *citing* NRS 78.139(1). The second is where a corporation's articles of incorporation preclude the application of the business judgment rule. NRS 78.138(8).

The Ratification Decision took place in December 2017, nearly six months after the 2017 amendments took effect. In the face of this plain language, Cotter, Jr.'s contention that the business judgment rule did not apply to the Ratification Decision is unsupportable. Significantly, Cotter, Jr. does not even address the effect of the language of either NRS 78.138(3) or (8). Instead, he relies, as he has done through this litigation, on Delaware law that is patently inconsistent with the plain language of Nevada's statutory law. This, too, is impermissible under Nevada law, as the 2017 amendments to NRS Chapter 78 also included the following:

> 2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

> 3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

NRS 78.012 (2) and (3).

Cotter, Jr. contends that the Ratification Decision was akin to a decision made by a sort of Special Litigation Committee in *In re Dish Network*, 133 Nev. Ad. Op 61, 401 P.3d 1081 (2017), and therefore, the standards set forth in that opinion should govern. As noted above, this attempt to change a decision made by a majority of the board members into a decision made by a specifically charged committee is itself unsound. Even if such comparison could apply, it is of no consequence. The *Dish* decision was based on events that predate Nevada's relevant statute. However, to the extent that *In re Dish Network* places the burden of persuasion upon a party seeking to *enforce* a decision by a board of directors, the decision has been abrogated by the 2017 amendments to NRS 78.138.

The Legislature's plain and unequivocal direction that the business judgment rules applies in all circumstances (save for a type of corporate decision not present here) forecloses any question as to the proper standard by which the Ratification Decision must be assessed. Authority from other jurisdictions cannot justify the creation of any exception to the rule. Nev. Const. Art. 3, § 1(1); *Chavez v. Sievers*, 118 Nev. 288, 294 (Nev. 2002) (recognizing that the legislature has the sole power

to frame and enact legislation, and declining to add exceptions not contained in the legislation).

B. Cotter, Jr. Bore the Burden of Showing That the Ratification Decision Was Invalid.

Cotter, Jr. contends that the Director Defendants had the burden of proof on the issue of the purported independence of the five directors who voted in favor of the Ratification Decision. This is an incorrect statement of law. As noted above, the business judgment rule applies to the Ratification Decision. Nevada's business judgment rule makes clear that the burden of proof lies with the party challenging a corporate decision, because of the statutory presumption that the challenged decision was made, in good faith and with adequate information, with the corporation's best interests in mind. *See* NRS 47.180 ("A presumption. . . imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."); NRS 78.138(3). Accordingly, Cotter's Jr. bore the burden of establishing that the Ratification Decision was not the product of the independent exercise of the five directors' judgment.

C. Summary Judgment on the Validity of the Ratification Vote Was Proper, as Cotter, Jr. Presented No Evidence That the Approving Directors Failed to Exercise Their Own Judgment.

Summary judgment is warranted if "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the

moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). When the party opposing summary judgment bears the burden of persuasion at trial, the party seeking summary adjudication need only point out the absence of evidence to support the nonmoving party's case. *SFR Invs. Pool 1, LLC v. U.S. Bank*, 135 Nev., Advance Opinion 45, at *6 (Nev. Sep. 26, 2019). The party who seeks to survive summary judgment must then "show the existence of a genuine issue of material fact." *Id.*

Here, Cotter, Jr. contended that the Ratification Decision was the product of a lack of independent judgment. Thus, he bore the burden of presenting evidence to show that the five directors did not exercise their independent judgment. However, he relied on the on the same bases for challenging the lack of independence that he had previously raised, and which the Court had previously found to be insufficient, *i.e.*, that all of the independent directors were unduly influenced by the Cotter sisters, either to maintain their own director positions, or because of the attenuated friendships between the directors and the parents of the Codding siblings, and even, absurdly, the friendship between Margaret Cotter and a director's *wife.*[8] Once again, he offered nothing sufficient to support his claims.

[8] Reading has discussed at length the paucity of Cotter, Jr.'s allegations and evidence on the issue of director independence in its briefs filed in Case Nos. 75053 and 77733, and incorporates such discussion and argument herein.

His only other basis to challenge the independence of the directors is his claim that Reading's counsel was conflicted, relying on cases a "special litigation committee" such as that envisioned by *In re Dish*, had been formed. But here, the only basis for claiming a "conflict" is that Reading's own counsel had communications involving the litigation with Reading's CEO, Ellen Cotter, and one of its Vice Presidents, Margaret Cotter. Thus, Cotter, Jr. contends that, even though the director defendants had (and continue to have) their own separate counsel, the corporation's counsel is unable to advise board members if that counsel also consults with management. Nothing in the authority cited by Cotter, Jr. precludes corporation litigation counsel from having communications with management. Indeed, Cotter, Jr. wholly ignores the fact that the *Directors* had their own counsel—indeed, the late William Gould was even represented by his own counsel, separate from that of the other defendants here.

Specifically, Cotter, Jr. relies on the fact that Ellen Cotter—Reading's CEO—was copied on two communications between Reading's general counsel and Reading's litigation counsel, wherein the ratification was one a topic of the communication. **XXIX JA7290 (entries ending with 60907 and 60911)**. There is no responsive communication from Ellen Cotter to either counsel with respect to this communication. This, coupled with Margaret Cotter's statement that she had discussed the ratification with Mr. Ferrario on December 15, 2017, is what Cotter,

Jr. offers to support his theory that Reading's counsel obtained the "blessing" of Ellen and Margaret Cotter to "use ratification," and that the purpose of ratification was not for the Company to put a stop to Cotter, Jr.'s ruinous vendetta against Reading, but instead, it was intended only to benefit the Cotter sisters. Opening Brief, p. 48.

To further "support" his theory, Cotter, Jr. baldly mischaracterizes the testimony of the five directors. For example, Cotter, Jr. makes the following statement:

> "Some of [the five directors] did not even know ratification was being considered, let alone requested on their behalf, until after Greenberg's attorneys had discussed it with the Cotter sisters and obtained their blessing to use it."

Opening Brief, p. 48. In support of this statement, Cotter, Jr. cites to deposition testimony found at "XXX JA7506 (at 530:18-19), JA7514 (at 683:14-19), JA7522 (at 544:3-8), JA7530, JA7554, JA7487." Opening Brief, p. 48. However, the cited testimony refers to the email sent by Gould to Ellen Cotter, requesting a special board meeting be called for the purpose of ratification, **RDI SUPP JA 7568-A [filed under seal]**; the testimony shows only that four of the five directors had not participated in *drafting that email*, which, as noted above, merely asked for the special meeting and to place the ratification on the agenda. There is no testimony here as to ignorance of either the ratification issue itself, or of the request to have it placed on the meeting agenda. To the contrary, when asked *about the email*, both

McEachern and Codding *volunteered* that it referred to the ratification they had discussed with Gould and Reading's counsel. **XXX 7487, 7522**. Thus, Cotter, Jr.'s theory boils down his contention that because only one of five directors participated in the drafting of a simple and straightforward email letter requesting a meeting and that an item be placed on the meeting agenda, this is somehow proof that the other directors were ignorant of the entire issue. Sadly, this is typical of the sort of "evidence" upon which Cotter, Jr. has relied throughout this matter.

D. Reading Was and Is Entitled to Defend Itself in This Litigation.

Cotter, Jr. contends that Reading was never entitled to defend itself in this litigation, that it should have remained neutral, and that its failure to do so taints the Ratification Decision. However, the authorities on which Cotter, Jr. relies do not support his position.

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

necessarily adverse to those of the plaintiffs and may be identical to them.").

Cotter, Jr. has not cited any case which imposes neutrality on a corporation where the derivative action seeks to impose the reinstatement of a discharged CEO—yet, this was the sole relief that Cotter, Jr. could seek against the three remaining Directors, because he could present no evidence on damages. Even disregarding the *absence* of evidence of the existence of actual damages, Cotter, Jr. has not shown neutrality is required where the prospect of financial recovery is so narrowly limited as it here. Today, and particularly in Nevada, financial recovery against directors is highly unlikely, given that liability can be premised only on conduct that "involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2).[9] There were no allegations that could satisfy the requirements of fraud or knowing violations of the law. Intentional misconduct would have required a finding that the remaining Director Defendants had actually believed that Cotter, Jr.'s service as CEO was as good as he claims to think it was, but still chose to fire him, knowing that Reading would suffer as a result. But even Cotter Jr.'s own Complaint details the many problems that occurred during his ten months in the position, including the extraordinary measure of appointing a director to serve as an Ombudsman "to work with" [Cotter, Jr.] as CEO. **I JA 13, ¶**

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

52.

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

Another justification offered for gagging a corporation's protests against rogue shareholder derivative actions is that allowing the corporation to defend the action results in the corporation funding the directors' defense. *Patrick v. Alacer Corp.*, 167 Cal.App.4th 995, 1008 (Cal. Ct. App. 2008) (collecting cases). This reasoning, however, is obviously obsolete, as modern corporate law throughout the country permits corporations to indemnify directors, including advancing funds for defense. In Nevada, indemnification is mandated, absent a finding of fraud or bad faith. NRS 78.7502, 78.521.

Indeed, so far from presenting a reason for the corporation to remain neutral, as the facts here show, the fact that it is burdened with the defense of the directors establishes an equitable reason why neutrality should never be imposed. Here, a purported derivative action that should have been dismissed based on the pleadings was instead allowed to continue for years. As detailed more completely in Case Nos. 77648 and 77733, the Company's officers and directors, including even its

general counsel and its outside counsel, were required to suffer through day after day of depositions or in-court testimony, with the Company footing the bill for the attorneys and travel expenses, all while constant duplicative demands for written discovery were made. The fact that the record in this matter contains 57 volumes, and *does not even include all the documents contained in the District Court*, (as Reading's need to cite to the Appendix from Case No. 77733 demonstrates), shows the extent to which this proceeding has been used as a means to bleed Reading. A company should not be required to rely on the defense raised on behalf of its directors to protect from a vindictive derivative plaintiff.

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

Here, in contrast, the Complaint alleges such "harm" as Cotter, Jr.'s

discharge and the Cotter sisters purportedly obtaining job titles for which they were, in Cotter, Jr.'s opinion, unqualified. Other than allegations about bonuses paid while Cotter, Jr. was still CEO, presumed to be fair under Nevada law, (and about which he made no complaint, until he himself was terminated), there were no contentions that Company assets were being misused or diverted into the defendants' pockets.

Moreover, the purported purpose behind the supposed self-interested acts of Ellen and Margaret was their supposed ambition to control the Company, a theory that makes could make sense only if *Ellen and Margaret did not already have voting control of Reading*. The purported "seizure" of control about which Cotter Jr. complained consisted of his termination and Ellen's appointment as interim CEO. Cotter, Jr. cannot point to vast replacement of directors; indeed, other than the addition of Judy Codding to replace the late Cotter, Sr, and the addition of Michael Wrotniak to replace the retiring Tim Storey, the composition of Reading's Board of Directors was the same has it had been for years, including when Cotter, Jr.'s was appointed as CEO.

In short, this is precisely the sort of sham derivative action where a corporation properly stands up for its own rights in the litigation. Despite Cotter, Jr.'s claims, the reality here was that a vast drain on company resources of both the time taken by its board members to participate in their defenses, as well as the

costs of the defense was being perpetrated.

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

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

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

Cotter, Jr has failed to present evidence to show that material issues of fact are present to preclude the grant of summary judgment. Accordingly, the judgment should be affirmed.

E. Summary Judgment on the Remaining Causes of Action Was Proper as the Ratification Decision Rendered the Alleged Conduct of the Cotter Sisters and Adams Irrelevant.

Cotter, Jr. contends that a determination that the Ratification Decision was valid did not automatically mean that the causes of action against the Cotter sisters and Adams were also defeated. However, Cotter, Jr. is wrong. He could not have any claim against these three directors because their votes in favor of the Termination Decision and Adams's vote in favor of the Option Decision had become irrelevant. Regardless of how they had voted, a majority of disinterested directors had approved the decisions. Accordingly, their specific motivations in voting in favor of these decisions could not have caused any damage to Reading.

In Nevada, an essential element for a claim for breach of fiduciary duty is that the beneficiary of the duty suffer damages as a result of the purported breach. *Foster v. Dingwall*, 126 Nev. 56, 69, 227 P.3d 1042, 1051 (2010), citing *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) ("fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship"); *see also Fin. Am. Group, LLC v. CH Montrose, LLC*, 127 Nev. 1133, 373 P.3d 913 (2011) (finding that causation is a required element for several causes of actions, including breach of fiduciary duty); Principles of Corp. Governance § 7.18 (1994); Restatement (Second) of Torts, § 431. Because votes of the Cotter Sisters and Adams have been rendered

irrelevant, Cotter, Jr. cannot show that any action by the remaining defendants was the cause of any purported injury to RDI.

As Cotter, Jr. was unable to satisfy an essential element of his claims, the grant of judgment against him was proper and should be affirmed.

II. THE COURT PROPERLY DETERMINED THAT THE TERMINATION AND OPTION DECISIONS COULD BE RATIFIED.

It has long been recognized that a board of directors may ratify decisions made by prior boards. *See* 2A Fletcher Cyc. Corp. § 762 ("Who May Ratify—Directors") (Sept. 2019). And, indeed, NRS 78.140 makes clear that ratification by informed disinterested directors or stockholders immunizes corporate decisions. Nevertheless, Cotter, Jr. contends that ratification is not possible as to the two decisions *he* challenges, because, according to him, the statute does not encompass decisions that do not involve commercial interaction between Reading and the purportedly interested directors or affiliates. He is wrong.

A. Cotter, Jr.'s Strained Construction of NRS 78.140 Is Irrelevant, as the Termination and Option Decisions Were Transactions Involving Directors He Claimed Were "Interested."

Cotter, Jr. argues that because NRS 78.140 refers to "contracts" and "transactions," the statute does not apply to the decisions that were ratified here. More specifically, Cotter, Jr. contends that the decisions did not involve a "contract" or a "transaction" *between* the purportedly interested directors and Reading. Indeed, Cotter, Jr. appears to conflate the terms "contract" and

"transaction," fixating solely on "contract," as the Termination and Option Decisions were themselves each clearly "transactions," in which —according to Cotter, Jr.—his sisters were directly interested.

Not surprisingly, Cotter, Jr. does not cite any relevant authority holding that a "transaction" can only refer to a contract between a company on one side, and the interested director or an affiliate of the director on the other. Nor has he advised the Court of any authority that rejects his analysis. For example, in *Warren v. Campbell Farming Corp.*, 271 P.3d 36 (Mont. 2011), the court was faced with the question of whether a bonus paid to a director for past work, which was determined by the trial court to not be a "contract," could be a "transaction" under Montana's safe harbor provision. There, as here, the parties opposing the application of the safe harbor contended that a transaction could only be a contract. The Montana Supreme Court noted that the use of the term "transaction" in the statute was distinguished from the term contract, as "contract" was only one possible form of transaction. 271 P.3d at 41. The *Warren* Court also noted that the prior version of Montana's safe harbor statute, which was worded very similarly to Nevada's, was consistent with this view.

Furthermore, the *Warren* Court looked at the definition of transaction, which it quoted as follows:

> 1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract.

> 2. *Something performed or carried out; a business agreement or exchange.* 3. *Any activity involving two or more persons.* 4. *Civil law.* An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.

Warren, 271 P.3d at 42 (emphasis in original), *quoting Black's Law Dictionary* 1635 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009) (last emphasis in original).

Here, the Board decision to terminate Cotter, Jr. was a "transaction," as it was an activity that involved Reading and Cotter, Jr., and it *also* involved the board members who voted in favor of it, including Ellen and Margaret Cotter, and Guy Adams. Cotter, Jr. *alleged* that in voting on this decision, these directors put their own interests ahead of Reading, claiming that his sisters received benefits from his termination (freedom of the fear he would fire them). Similarly, the Option Decision, approved by Kane and Adams, was a transaction to which Reading, Kane, and Adams (the latter of whom was alleged to be voting to favor the interests of the Cotter sisters rather than the Company's), and the Estate of Cotter (of which the Cotter sisters were co-executors), were all parties. It defies logic to assert that decisions alleged to have been made for the sole and express purpose of satisfying the Cotter sisters' personal interests, could somehow not be a "transaction" to which they were parties. Cotter, Jr. cannot have it both ways.

Cotter, Jr. attempts to bolster his position by pointing out that prior caselaw addressing NRS 78.140 involved commercial contracts of one variety or another. However, none those cases stated that NRS 78.140 is limited to such circumstances, or otherwise narrows the plain language of the statute.

B. Cotter, Jr. Had the Burden of Proof to Show That NRS 78.140 Did Not Apply.

Nevada law has always been clear that the party *challenging* a transaction based on a purported conflict of interest of a director or office bears the burden of proof. *See Pederson v. Owen*, 92 Nev. 648, 650, 556 P.2d 542, 543-544 (1976) (noting lack of evidence of unfairness of transaction). Indeed, even *prior* to the adoption of NRS 78.140, Nevada's common law was the same. *See Schoff v. Clough,* 79 Nev. 193, 196, 380 P.2d 464, 465 (1963) (noting lack of evidence of unfairness). Cotter, Jr.'s reliance on Delaware authority to the contrary is unavailing. This Court has looked to Delaware authority only when there is no Nevada authority on point. Indeed, even under Nevada's common law, a "contract between a corporation and an officer thereof" is not void or voidable except for unfairness or fraud. *Hough v. Reserve Gold Mining Co*., 55 Nev. 375, 35 P.2d 742 (1934).

Here, Cotter, Jr. contends that the Cotter sisters and Adams had the burden of showing an absence of dispute over material facts with respect to the validity of the Ratification Decision. As the movants for summary judgment, this is true. But since Cotter, Jr. had the ultimate burden of persuasion, the Cotter sisters and Adams could have satisfied that burden simply by showing that Cotter, Jr. could present no evidence to show that any disputed issues of material fact as to the Ratification Decision.

Cotter, Jr.'s theory about timing is nonsensical, given that the five directors were themselves, until mid-December 2017, accused of being unduly influenced by the Cotter sisters, and thus, any ratification would simply have joined the list of other challenged actions in Cotter, Jr.'s complaints. To suggest, therefore, that failure to take an action indicates a nefarious purpose—when to do so would be futile—defies credulity.[10]

Nor does the mere fact that directors recognized that Cotter, Jr.'s derivative suit was a waste of Reading's assets create an inference that the Ratification Decision was not intended to benefit Reading. As noted above, Reading could not achieve any benefit from this litigation. Therefore, even if

[10] Cotter, Jr.'s theory is also significantly undercut by the fact that in January 2018, *he* was seeking to delay trial, to which delay Respondents were vehemently opposed. See **VII RDI-A 9616 (filed under seal); VII RDI-A 10667**.

the Ratification Decision were a litigation strategy, it is one expressly sanctioned by Nevada law.

Finally, that the five directors did not themselves raise the prospect of ratification, but instead, considered it following advice from the Company's counsel, can hardly constitute a basis for suspecting the good faith of the Ratification Decision. Corporations retain counsel for the express purpose of providing advice to their directors and management. Cotter, Jr.'s apparent expectation that five people would, and should, jointly draft a letter requesting that ratification of two prior board decisions be placed on a meeting agenda is itself ridiculous. His contention that the lack of such joint participation is evidence of a lack of knowledge of the entire topic is beyond the pale.

CONCLUSION

Cotter, Jr.'s rampage against Reading must come to a close. All of the actions he challenged have been shown to have been approved or ratified by directors against whom he has no evidence of wrongdoing. The time has come for him to admit defeat, lay down his club, and allow Reading to recover from the many blows his sham derivative action has inflicted on it. As the record fully

supports the grant of summary judgment against Cotter, Jr. on all his remaining claims, the judgment should be affirmed.

Respectfully submitted this 27th day of November 2019.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 9479 words.

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

Dated this 27th day of November 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Greenberg Traurig, LLP, that in accordance therewith, I caused a true and correct copy of the foregoing ***Answering Brief of Respondent Reading International, Inc. for Case No. 76981*** to be served via this Court's e-filing system, on counsel of record for all parties to this matter on November 27, 2019.

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