IN THE SUPREME COURT OF NEVADA

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

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

APPELLANT'S REPLY BRIEF IN CASE NO. 76981

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RULE 26.1 DISCLOSURE

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

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

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I. INTRODUCTION

RDI and the three interested directors have collectively dedicated more than a hundred pages to countering the arguments made in Cotter Jr.'s Opening Brief.[1] They raise some of the same tired old arguments to justify the sham "ratification" on the eve of trial and advance a number of new arguments they did not make in the district court. In doing so, they admit that the goal of ratification was to obtain a dismissal for the Cotter sisters and Adams while pretending that the December 21, 2017 Special Independent Committee (SIC) meeting that prompted the December 29, 2017 ratification vote did not occur. They also contend, contrary to fact and law, that RDI's counsel was not hopelessly conflicted when its counsel was simultaneously advising the SIC, the Board, *and* the Cotter sisters on preparation for trial.

RDI and the directors argue to this Court that the ratification was done in good faith and feign concern about shareholder value, but they do not dwell on the fact that they never created an independent special litigation committee at any time to investigate Cotter Jr.'s derivative

[1] RDI filed a separate "answering brief." Cotter Jr. is concurrently filing a separate Reply Brief to RDI's rogue "answering brief."

complaint. They collectively spent more than $15 million in attorneys' fees defending against his claims *before* "ratifying" the challenged actions to help serve the Cotter sisters' interest in avoiding trial. Even on appeal, RDI continues to waste the shareholder value it professes to be concerned about: The company has filed a ponderous separate "answering brief" in an appeal from an order that did not pertain to RDI. RDI did not even join in the directors' Ratification MSJ below. Its answering brief is akin to an amicus brief for which it did not seek consent.

The directors further argue that the request to ratify the Termination and Share Option Decisions was made by *independent* directors, but these so-called directors did not make this request until the eve of trial against the *interested* directors, on December 27, 2017. Not one of the five outside directors—not even director Gould, a corporate attorney who co-wrote a treatise on corporate governance—made such request in the prior two years that the case was pending. They only made the request *after* RDI's counsel—in the midst of preparing the Cotter sisters for trial—proposed a rushed ratification to the SIC on December 21, 2017 to assist the Cotter sisters and Adams in avoiding trial and explaining to a jury their mismanagement of RDI for the benefit of the sisters.

Unable to deal with these facts, the directors and RDI resort to the same old petty examples of Cotter Jr.'s alleged misconduct to justify the "ratification" of the Termination Decision that ousted him as the CEO they had unanimously appointed months earlier. Unable to deal with the law on this subject, the directors and RDI resort to making numerous new legal arguments they did not make below, and should not be considered now. *See In re AMERCO Deriv. Litig.*, 127 Nev. 196, 217 n. 6, 252 P.3d 681, 697 n. 6 (2011) (declining to consider an issue raised for the first time on appeal). They contend Cotter Jr.'s derivative complaint endangered the company but are incapable of demonstrating how it did so.

The Court should reverse the order dismissing the interested directors, declare that NRS 78.140 does not apply to the ratification of the Termination and Share Option Decisions, and hold that the interested directors did not meet the standard for disinterested ratification. There were genuine issues of material fact as to whether the Voting Directors were influenced by the directors "doing the controlling," particularly the Cotter sisters, when the interested Decisions were "ratified." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 638, 137 P.3d 1171, 1181 (2006).

II. ARGUMENT

A. NRS 78.140 provides no basis to ratify the Termination and Share Option Decisions.

The directors raise a number of arguments aimed at making their ratification defense fit under NRS 78.140, none of which has merit.

1. NRS 78.140 does not address ratification of decisions made by directors who lack independence.

The directors consistently misstate the plain language of NRS 78.140. By its terms, the statute is limited to *interested* director "contracts or transactions." Contrary to the directors' argument, AB at 28, 36, NRS 78.140 does not talk about, let alone allow ratification of, *decisions* made by "*nonindependent*" directors. The Court's holding in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) does not suggest otherwise. *Shoen* only spoke about "valid *interested*" actions, meaning ones in which a director is interested, financially or otherwise. *Id.* at 636, 137 P.3d at 1181. *Shoen* did not interpret NRS 78.140, and it did not involve board decisions but a number of business transactions. *Id.* at 628, 636 n.34, 137 P.3d at 1175-76, 1181 n. 34.

2. The Delaware cases on which the directors rely support Cotter Jr.'s justifiable narrow interpretation of NRS 78.140.

The unpublished Delaware cases cited by the directors only confirm Cotter Jr.'s reading of NRS 78.140. In *Cooke v. Oolie*, 2000 WL 710199 (Del. Ch. May 24, 2000), for example, the court held that Section 144 of the Delaware General Corporation Law—Delaware's counterpart to NRS 78.140—only "applies to transactions between a corporation and its directors or another corporation in which the directors have a financial interest." *Cooke,* 2000 WL 710199, at * 13 n. 39. Here, however, we are dealing with director action: the Termination Decision and the Share Option Decision. Moreover, in *Cooke*, there were no allegations or evidence that the disinterested directors who voted to pursue the challenged proposal lacked independence. *Id.*, at *13. Here, by contrast, Cotter Jr. challenges the independence of the directors who recommended and voted on *ratification* of the Termination and the Share Option Decisions, based on the advice of RDI's conflicted counsel.

3. The directors' new arguments to support their reading of NRS 78.140 are improper and without merit.

The directors raise two new arguments on appeal to support their expansive interpretation of NRS 78.140. First, the directors argue that

Article II, Section 8 of RDI's Bylaws informs the meaning of NRS 78.140. But Section 8 merely says what NRS 78.315 already provides in so many words—*i.e.*, that the board of directors can conduct any business as long as a quorum is present and consent is provided or notice is waived. VIII JA1809. It is meaningless that Section 8 of RDI's Bylaws uses the word "transaction" because Section 8 by its terms is not concerned with ratification. *Id*.

The directors' second new argument is that NRS 78.0296—which they admit does not apply, as it did not become effective until *after* Cotter Jr. filed suit—provides further support for their argument that NRS 78.140 applies to the ratification of the Termination and Share Option Decisions. But this new statute, like NRS 78.140, is equally narrow. It provides for a non-exclusive means of ratifying corporate acts that are "not in compliance" with NRS Chapter 78, with the corporation's bylaws, or with its articles of incorporation. NRS 78.0296(7)(a)(1). Thus, NRS 78.0296 merely provides corporations a means to correct prior failures to comply with corporate *formalities*. The sparse legislative history of NRS 78.0296 shows that the legislature was concerned with *errors*, such as a new corporation issuing shares in excess of the amount authorized that is not

discovered until years later when shares have changed hands. *See April 6, 2015 Hearing on SB 446 before the Subcomm. of the Senate Comm. of the Judiciary*, 78th Sess. (Nev. 2015) (statement of Robert Kim, Chair of the Executive Comm., Business Law Section, of the Nevada State Bar). These are the types of acts that necessitate ratification with retroactive effect to create certainty for all parties dealing with the corporation; *not* board decisions made in violation of the directors' fiduciary duties.

4. Decisions are not contracts, and disinterestedness is not independence.

The directors appear to argue that there is no distinction between decisions and transactions or between directors who are disinterested and directors who are not independent. AB at 2-5. These distinctions however, are real under NRS 78.140 and mean something. The statute does not provide for ratification of decisions made by directors who lack independence. While the directors are correct that Cotter Jr. alleged the Termination Decision was void, he based this allegation on the voting directors' interestedness *and* their lack of independence. III JA571. NRS 78.140 is only concerned with validating an interested transaction, which the Termination Decision is not.

5. Cotter's Nevada case law trumps the directors' nonbinding and irrelevant authorities.

The directors next accuse Cotter Jr. of selectively citing Nevada case law on ratification. He did not do so at all. All of the Nevada cases discussing NRS 78.140 cited in his Opening Brief involved contracts and business transactions. OB 39-41. No Nevada case has held that NRS 78.140 may be used to "cleanse" board decisions made in breach of the directors' fiduciary duties.

The directors' out-of-state cases and secondary authority cited for the first time on appeal do not help the directors' NRS 78.140 arguments either. The Fletcher Cyclopedia of the Law of Corporations only confirms that duly elected directors can ratify decisions involving irregularities and illegalities, such as decisions made without a quorum. *See Blish v. Thompson Automatic Arms. Corp.*, 64 A.2d 581, 604 (Del. Ch. 1948) (ratification by independent board of "the authorization and issuance of the shares" rendered invalid because of a lack of a quorum) (cited in 2A Fletcher Cyc. Corp. § 762 ("Who May Ratify—Directors") (Sept. 2019)).

Lewis v. Vogelstein, 699 A.2d 327 (Del. Ch. 1997) also makes clear that ratification has to do with fixing a lack of authority, explaining that "ratification is a concept deriving from the law of agency . . . ." *Id.* at

334. It is concerned with the "*ex post* conferring upon or confirming of the legal *authority*" of an agent who did not have such authority before. *Id.* (emphasis added). Further, *Lewis* confirms that "courts have given [statutes like NRS 78.140 and Del. 144] a very narrow interpretation . . . compliance with that section simply removed the automatic taint of a director conflict . . . ." *Lewis*, 699 A.2d at 335 n. 12.

But here, we are not dealing with an agent or a board that lacks authority to act, nor are we dealing with a violation of the bylaws ratified by a "newly elected board," as in *Mates v. N. Am. Vaccine, Inc.*, 53 F. Supp. 2d 814, 826 (D. Md. 1999), which, unlike this case, involved allegations that the ratifying directors acted in bad faith or lacked independence. What these inapposite authorities confirm is that ratification generally (and ratification under NRS 78.140 in particular) is merely a measure by which to fix non-compliance with technical matters, which has *nothing* to do with cleansing decisions taken by non-independent directors in breach of their fiduciary duties.

B. Nevada law does not recognize common law ratification of a decision made in breach of the directors' fiduciary duties.

The directors rely on a number of Nevada cases to argue—for the first time on appeal—that even outside of NRS 78.140, the Termination

and Share Option Decisions could be "ratified" and the district court's decision upheld. The Court should decline to consider this new argument that the district court could not consider first. *See In re AMERCO Deriv. Litig.*, 127 Nev. 196, 217 n. 6, 252 P.3d 681, 697 n. 6 (2011) ("*Amerco*") (declining to consider an issue raised for the first time on appeal). Should the Court nevertheless be inclined to consider this new argument, it should be rejected for the following reasons.

1. The Nevada cases do not support the holdings the directors attribute to them.

This Court in *Amerco* did not recognize "that ratification may occur even outside of the NRS 78.140 context," as the directors argue, AB at 40. In fact, the Court "***decline*[d]" to address the "ratification defense" in *Amerco*, because it was "not properly before the district court, and"—much like the directors' new argument here—"raised for the first time on appeal." *Amerco*, 127 Nev. at 217 n.6, 252 P.3d at 697 n.6. Moreover, *Amerco* did not involve decisions like the Termination and Share Option Decisions; it involved "business *transactions*" between AMERCO and SAC entities controlled by AMERCO shareholder Mark Shoen. *Id.* at 205, 252 P.3d at 689.

The directors also attribute a holding to *Shoen* that does not appear in the case. They argue that acts which are not *ultra vires* can be ratified, AB at 41—another point not presented to the district court. But all that *Shoen* says on the subject is that acts "within the corporate powers, but . . . performed without authority or in an unauthorized manner" are not *ultra vires* acts. *Shoen*, 122 Nev. at 643, 137 P.3d at 1186. As in *Amerco*, the *Shoen* Court *declined* to consider the argument that ultra vires acts could be ratified, because the argument was not raised below. *Shoen*, 122 Nev. at 643, 137 P.3d at 1186.

The other Nevada cases cited by the directors on page 40 of their Brief are not on point, either. All involved decisions or contracts that were "illegal," or otherwise invalid because of corporate irregularities, such as decisions made without providing notice to a director in violation of the bylaws, as in *Clark Realty Co. v. Douglas*, 46 Nev. 378, 212 P. 466, 468 (1923), decisions made at a meeting that lacked notice and a quorum, as in *Fed. Mining & Eng'g Co. v. Pollak*, 59 Nev. 145, 154, 85 P.2d 1008, 1012 (1939), or contracts entered into before the company was formally incorporated, as in *European Motors, Ltd. v. Oden*, 75 Nev. 401, 403–04, 344 P.2d 195, 197 (1959). None of these cases involved allegations that the

initial decisions or the subsequent ratification decisions, or both, were made by directors lacking disinterestedness and independence, as is the case here.

2. The one-off Delaware cases do not help the directors.

The unpublished Delaware cases cited by the directors are as uninformative as they are inapposite. In *Cooke*, two disinterested directors voted on an acquisition proposal that could potentially benefit two other directors who were also majority shareholders. *Cooke*, 2000 WL 710199 at *13. The court held that the vote by the two disinterested directors removed "the taint of the alleged disloyalty" of the other two board members. *Id*. (applying Del. Corp. Code §144 by analogy). No facts were alleged in *Cooke* that the disinterested directors who voted in fact lacked independence. Here, by contrast, a majority of interested *and non*independent directors voted on the Share Option and Termination Decisions in 2015. Moreover, Cotter Jr. provided evidence that the directors who recommended the ratification in issue and those who voted to ratify the Decisions in 2017 ("Voting Directors") lacked independence, including acting on the advice of conflicted counsel.

Marciano v. Nakash, 535 A.2d 400, 403 (Del. 1987) is even less helpful to the directors than *Cooke* because *Marciano* reinforces the point Cotter Jr. made in his Opening Brief—that compliance with safe harbor statutes such as Delaware Gen. Corp. § 144 "merely removes an 'interested director' cloud when its terms are met and provides against invalidation of an agreement 'solely' because such a director or officer is involved." *Marciano*, 535 A.2d at 404 (internal quotation marks omitted) (quoting *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. Supr. 1976)). Both *Marciano* and *Fliegler* applied a fairness test in addition to determining whether the requirements of § 144 were met. *See id.*[2] Moreover, neither case involved an allegation of a lack of independence.

3. RDI's Bylaws do not shield the directors from liability.

The directors' argument that the Board had "the unfettered right" under the Bylaws to remove Cotter Jr., AB at 42, is equivalent to arguing that the Board is above the law. The mere authority to perform an act under the Bylaws does not shield such acts from judicial scrutiny:

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[2] It's ironic the directors should cite these Delaware authorities, while accusing Cotter Jr. of relying on "patently inconsistent" Delaware law and advocating an "entire fairness" standard. *See* Directors' Joinder and RDI "answering brief" at 23.

Directors owe "fiduciary duties . . . to exercise their respective powers in good faith and with a view to the interests of the corporation." NRS 78.138(1). Directors cannot engage in acts authorized by the Bylaws in "breach of [their] fiduciary duties . . . as a director or officer" if the acts involve "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7). Again, Cotter Jr. is not contesting the directors' *authority* to make certain decisions under the Bylaws. He is contending the directors did not act independently when exercising their authority, in breach of their fiduciary duties.

C. The ratification was a sham and did not immunize the interested directors against Cotter Jr.'s breach of fiduciary duty claims.

Predictably, the directors focus their arguments solely on what occurred at the December 29, 2017 special board meeting. They point to the 5-1 vote in support of ratification of the Termination and Share Option Decisions, the information the Voting Directors considered, the advice of counsel, and to the fact that Cotter Jr. knew the Cotter sisters were interested in the Decisions that were purportedly ratified. AB at 44.

But the directors completely ignore the conflicted role of RDI's counsel in advising three separate clients—the interested Cotter sisters, the

Special Independent Committee, and the Board—on ratification. They ignore the fact that the legal advice by conflicted counsel to the Special Independent Committee on December 21 meeting is what prompted the directors to recommend "ratification." The directors altogether downplay the role of RDI's Special Independent Committee, the timing of the ratification, and the admitted goal of obtaining the dismissal of Cotter Jr.'s complaint against the interested directors—all of which facts were new evidence of the Voting Directors' lack of independence.

1. The SIC had the same powers as an SLC.

Despite its creative name, RDI's Special Independent Committee (SIC) was no different from a Special Litigation Committee (SLC) charged with investigating the merits of Cotter Jr.'s lawsuit and recommending its dismissal. Under the Charter that created it, the SIC was authorized to investigate and exercise oversight in the litigation, to instruct legal counsel "to file pleadings or other papers, to make recommendations to the Board, and to "***take all other actions***" the SIC deemed necessary or appropriate . . . ." XXXI JA7663-7665 (emphasis added). The power to take "all other actions" would certainly include the power to "determine whether it was in the company's best interest to pursue the claims" made

by Cotter Jr. *In Re DISH Network Deriv Litig.,* 133 Nev. 438, 441, 401 P.3d 1081, 1086 (2017) ("*DISH Network*").

Thus, the notion that RDI created an SIC merely to monitor Cotter Jr.'s lawsuit and that the SIC meetings were merely "update status calls," is nonsense given the powers described in its Charter and the SIC's authority "to retain" its own "legal counsel," XXXI JA7665, not RDI's counsel. The three SIC members—Gould, Codding, and McEachern—were already "monitoring" Cotter Jr.'s lawsuit as direct participants: they were defendants. And the characterization of the December 21, 2017 SIC meeting by RDI's counsel as a mere "update call" is refuted by SIC member Gould, who testified that the SIC *did* play a formal role in recommending taking up ratification at a special board meeting. XXX JA7505.

Of course, the minutes of the December 21 meeting were so heavily redacted on the basis of privilege that Cotter Jr. could not discover or verify what was discussed at the December 21 meeting. XXVI JA6513B-C. But even assuming the SIC did *not* discuss the effect of the ratification with its conflicted counsel, it was clearly the goal to obtain the dismissal of Cotter Jr.'s complaint. Gould admitted as much and so do the interested

directors in their Answering Brief, where they say that the Board could "consider the potential litigation effect of ratification." AB at 49.

By hiding the December 21 SIC meeting from Cotter Jr., by ghostwriting the five directors' email requesting that the Board take up ratification, and by delaying the drafting of the SIC minutes until long after the interested directors filed and the district court decided their Motion for Judgment as a Matter of Law, the directors and their conflicted counsel very much operated in "secret to . . . extinguish a litigation." AB at 47. The entire process was orchestrated with RDI's conflicted counsel to avoid having to confront and satisfy the high burden of proof under *DISH Network* to show "at an evidentiary hearing" that the SIC was "independent and conducted a good-faith, thorough investigation." 133 Nev. at 442-443, 401 P.3d at 1087-88.

2. The ratification request was made at the instigation of conflicted counsel.

The directors' contention that the December 29 ratification vote was "openly driven by five independent directors" is not supported by a citation to the record, AB at 47, because that contention is baseless.

The available evidence—as distinguished from the directors' self-serving arguments—shows that at no time between the filing of Cotter

Jr.'s lawsuit in 2015 and the December 21, 2017 SIC meeting did a single director "openly" propose to ratify the Decisions in issue. Their request to put ratification on the agenda for the December 29, 2017 special board meeting was not made until *after* RDI's counsel suggested they do so at the December 21 SIC meeting. The fact that the Voting Directors' email invoked the Bylaws and was made by enough directors is beside the point. Cotter Jr. does not challenge the directors' compliance with procedural corporate formalities.

Further, with all due respect for Attorney Bonner's legal experience and qualifications as a member of RDI's conflicted law firm, he was a *fact* witness. As such, he could not render a legal opinion as to the "legal consequence" of the ratification vote on December 29. AB at 48. Nor could his general characterization of SIC meetings as "status updates" displace director Gould's specific testimony that the SIC on December 21, 2017 took the formal action to request that the company put the subject of ratification "on the agenda for its next meeting, and call for a special meeting if there was not a regular meeting being scheduled." XXX JA7505.

If the SIC truly played no role in the ratification process, then the directors must concede that RDI's conflicted counsel initiated

ratification with the approval of the Cotter sisters. The Voting Directors *did not* draft the email request that ratification be put on the agenda; conflicted Greenberg Traurig attorneys and RDI's in-house counsel did. XXX JA7509; *see also, e.g.*, XXIX JA7258 (privilege log entry 59912), JA7260 (log entry 59959); JA7276 (log entries 60408, 60412). Not one of the Voting Directors testified that ratification of the Share Option and Termination Decisions was their idea. The idea was Greenberg Traurig's to benefit the Cotter sisters.

3. There is no excuse for the belated ratification.

The interested directors admit that none of the Voting Directors proposed to ratify the Termination and Share Option Decisions between 2015 and December 27, 2017. Nevertheless, they argue ratification was "not even a possibility" before December 11, 2017, because only then did the district court grant summary judgment in favor of the Voting Directors based on the absence of genuine issues of fact related to their independence and disinterestedness. AB at 49.

But just eleven pages before making this argument, the interested directors argue the exact opposite. There, they say that directors may ratify corporate acts even after the filing of a derivative suit. AB at 37-

38 (citing 2A Fletcher Cyc. Corp. §§ 762, 429, and *Blish*, 64 A.2d at 583-85). Indeed, assuming NRS 78.140 applied and the directors had ratified the Decisions in 2015, that ratification decision would be subject to the same "standard that applies to directors in the demand-futility context," *DISH Network*, 133 Nev. at 446, 401 P.3d at 1089—*i.e.*, the district court would have looked at whether the directors who ratified the decision were disinterested and independent. *Shoen*, 122 Nev. at 637, 137 P.3d at 1182. Thus, the directors' attempt to explain why they waited until December 2017 to do what they now say was in the best interest of RDI all along, as distinguished from the Cotter sisters, is not well taken.

4. The directors admit the ratification was a litigation tactic.

Selectively but misleadingly quoting director Gould's testimony, the directors suggest that he "rejected" the inference that ratification was a litigation tactic. AB at 49. But Gould clearly testified otherwise: he said that the discussion during the December 29 meeting about the Decisions that the Voting Directors were about to ratify was "not totally candid . . . because the ratification might be a litigation tactic." XXX JA7508. RDI's counsel in so many words admitted in the district court that dismissal of the complaint was an objective. XXVII JA6769-6770. Now the

directors admit the same thing in their Answering Brief as well. AB at 50 ("Regardless, any consideration by Gould or any other Director of the potential legal ramifications of ratification was entirely appropriate").

Of course, there is nothing wrong with directors considering the effect of their decisions. But where, as here, ratification was conceived by RDI's counsel, first discussed with the Cotter sisters, and thereafter raised with the SIC members with the admitted goal of obtaining the dismissal of Cotter Jr.'s derivative complaint, there is no presumption of independence that would otherwise apply in pre-suit cases. *DISH Network*, 133 Nev. at 446, 401 P.3d at 1090. The directors have the burden of proving their independence "by a yardstick that must be like Caesar's wife —above reproach." *Id.* (internal quotation marks omitted). Only then are they entitled to invoke the business judgment rule's presumptions. *Id.*

Further, the decision to terminate derivative litigation cannot be precipitously made at a last-minute telephonic board meeting, as occurred here. Such decision requires a thorough, good faith investigation, *DISH Network*, 133 Nev. 439, 401 P.3d at 1085, which involves more than "acts and determinations." *Id.* at 1099 (Pickering, J., concurring in part and dissenting in part). "It includes countless decisions along the way of whom

to interview, what to ask, what to review, what not to review, and how to interpret the information and advice assembled." *Id.* (quoting *In re Oracle Corp. Deriv. Litig.*, 824 A. 2d 917, 920 (Del. Ch. 2003)). Here, the pervasive role of RDI's conflicted counsel demonstrating the absence of any neutrality on the part of RDI and a total coordination between all directors, including the interested directors, raises *genuine issues of material fact* as to whether the directors who ratified the Decisions were independent, and whether the investigation was thorough and in good faith.

The directors' purported concern with the drain the derivative suit caused on company resources came a little too late and rings hollow: They spent almost **$16 million** in attorneys' fees before establishing the SIC and recommending ratification. XXXVI JA9020. Nothing prevented them from establishing an SLC to investigate Cotter Jr.'s claims at the outset, as in *DISH Network*, if they truly believed they had a majority of independent directors. They did not hold such a belief.

5. The directors did not propose or seek out the advice of counsel on ratification.

Next, the directors argue that seeking advice from RDI's counsel is evidence of good faith. AB at 54 (citing NRS 78.138(b)(2) and

DISH Network, 133 Nev. at 450, 401 P.3d at 1092). This may be true as a general proposition, but that is not what occurred here.

RDI's counsel first reached out to *the Cotter sisters* on December 13, 2017 about the ratification process in an email entitled "Special Committee." XXIX JA7290 (log entries ending in 60907, 60911), XXX JA7399 (entries ending in 73538), JA7429 (entry ending in 76569), JA7444 (entry ending in 76783). The directors fail to explain why it was necessary for RDI's counsel to advise the interested Cotter sisters on what should be done to serve their interests *before* the SIC had even met and *before* the directors supposedly "openly" and "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." AB at 47. Of course, the only reason it was necessary to alert Ellen Cotter is that *RDI's counsel* came up with the ratification scheme and knew it had to be implemented before trial if the goal was to avoid any risk to the Cotter sisters—hence, the special board meeting scheduled for December 29, 2017.

The evidence shows that these discussions between RDI's counsel and the Cotter sisters were anything but "innocuous." In fact, the directors and RDI do not deny, nor could they, that RDI's counsel was

already meeting with the Cotter sisters in person to prepare them for trial against Cotter Jr.'s claims at the same time they suggested "the ratification process" to them to avoid the risk to their interests that trial posed. XXXVII JA9206; XL JA9854-9856.

The directors' argument that it was logical for RDI's counsel to propose ratification first because directors are not "typically attorneys" is baffling, considering that Gould—who served as the Chair on the SIC—was a "corporate attorney" described by these directors elsewhere as "a renowned ***expert on corporate governance issues***." AB at 7 (emphasis added). Indeed, director Gould co-wrote a treatise called "Advising & Defending Corporate Directors and Officers," which this Court acknowledged and cited as authority in *Wynn Resorts Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 377, 399 P.3d 334, 343 (2017). But notwithstanding Gould's expertise on the business judgment rule, and despite having seven attorneys to assist him, Gould never, in the two years of litigation, proposed that the Board take up ratification or form an SLC to evaluate Cotter Jr's derivative claims.

It is also irrelevant that RDI and the directors were *also* represented by separate counsel. The point is that despite this separate

representation, Greenberg Traurig fulfilled dual, if not triple but conflicting roles, in advising (1) the Cotter sisters who were already represented by Quinn Emanuel, (2) the SIC, which had the right to retain separate counsel, and (3) the RDI Board. RDI did not merely join in "certain motions," as the directors contend; RDI joined in **all seven** motions for (partial summary) judgment filed by the directors. XV JA3707-XVI JA3814; XIX JA4606-4609. *Throughout* this litigation RDI took an adversarial position when it should have remained neutral, as a nominal party.

It is precisely for this reason that cases involving SLCs, such as *DISH Network*, should be applied to the ratification of the Termination and Share Option Decisions. From day one, RDI mounted a litigation offense to obtain the dismissal of Cotter Jr.'s derivative claims that were brought on RDI's behalf. Without first creating an SLC and before even beginning an investigation, RDI had already concluded that "it was not in [RDI]'s best interest to pursue [Cotter Jr.'s] derivative claims." *DISH Network*, 133 Nev. at 439, 401 P.3d at 1084. RDI not only filed a motion to dismiss for Cotter Jr.'s alleged failure to make a demand on the Board—which motion was denied—but RDI also immediately filed a motion to compel arbitration in

an effort to rid itself and the interested directors it sponsored of the lawsuit. I JA127-148. It also filed an answer seeking the dismissal of Cotter Jr.'s claims and went on to join every effort of the directors to obtain dismissal of the case in court. II JA397-418; I JA105-108; XV JA3707-XVI JA3814; XIX JA4604-4609; XX JA4891-4916; XX JA4978-4980; XX JA5025-JA5027; XXV JA6162-JA6170.

6. RDI's adversarial role is indefensible.

The general rule is that a corporation named as a nominal defendant in a derivative lawsuit should be and remain neutral. *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005-09, 84 Cal.Rptr.3d 642, 652 (2008) ("*Patrick*"). While the corporation may contest a derivative plaintiff's standing, the nominal defendant cannot "challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit . . . ." *Id.*; *see also, e.g., Apple Inc. v. Superior Court*, 18 Cal.App.5th 222, 239, 227 Cal.Rptr.3d 8, 20 (2017) (holding same); *Swenson v. Thibaut*, 250 S.E. 2d 279, 293-94 (N.C. App. 1978) (holding same).

Ignoring the more recent cases from the jurisdiction where their counsel practice, the directors instead turn to *dicta* in *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D. N.J. 1977), and the Fletcher Cyclopedia to argue that

corporations have "perhaps a role to play" in frivolous derivative cases. AB at 56 (quoting *Messing*, 439 F. Supp. at 782). They then selectively quote from *Int'l Brotherhood of Teamsters v. Hoffa*, 242 F. Supp. 246, 252 (D. DC 1965) to suggest RDI should be treated like an "active defendant" that was justified to "aggressively" defend against Cotter Jr.'s case.

But the holdings in *Messing* and *Hoffa* only reinforce *Patrick's* rule of neutrality. The *Messing* court made clear that "the corporation, although a nominal defendant, is the real plaintiff in this action." *Messing*, 439 F. Supp. at 779. It went on to say that "[t]he initial decision . . . as to what role if any the corporation should take must in the first instance be made completely *free from any actual or apparent conflict*." *Messing*, 439 F. Supp. at 782 (emphasis added). The *Messing* court warned *against* "relying upon the nature of the charges against the directors" and explained that the interests of the corporation and the director defendants "will almost always be diverse." *Id*. The court in *Hoffa* held that generally, the corporation "should be kept in a neutral role when it can demonstrate no interest in the litigation beyond a shielding of officials whose activities are under attack" and that "even when permitted an adversary role, it should

be limited to defenses designed to safeguard the institutional issues at stake." *Hoffa*, 242 F. Supp. at 253.

Here, by contrast, RDI *immediately* sided with the directors, answering the complaint, moving to dismiss, moving to compel arbitration, joining in each dispositive motion filed by the directors, and arguing on their behalf in court. I JA105-108, JA127-148; II JA397-418; III JA510-515. RDI had already predetermined that the case was "frivolous." These facts show that RDI's main interest was protecting the Cotter sisters from Cotter Jr.

Cotter Jr.'s derivative complaint did not pose a "threat" to RDI's existence that would justify its aggressive partisan litigation position. The cases cited by the directors on pages 57 and 58 of their Answering Brief are not analogous to this case, and the directors fail to show otherwise. In *Blish*, for example, the corporation was on the brink of insolvency when a shareholder sought to cancel the issuance of 116,400 shares of stock to Maguire & Co, as compensation for its efforts to obtain financing to save the corporation from insolvency. *Blish*, 64 A.2d at 586, 558-59, 607 (Del. Ch. 1948). No such circumstances existed here. In *Kirby v. Schenck*, also cited by the directors, AB at 58, the court held that there was insufficient

evidence to conclude that the shareholders' attacks on certain of the corporation's personal service contracts put the corporation in such serious peril that the corporation's retention of counsel was justified. *Kirby v. Schenck*, 25 N.Y.S.2d 431, 432-33 (N.Y. 1941).

Cotter Jr.'s complaint also did not threaten "a corporate reorganization," AB at 58, because there *was* no merger or any other form of reorganization on the horizon. Even assuming Cotter Jr.'s complaint could be construed as seeking to interfere with internal management, the corporation is only justified in abandoning its neutral position if "there is no allegation of fraud or bad faith." *Swenson*, 250 S.E. 2d at 294 (citing *Nat'l Bankers Life Ins. Co. v. Adler*, 324 S.W.2d 35 (Tex. Civ. App.1959); *Patrick*, at 1006 (holding same, quoting *Swenson*). But here, Cotter Jr.'s complaint throughout accused the Board of acting in bad faith in making the decisions to terminate him, to abandon the search for a qualified CEO, to stack the board with friends of the Cotter sisters (at their suggestion) to perpetuate their control, and to appoint unqualified executives. *E.g.*, III JA525, JA532, JA539, JA562, JA564-569.

In sum, there is no basis for RDI's aggressive litigation role in the district court, just as there is no basis for the directors' claim that Cotter

Jr.'s complaint was "patently frivolous." The rulings by the district court refute this gratuitous mischaracterization. RDI and the directors lost each of their serial motions to dismiss for Cotter Jr.'s alleged failure to make a demand, lost their challenges to Cotter Jr.'s fitness to serve as a derivative plaintiff, and the interested directors lost two rounds of motion practice on their Partial MSJ Nos. 1 and 2. I JA238-II JA256; II JA257-259, JA260-262; XX JA4917-JA4920; XX JA5037; XXV JA6065-6071, JA6273.

D. The Board did not prove that it acted independently when ratifying the Termination and Share Option Decisions.

Even assuming NRS 78.140 provided a basis to ratify the Termination and Share Option Decisions, the Cotter sisters and Adams had the burden to prove that the directors who made the ratification decisions ("Voting Directors") were disinterested and independent in their ratification decision. They could not simply rely on the district court's December 28 determination that Cotter Jr. failed to raise a genuine issue of material fact as to their independence. That determination was made *before* and had nothing to do with the challenged ratification decision on December 29. XXV JA6065-JA6071.

As this Court has held, the directors' independence must be (re)evaluated for each decision: The question is "whether the directors,

having made a business decision, were . . . independent" or whether they were "controlled by another who is interested, ***in the subject transaction*** . . . ." *Shoen*, 122 Nev. at 638, 137 P.3d at 1182 (emphasis added). Thus, the question is not only whether the directors act independently "generally," but "***more specifically in respect to the challenged transaction***," *id*. (emphasis added)—here, the ratification decision. It was therefore error for the district court to rely on its prior "independence" determination to hold that the Voting Directors voted independently on December 29.

Moreover, where both the Voting Directors and the SIC members who recommended ratification were represented by the same counsel, and the admitted goal of ratification was to obtain the dismissal of Cotter Jr.'s derivative lawsuit, the Cotter sisters and Adams had the burden to prove the independence of the SIC and Voting Directors "by a yardstick that must be like Caesar's wife—above reproach." *DISH Network*, 133 Nev. at 446, 401 P.3d at 1090. They could not rely on a presumption of the Voting Directors' independence.

Regardless of who had the burden of proof, Cotter Jr. presented sufficient evidence to raise a genuine issue of material fact as to the Voting

Directors' independence with respect to the ratification decision, including: (1) the Cotter sisters' direct involvement in the ratification process; (2) RDI's counsel's conflicted role in advising the Cotter sisters for trial while advising the SIC and the Board to recommend ratification; (3) the instigation and orchestration of the ratification by RDI's counsel rather than the Voting Directors; (4) the SIC meeting, which was not disclosed to Cotter Jr. or to the district court; (5) RDI's counsels' delay in preparing SIC meeting minutes; (6) RDI's counsel's rushed preparation of minutes for the special board meeting on December 29; and (7) the Cotter sisters and Adams' immediate use of the minutes of the December 29 meeting for their Motion for Judgment filed on the eve of trial. XXVII JA6727-XXVIII JA6815; XXXI JA7608-7797.

1. The Voting Directors' independence is a prerequisite to the application of the business judgment rule.

The Cotter sisters and Adams selectively quote language in *Shoen* to suggest that the business judgment rule applies as long as the Voting Directors are disinterested. *See* AB at 63 ("the business judgment rule applies 'in the context of valid interested director action' ") (quoting and citing *Shoen*, 122 Nev. at 636, 137 P.3d at 1181).

But where, as here, a genuine issue of material fact is raised as to whether the Voting Directors were in fact independent, the business judgment rule simply does not apply. *See Shoen*, 122 Nev. at 638, 137 P.3d at 1182 (explaining that the "second prong of the *Aronson* test"—*i.e.*, whether the business decision was "the product of a valid exercise of business judgment"—is implicated "***only*** if the business judgment rule remains applicable because a majority of directors are . . . ***independent*** of one who is interested under the first prong") (emphasis added). The Voting Directors must be disinterested *and* independent.

The Cotter sisters and Adams' reliance on *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) to corroborate their position is entirely misplaced. *Gantler* involved a *shareholder* ratification of director action undertaken by a majority of directors who lacked independence. *Id.* at 712-13. There, the court held that the "cleaning effect" of shareholder ratification so as to entitle the directors to invoke the business judgment rule occurs only if shareholders approve director action that does not legally require shareholder approval "to become legally effective." *Id.* at 713. In other words, the shareholder ratification provides an additional and "***independent*** layer of [] approval in circumstances where shareholder

approval is not legally required." *Id.* at 713 (emphasis added). Here, by comparison, there was no independent layer of approval by shareholders; the directors ratified director action. In such cases, the business judgment rule is triggered only if the Voting Directors were both (1) disinterested under NRS 78.140; *and* (2) independent, which in this case they were not.

Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A. 2d 114 (Del. 2006) is also distinguishable and reinforces Cotter Jr.'s position. There, the trial court found that the majority of the directors who voted to ratify the BFC Transaction were both disinterested *and* independent. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177, 191 (Del.Ch. 2005). The plaintiff did not challenge the trial court's finding on independence on appeal. *Benihana of Tokyo, Inc.*, 906 A. 2d at 120 n.14. As a result, the decision to ratify the BFC Transaction was subject to the business judgment rule. Here, however, Cotter Jr. challenged the Voting Directors' independence below and again on appeal and supported his challenge with substantial evidence. XXXI JA7608-JA7797.

2. The Ratification only served the Cotter sisters.

Finally, the Cotter sisters and Adams argue that Cotter Jr. "does not even attempt to challenge the rational business purposes behind

ratification of the underlying Termination or Share Option Decisions." AB at 63. This argument is false. Throughout his Opening Brief and in other briefs filed by Cotter Jr. in the consolidated appeals, he has argued that no business purpose—let alone a *rational* business purpose—was served by ratification of the Termination or Share Option Decisions. OB at 36, 47, 51-52; *see also* Cotter Jr.'s Opening Brief in Case No. 75053 at 20, 39; Cotter Jr.'s Answering Brief in Case No. 77733 at 13-14, 22-23. The only purpose ratification served was to hand the Cotter sisters and Adams a dismissal on the eve of trial and cement the sisters' absolute control of RDI.

Moreover, as the directors themselves pointed out in their Answering Brief in Case 75053 at 4, courts do not inquire into the merits of a decision but only " 'into the procedural indicia of whether the directors resorted in good faith to an informed decision making process.' " *Wynn Resorts Ltd.*, 133 Nev. at 377, 399 P.3d at 343 (quoting *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994)). Thus, Cotter Jr. was not required to counter the Voting Directors' purported reasons for ratifying the Decisions. He did what the law required; he provided ample evidence that the ratification process was a sham and a fraud.

Even assuming otherwise, the justifications offered for the ratification decisions do not merit a response. All that the directors have come up with are the same old petty examples of alleged conduct by Cotter Jr., such as his alleged temper in the office, which they never investigated, or the fact that his office door was not open wide enough. AB at 9. They point to the same two alleged acts to "undermine" the Cotter sisters in board meetings, which people in the business world would more commonly refer to as addressing issues affecting the business of RDI. *Id*. at 10. Two Voting Directors formed opinions about Cotter Jr.'s capacities as a CEO based on how he acted during board meetings. *Id*. at 21.

In all their accusations, these directors appear to have forgotten that Cotter Senior, to whom each of the directors bowed before his death, believed Cotter Jr. was most qualified to be CEO and that the directors ***unanimously*** appointed him. *Id*. at 7. All that changed after Cotter Sr. passed away. The Cotter sisters became majority shareholders and believed they were entitled to the job Cotter Jr. fulfilled, and the Voting Directors, who served at the pleasure of the majority sisters-shareholders, enabled their wishes.

III. CONCLUSION

The Court should reverse the order dismissing the three interested directors because NRS 78.140 provides no basis to ratify board decisions made by a majority of nonindependent and interested directors, there were genuine issues of material fact as to the Voting Directors' independence, and there were genuine issues of material fact as to whether the purported ratification was in good faith.

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CERTIFICATE OF COMPLIANCE

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

2. I also certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Palatino 14 point font and contains 7622 words.

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

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