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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. 76981, 77648 & 77733 District Court Case No. A-15-719860-B Coordinated with: Case No. P-14-0824-42-E

Appeal (77733)
Eighth Judicial District Court, Dept. XI
The Honorable Elizabeth G. Gonzalez

RESPONDENT'S ANSWERING BRIEF IN CASE NO. 77733

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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.

Respondent 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. JURISDICTIONAL STATEMENT

Respondent James J. Cotter Jr. ("Cotter Jr.") agrees that the district court's order denying Reading International Inc. ("RDI")'s Motion for Attorneys' fees is a special order entered after judgment that is appealable under NRAP 3A(b)(8).

However, Cotter Jr. disagrees that the post-judgment order denying nominal defendant RDI's Motion for Judgment in its Favor is appealable under NRAP 3A(b)(8). As discussed further in this Brief under Argument D.1, that post-judgment order does not grow out of the final judgment that was entered in favor of the three individual defendants, as *Davidson v. Davidson*, 132 Nev. 709, 713, 382 P.3d 880, 883 (2016) and *Peck v. Crouser*, 120 Nev. 120, 122-24, 295 P.3d 586, 587-88 (2013) require.

II. STATEMENT OF THE ISSUES

(1) Did the district court act within its sound discretion in denying RDI's motion for attorneys' fees, where: (a) Cotter Jr. prevailed on numerous dispositive motions; (b) the interested directors avoided trial only because of a belated "ratification" of key decisions challenged by Cotter Jr.; (c) Cotter Jr.'s breach of fiduciary duty claims raised novel and complex issues of law; and (d) Cotter Jr. diligently pursued his case?

(2) Should the district court's order denying RDI attorneys' fees be affirmed on the alternative grounds that: (a) RDI was not a prevailing party; (b) Gould's request was time-barred; and (c) the request for $15.9 million in claimed attorneys' fees was outrageously excessive under the circumstances?

(3) Did the district court correctly deny RDI's Motion for Judgment in its Favor, where RDI was a mere nominal defendant that did not prevail?

III. STATEMENT OF RELEVANT FACTS

This is a shareholder derivative case brought by shareholder and former director and officer Cotter Jr. on behalf of RDI, a publicly traded Nevada corporation. RDI-A00482-538, I RDI-A00492.[1]

A. Background Facts.

1. Cotter Jr. is appointed CEO by unanimous vote.

In August 2014, Cotter Jr. was unanimously appointed CEO of RDI by the full RDI board of directors, when his father, James Cotter Sr.

[1] This is one of three cases that have been consolidated for appeal purposes but briefed separately. As a result, this statement of facts only sets out the facts necessary for the issues raised in this appeal. The briefs filed in Case No. 75053 expand on certain facts while other facts will be addressed in more detail in the briefs filed in Case No. 76981 and Case No. 77648.

resigned for health reasons. RA31.[2] At that time, Cotter Jr. had been a director of RDI for twelve years, Vice Chairman of the RDI board of directors for seven years, involved in RDI's management for nine years, and President of RDI for the past year. *Id.*; IV RDI-A06203.

2. The Cotter sisters seek to become Co-CEOs and increase their control over RDI's Class B voting stock.

Following the death of Cotter Sr. in September 2014, Ellen Cotter and Margaret Cotter—Cotter Jr.'s only two sisters, who were also board members (the "Cotter sisters")—refused to accept Cotter Jr.'s authority as CEO, refused to report to him, and demanded significant salary raises and increases in their respective executive roles at RDI. III RDI-A05686; VI RDI-A08807 (¶ 41). Just one month after their father passed, the Cotter sisters proposed to: (1) reconstruct RDI's dormant executive committee of which they were members and have it play an active and supervisory role in determining RDI's future business strategy; (2) report to the committee instead of RDI's CEO, Cotter Jr.; (3) have the committee vote on decisions made by key executives; and (4) obtain management power within their respective "operational areas" outside the

[2] Citations to "RA" are to the Respondent's Appendix, submitted with this brief.

purview of the CEO. III RDI-A05686; IV RDI-A06376-06378, RDI-A09472-09478.

Several months later, the Cotter sisters initiated trust and estate litigation against Cotter Jr. in the California probate court to obtain control of RDI Class B voting stock that would give them the authority to elect all of RDI's directors. III RDI-A05884-05885 (¶ 8), RDI-A05850-05851; I RA51.

3. Cotter Jr. is terminated as CEO.

In the spring of 2015—less than a year after Cotter Jr. was unanimously appointed CEO—the Cotter sisters together with RDI directors Kane, McEachern, and Adams voted to terminate Cotter Jr. after Cotter Jr. refused the take-it-or-leave-it settlement offer made by the Cotter sisters relating to the trust and estate litigation. III RDI-A05747; IV RDI-A05987, RDI-A06238, RDI-A06243, RDI-A06544–45, RDI-A06788.

4. Following Cotter Jr.'s removal, the Cotter sisters get the executive positions they wanted.

Once Cotter Jr. was terminated, Ellen Cotter was appointed interim CEO, and ultimately—following an aborted independent CEO search—CEO, despite her lack of experience in real estate development and not meeting other specific criteria that the CEO search committee had earlier found crucial for that position. VI RDI-A08818, RDI-A09248–92449,

RDI-A0952I; V RDI-A08216. Cotter Jr.'s other sister, Margaret Cotter, was granted her wish to become RDI's Executive Vice President of Real Estate Management and Development-NYC despite her lack of experience or other qualifications for this position. III RDI-A05713-05714; VI RDI-A08819, RDI-A09248–09249.

B. The Litigation.

1. Cotter Jr. files a derivative suit on RDI's behalf and RDI actively defends against it.

On June 12, 2015, Cotter Jr. filed a verified derivative complaint on behalf of RDI against seven director "Defendants," expressly naming RDI as a "nominal defendant." I RDI-A00001, RDI-A00007, RDI-A00087, RDI-A00483. As RDI admits, Opening Brief ("OB") at 6, all four of Cotter Jr.'s fiduciary duty claims were made against two or more *individual* directors—*not* RDI. I RDI-A00528–00533. Each claim alleged that the "individual defendants" breached their fiduciary duties to the Company (defined as RDI), resulting in damages to the Company—*i.e.*, RDI. *Id.* (*e.g.*, ¶¶ 174, 178, 181, 185).

Nevertheless, nominal defendant RDI, through its counsel Greenberg Traurig, filed answers to Cotter Jr.'s complaints, joined in all the directors' motions for partial summary judgment, and repeatedly argued in

favor of dismissing the derivative complaint in court. I RDI-A00205-226; IV RDI-A08604-8629; I RA173-191.

At no time did RDI's board of directors form a special litigation committee to assess the merits of Cotter Jr.'s lawsuit or the derivative lawsuit filed by the "T2 Plaintiffs," who were allowed to intervene. I RDI-A00069-86. It wasn't until December 2017, on the eve of trial, that a "special independent committee" was created, met, and proposed ratification of two key decisions made by RDI's board in 2015 that were the subjects of Cotter Jr.'s main derivative claims on behalf of RDI. VII RDI-A09859-09907.

Instead, the individual director defendants *and* RDI embarked on an aggressive litigation path to defend against Cotter Jr.'s derivative claims. Although Cotter Jr.'s case was filed in Clark County, Nevada, all directors engaged Los Angeles-based law firms to represent them: The Cotter sisters, Ed Kane, Guy Adams, and Douglas McEachern (hereafter, the "Cotter directors") hired Quinn Emanuel; director William Gould hired Bird Marella as lead counsel. VIII RDI-A10587–10604, RDI-A10600–10602. In just seven months—before a single deposition was taken—Quinn Emanuel had already billed $2 million in legal fees, while RDI, a nominal defendant, had already incurred more than $800,000 in legal fees from Greenberg Traurig. VIII RDI-A10582; RDI-A10592.

2. The directors and RDI are unsuccessful in their many motions to defeat Cotter Jr.'s derivative lawsuit.

On August 10, 2015, the Cotter directors filed a motion to dismiss Cotter Jr.'s initial complaint, arguing, in relevant part, that Cotter Jr.: (1) failed to adequately plead demand futility; and (2) could not adequately represent the interests of RDI's shareholders. I RA7. RDI joined in the motion. I RA 58-61. The district court denied the motion, finding that "Cotter Jr. had adequately alleged demand futility and interestedness." I RA188 (at 16:2-30); I RA195–197.

On August 31, 2015, RDI filed a motion to compel arbitration, arguing (among other things) that Cotter Jr.'s lawsuit was "about nothing more than the termination of Mr. Cotter's employment" and therefore subject to arbitration under the parties' employment agreement. I RA64. The district court, distinguishing Cotter Jr.'s rights as a shareholder from those as a former employee, disagreed, and denied RDI's Motion. I RA192-194.

During the August 9, 2016 hearing, RDI's counsel argued against Cotter Jr.'s motion to amend his complaint to address events and actions by the board that post-dated his initial complaint. II RA246-248. But the district court granted Cotter Jr.'s motion and, again, found "that

demand would be futile on the board under the circumstances." II RA264 (at 23:1-2).

On October 11, 2017, the Cotter directors filed a Motion for Evidentiary Hearing Regarding Cotter Jr.'s Adequacy as a Derivative Cotter Jr., in which RDI and Gould joined. II RA279–321. The district court disagreed with defendants' "old" argument that Cotter Jr. was "using this derivative case to pursue solely personal remedies." II RA333 (at 6:8-22) ("we've known that and I've known that when I did not dismiss the derivative portion of the case"). In denying the Motion, the district court pointed out to defense counsel that not all aspects of Cotter Jr.'s derivative claims were solely personal to him. II RA336 (at 9:16-19) ("that's not the whole allegations that he's made as part of his derivative claim.").

3. Cotter Jr. makes efforts to move the case along.

Cotter Jr. sought expedited written discovery at the outset. OB at 15; I RDI-A00033-00064. But the individual defendants and RDI were slow to respond: by February 18, 2016, the Cotter sisters had produced only 1,500 pages, while Cotter Jr. had produced more than 11,000. I RA200. The defendants also delayed producing documents later in the case, which required Cotter Jr. to file several discovery motions throughout the case,

which the district court granted in full or in part. II RA267-269; IV RA852-857; V RDI-A08422 (at 32:12-16).

4. The T2 Plaintiffs withdraw their complaint weeks after being accused of insider trading.

On June 21, 2016, the district court heard the Cotter directors' motion to disqualify the T2 Plaintiffs for trading on non-public information that they received during the litigation. I RA222. The district court denied the motion but without prejudice to renew, because the Cotter directors had not identified in their motion papers the material non-public information they believed the T2 Plaintiffs had traded on. *Id.* Three weeks after the Cotter directors' counsel advised the court that they could supplement the missing information, *id.*, the T2 Plaintiffs and the directors entered into a settlement agreement. RDI-A00283 (¶ 6).

5. Cotter Jr. files a Second Amended Complaint with new allegations.

After the T2 Plaintiffs withdrew their derivative lawsuit, Cotter Jr. was allowed to file a second amended complaint ("SAC"), which added allegations pertaining to decisions and conduct post-dating Cotter Jr.'s termination. I RDI-A00482-00538. These allegations neither appeared in Cotter's preceding complaints nor in the T2 Plaintiffs' complaint that was withdrawn. I RDI-A00001-00032, RDI-A00069-00086.

The SAC not only addressed the directors' failure to respond to third party Patton Vision's interest in purchasing RDI shares, as RDI contends, OB at 18. Rather, the SAC alleged a number of other decisions that further solidified the Cotter sisters' control over RDI in derogation of the directors' fiduciary duties, including: (1) Kane, Adams, and the Cotter sisters' use of the executive committee to limit the participation of directors who had voted against Cotter Jr.'s termination, such as director Storey; (2) the decisions by the one-time "special nominating committee" comprised of Adams, Kane and McEachern not to re-nominate Storey as a director and to nominate two directors hand-picked by the Cotter sisters; (3) the CEO search committee's decision to abort a formal search for a qualified independent CEO; (4) the decision to appoint Margaret Cotter senior executive responsible for RDI's New York real estate portfolio despite her lack of credentials for or experience in real estate development; and (5) the directors' preparation, and failure to correct, erroneous or materially misleading statements in public (SEC) disclosures and press releases. I RDI-A00507–00512, RDI-A00515–00517, RDI-A00521–00523; VII RDI-A09778–09782.

The SAC not only sought damages but also injunctive relief on behalf of RDI. I RDI-A00533-00535I.

6. The district court denies several motions for partial summary judgment in 2016.

On September 23, 2016, the Cotter directors filed six motions for partial summary judgment ("Partial MSJs"), each addressing certain issues or board actions alleged in the complaint, such as Cotter Jr.'s termination (No. 1), and the decision to appoint Ellen Cotter (No. 5). II RDI-A00539-04792. RDI joined in each one of them. IV RDI-A06037-06144. Gould filed a separate motion for summary judgment ("MSJ"), and RDI filed a Reply in support of it. II RA273-278. Cotter Jr. opposed each Partial MSJ and Gould's MSJ with evidence in the form of deposition testimony, declarations, and other evidentiary exhibits. I RDI-A06197-08308.

The district court denied Partial MSJ No. 1 regarding Cotter Jr.'s termination, finding there were "genuine issues of material fact and issues related to interested directors participating in the process." V RDI-A08507 (at 117:9–12). The Court also denied in part Partial MSJ No. 4 regarding the use of the executive committee, and denied the remaining four Partial MSJs on Rule 56(f) grounds. VI RDI-A08630-08633. The district court did not decide Gould's MSJ because his counsel declined the district court's invitation to argue it in the five minutes of time remaining. V RDI-A08529–

08530 (at 139:18-140:3); V RDI-A08541–08542 (at 151:20-152:6).[3] Gould did not re-notice his MSJ until more than a year later. II RA378–393.

7. The district court again denies Adams and the Cotter sisters' motions for partial summary judgment in 2017.

On November 9, 2017, the Cotter directors filed a Supplement to their Partial MSJ Nos. 1, 2, 3, 5, and 6. VI RDI-A08730-08873. Cotter Jr. filed supplemental oppositions to the Partial MSJs and Gould's MSJ, each of which was supported by evidence gathered over the course of discovery. VI RDI-A08830-09500. Gould did not supplement his MSJ by the November 9, 2017 deadline. VI RDI-A08664–08667. Three weeks later, however, his counsel filed a request for hearing on his previously filed MSJ, which contained additional argument. II RA378–393.

On December 11, 2017, the district court heard and decided the Partial MSJs, as well as Gould's MSJ. II RA394-468.[4] The district court granted summary judgment in favor of directors McEachern, Kane, Gould, Codding, and Wrotniak on the grounds that Cotter Jr. had failed to raise a genuine issue of material fact regarding their disinterestedness, but *denied* Partial MSJ Nos. 1, 2, 5, and 6 as to the Cotter sisters and Guy Adams

[3] The Honorable Elizabeth Gonzalez typically gives each of the parties no more than ten minutes to argue their motion. III RA541 (at 3:4).

[4] Gould's MSJ was not set for hearing until January 8, 2018. II RA380.

because of genuine issues of material fact related to their disinterestedness and/or independence. II RA434 (at 41:4-20); RA437 (at 44:20-25); RA438 (at 45:1-4); RA441 (at 48:17-22); RA442 (at 49:11–52:15); VII RDI-A09598.

8. The Cotter sisters and Adams seek to avoid trial based on a belated "ratification" of their decisions.

The dismissal of the five directors narrowed Cotter Jr.'s derivative claims down to two principal decisions in which the three remaining director defendants had a determinative say: (1) the June 12, 2015 decision by directors Adams, Kane, McEachern and the Cotter sisters to terminate Cotter Jr. as CEO of RDI ("Termination Decision"); and (2) the September 2015 decision by Adams and Kane to allow the Cotter sisters to exercise an option to purchase 100,000 shares of Class B voting stock in RDI held by the estate of Cotter, Sr. and use Class A non-voting stock to pay for the exercise of the option (the "Share Option Decision"). VII RDI-A09567-09568.

On December 21, 2017—just ten days after five of the eight directors were dismissed and unbeknown to Cotter Jr.—RDI's counsel advised the recently-created "special independent committee" ("SIC") comprised of directors Gould, McEachern, and Codding to recommend "ratification" of the Termination Decision and the Share Option Decision

made more than two years earlier. VII RDI-A9859-09907. Following the December 21 SIC meeting, RDI's general counsel and outside counsel prepared a written request purportedly made on behalf of the five directors to put ratification of the two Decisions on the agenda of the upcoming special board meeting, on December 29, 2017. VII RDI-A0991–09914; IV RA746–750. At that special board meeting, the five dismissed directors voted to "ratify" the Termination and Share Option Decisions. IV RA738–739, RA752.

Days later, and less than four days before trial was to begin, the three remaining Cotter directors filed a Motion for Judgment as a Matter of Law based on the recent ratification vote—which director Gould admitted was a "litigation strategy"—arguing that the ratification made trial unnecessary and that judgment in their favor should be rendered. III RA485–517. At the same time, RDI filed a "Motion to Dismiss for Failure to Show Demand Futility" ("Demand Futility Motion") based on the order dismissing the five directors for Cotter Jr.'s failure to raise a genuine issue of material fact as to their independence and disinterestedness. III RA 469-477.

9. The district court allows discovery on ratification.

The district court denied both RDI's Demand Futility Motion and the Cotter directors' Motion for Judgment as a Matter of Law because they were not timely filed by the November 9, 2017 deadline. III RA541 (at 3:13-17); III RA548–549 (at 10:20-11:4). Notably, the Court faulted RDI for never requesting an evidentiary hearing on demand futility as *Shoen* contemplates:

> You never requested it for the [three] years or so we've been in litigation. . . You didn't request it after the motion to dismiss was denied because it appeared the allegations at that time were well founded. You never again requested or renewed that motion with a request for an evidentiary hearing.

RA 552–553 (at 14:22-15:3).

Even after this admonition, RDI did not ask for an evidentiary hearing on demand futility.

After the January 8, 2018 trial was vacated for unrelated reasons, the district court ruled that Cotter Jr. was entitled to conduct discovery with respect to the ratification that occurred on December 29. III RA528, RA533–534. The district court allowed just 75 days for that discovery, and Cotter Jr. promptly served document requests and subpoenas. III RA534, RA583-636. However, the directors and RDI were slow to produce the requested documents and failed for months to produce

or disclose on a privilege log the minutes of the December 21, 2017 meeting between RDI's counsel and the SIC. III RA564-565. Cotter Jr.'s counsel only learned of the December 21 SIC meeting when he deposed the three SIC members months after the fact. III RA565 (¶ 16). SIC member Gould produced just one single email on March 30, 2018, and his seven-entry privilege log did not include the December 21, 2017 meeting minutes. III RA565 (¶ 15). His counsel thereafter claimed he "accidentally deleted" his email inbox. IV RA696 (at 4:12). RDI's counsel, Greenberg Traurig, did not produce heavily redacted minutes from the December 21 SIC meeting until April 12, 2018. III RA566 (¶ 17).

10. The defendants' belated production of the SIC meeting minutes results in an evidentiary hearing.

Based on defendants' belated production of the minutes of the December 21 SIC meeting and their failure to inform the district court about the SIC meeting less than two weeks before trial was initially set to start, the district court ordered an evidentiary hearing. IV RA705. The evidentiary hearing revealed that RDI's corporate counsel, Michael Bonner of Greenberg Traurig, had quickly prepared a draft of minutes of the December 29, 2017, special board meeting—which were used in support of the Cotter directors' January 4, 2018 Motion for Judgment—but delayed

drafting the minutes of the December 21 SIC meeting showing contact with RDI's counsel until late January 2018. IV RA734, RA736-737, 750-753. After the evidentiary hearing, the district court granted Cotter Jr.'s discovery motion for omnibus relief, ordering the directors and RDI to produce, *inter alia*, all documents relating to the December 21 SIC meeting and all documents related to ratification. IV RA856.

11. The Cotter sisters and Adams finally succeed on their Ratification MSJ in June 2018.

On June 1, 2018—before the defendants' document production was complete—the Cotter directors renewed their motion for summary judgment based on the December 29 ratification ("Ratification MSJ"). VII RDI-A09859-09907. The district court heard the Ratification MSJ on the same day as Cotter Jr.'s motion to compel documents withheld as privileged and motion for relief for non-compliance with the May 2 production order. IV RA800-851.

The district court granted in part Cotter Jr.'s Motion for Relief, and for purpose of the pretrial motions imposed as an evidentiary sanction "a rebuttable presumption that the doc[ument]s, if timely produced, would support the plaintiff's position that the ratification was a sham or fraudulent exercise." IV RA834. But the district court thereafter held that

the defendants had overcome the presumption, and that the ratification decision was protected by the business judgment rule. IV RA846.

The district court denied as moot RDI's "Motion to Dismiss Pursuant to NRCP 12(b)(2), or in the Alternative, NRCP 12(b)(5) for Lack of Standing." IV RA848. The district court's findings of fact and conclusions of law were entered August 14, 2018. VII RDI-A10542-10552.

C. The Post-Judgment Motions.

1. The district court denies RDI's motion for attorneys' fees.

After the district court entered judgment in favor of the three Cotter directors, RDI filed a Motion for Attorneys' fees ("Fee Motion") on behalf of itself and the other defendants, seeking a total of **$15.9 million** in attorneys' fees. VIII RDI-A10559-10641. The $15.9 million did "not [even] represent the total of all work performed, or even fees incurred," RDI noted, "as fees relating to defense against the T2 complaint have been excluded where possible . . . ." VIII RDI-A10560 (fn. 2).

The majority of attorneys' fees—$11.7 million—were incurred by Quinn Emanuel, which put eight attorneys on the case whose hourly rates ranged between $365 and $1,147 per hour. VIII RDI-A10588-10590, RDI-A10593 (¶¶ 5-14, 21). Director Gould incurred $1.2 million in fees. VIII RDI-A10601-10602 (¶¶ 2-3), RDI-A10607 (¶ 4). He was represented by

nine attorneys. VIII RDI-A10604, RDI-A10608 (¶ 6). Nominal defendant RDI incurred almost $3 million in fees and had 23 individuals working on the case. VIII RDI-A10585.

Cotter Jr. opposed the Fee Motion by: (1) pointing to RDI's failure to support its Fee Motion with record evidence; (2) detailing and supporting with record citations all the district court's rulings disproving RDI's argument that Cotter Jr.'s claims lacked merit, including all orders denying the defendants' demand futility motions, the orders denying one or more of the defendants' Partial MSJs, and the orders granting Cotter Jr.'s discovery motions; (3) detailing the novel and complex legal issues presented in the case; and (4) detailing Cotter Jr.'s non-dilatory litigation conduct. VIII RDI-A10648-10707.

Following a hearing, the district court denied RDI's Fee Motion, finding that "this case did not meet the standards of NRS 18.010(2)(b) for the award of attorneys' fees." VIII RDI-A10772-10773, RDI-A10775-10778. The district court reasoned that while it granted "summary judgment at the end based upon the ratification by the directors that I found to be independent, that does not make itself a vexatious claim." VIII RDI-A10772, VIII RDI-A10776.

2. The district court denies nominal defendant RDI's Motion for Judgment in its Favor.

On September 12, 2018, RDI filed a Motion for Judgment in its Favor. VIII RDI-A10642-10647. RDI argued that the August 14, 2018 judgment was not a final judgment because it did not determine RDI's rights. VIII RDI-A10645. RDI argued it was entitled to judgment in its favor or, in the alternative, an amendment to the judgment because RDI had filed answers to Cotter Jr.'s complaints and had joined in the individual directors Partial MSJs, on which the directors ultimately prevailed. VIII RDI-A10644.

Cotter Jr. opposed the motion on numerous grounds, including that: (1) RDI was a mere nominal defendant; (2) Cotter Jr. made no claims against RDI on which it prevailed; and (3) the district court lacked jurisdiction to grant the Motion because Cotter Jr. had already appealed from the August 14 judgment. VIII RDI-A10708-10720. The district court denied RDI judgment in its favor on the basis that it was a mere nominal defendant. VIII RDI-A10779-10782.

IV. SUMMARY OF ARGUMENT

The district court was well within its sound discretion to deny RDI's shameless request for **$15.9 million** in discretionary attorneys' fees

incurred by it and the directors. RDI did not meet its burden under NRS 18.010(2)(b) to show that such an exorbitant sanction was warranted. The record evidence—which RDI by and large ignored in its Fee Motion below and again in its Opening Brief on appeal—does not support the contention that Cotter Jr. filed and maintained his derivative action without reasonable grounds or to harass the directors; it *confirms* the district court's finding that "this case did not meet the standards of NRS 18.010(2)(b) for the award of attorneys' fees." For example:

1. The directors admitted, and other evidence supports, key allegations that supported Cotter Jr.'s claims for breach of fiduciary duty.

2. The district court denied each motion to dismiss based on demand futility filed by the directors and RDI, thus finding that Cotter Jr. had met the heightened pleading requirements of NRCP 23.1.

3. Cotter Jr. diligently moved his case along, and did not engage in serial filings repeating arguments that the district court had already rejected (unlike the directors and RDI, who filed several motions to dismiss based on demand futility after the first was denied).

4. The district court sanctioned the directors and RDI (not Cotter Jr.) when they withheld key ratification documents.

5. The district court did not enter judgment in favor of the five director defendants until after several rounds of (partial) summary judgment motions, some of which were denied.

6. Until the eve of trial, the district court found that Cotter Jr. had raised genuine issues of material fact as to the independence and disinterestedness of directors Ellen Cotter, Margaret Cotter, and Guy Adams.

7. The Termination Decision on which Cotter Jr.'s initial complaint was based, the Share Option Decision, and all of his four causes of action would have gone to trial against the Cotter sisters and Adams but for the belated "ratification" orchestrated by RDI's conflicted counsel, which was admittedly a "litigation strategy" to avoid trial.[5]

Moreover, it is undisputed that this case presented novel and complex legal issues on the scope and application of the business judgment rule under NRS 78.138, the character of the evidence that could overcome protection of the rule for decisions by corporate directors, as well as the applicability of NRS 78.140 to ratification of a board decision as distinguished from a "contract or transaction"—especially if the decision

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[5] *See generally* Appeal Case No. 76981 and Cotter Jr.'s Opening Brief filed therein.

benefits control shareholders/officers/directors, such as the Cotter sisters, and the ratification occurred following the advice of conflicted counsel.

Cotter Jr. filed this derivative lawsuit in June 2015—two years before this Court decided *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334 (2017), which clarified and further defined the scope of the business judgment rule for directors who act in good faith on the advice of counsel under NRS 78.138. There is no Nevada precedent addressing ratification under NRS 78.140 of board decisions of the type at issue here.[6]

Presentation of novel and complex issues of law should not be discouraged by threat of an award for attorneys' fees under NRS 18.020(2)(b) if the presentation is unsuccessful. As this Court held, "the Legislature's desire to deter frivolous lawsuits [under NRS 18.010(2)(b)]. . . must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law." *Frederic and Barbara Rosenburg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. Adv. Op. 69, 427 P.3d 104, 113 (2018). Given the complexity and novelty of the legal issues in this case, it would have been an abuse of

[6] Ratification was not an issue decided in *In Re AMERCO Deriv. Litig.*, 127 Nev. 196, 217 n.6, 252 P. 3d 681, 697 n.6 (2011).

discretion to award attorneys' fees—even assuming "the evidence produced and Nevada's *current* jurisprudence does not fully support" Cotter Jr.'s 2015 lawsuit. *Id*. (reversing award of attorneys' fees) (emphasis added).

RDI essentially argues that, because Cotter Jr. ultimately did not prevail on his derivative claims, he should pay RDI and the directors all of their attorneys' fees for making the claims. But this is not the standard for an award of attorneys' fees under NRS 18.010(2)(b). If it were, the American Rule that parties must bear their own attorneys' fees would no longer be the "Rule" but the exception.

The district court also correctly denied nominal defendant RDI's Motion for Judgment in its Favor. RDI filed this resourceful Motion in a futile attempt to become a "prevailing party," so that it could recoup the **$1.1 million** in costs it needlessly and irresponsibly incurred in this case. Assuming, for sake of argument only, that the order denying RDI's Motion qualifies as an appealable special order under NRAP 3A(b)(8)—despite not growing out of the final judgment that was entered in favor of the directors only—RDI was nevertheless a mere nominal defendant on whose behalf and for whose benefit Cotter Jr.'s claims were brought. No claims were asserted against RDI on which it prevailed, and RDI did not

"prevail" on a single motion it filed. RDI is therefore not entitled to judgment in its favor as a matter of law.

For these reasons and those set out below, the Court should affirm in their entirety the district court's orders denying RDI's (1) Motion for Attorneys' Fees and (2) Motion for Judgment in its Favor.

V. ARGUMENT

A. The district court's decision to deny attorneys' fees was well within its sound discretion.

Attorneys' fees under NRS 18.010(2)(b) are discretionary. *Foley v. Morse & Mowbray*, 109 Nev. 116, 124, 848 P.2d 519, 524 (1993). Courts "may" award attorneys' fees if they find that a "claim . . . was brought or maintained [1] without reasonable ground or [2] to harass the prevailing party." NRS 18.010(2)(b). To overturn an order denying attorneys' fees, there must be evidence that the district court abused its discretion. *See Nat'l Tow and Rd. Serv., Inc. v. Integrity Ins. Co.*, 102 Nev. 189, 191, 717 P.2d 581, 583 (1986).

As discussed below, RDI did not meet its high burden to prove that the district court abused its discretion, and no such evidence exists.

1. The district court's reasoning for denying attorneys' fees is strong and compelling.

Where, as here, the district court denies a motion for attorneys' fees, it is not required to make specific findings. *See Stubbs v. Strickland*, 129 Nev. 146, 152 n.1, 297 P.3d 326, 331 n.1 (2013) ("While we require a district court to 'make findings regarding the basis for *awarding* attorney fees . . . this court has *not* required such findings when a district court *denies* a motion for attorney fees") (internal citation omitted) (emphasis added).

Here, the district court—which oversaw the case from its inception in June 2015 until conclusion in November 2018 and was thus intimately familiar with Cotter Jr.'s claims, the directors' defenses, the legal issues and arguments, the evidence presented, and its own rulings—found that "**this case** did not meet the standards of NRS 18.010 for the award of attorneys' fees." VIII RDI-A10772 (emphasis added). While it granted "summary judgment *at the end* based upon the ratification by the directors that I found to be independent, *that does not make itself a vexatious claim*." VIII RDI-A10772, RDI-A10776 (emphasis added). In other words, the mere fact that the directors ultimately prevailed did not support a finding that Cotter Jr.'s claims were baseless or filed with an improper purpose. These

findings were sound and more than sufficient to support the district court's denial of attorneys' fees under NRS 18.010(2)(b).

2. The district court applied the proper analysis in denying attorneys' fees under NRS 18.010(2)(b).

There is no basis for RDI's speculation that the district court "appears" to have based its order "on an improper analysis." OB at 27. For example, RDI does not argue, nor does the ruling support, that the district court based its decision on an erroneous motion to dismiss standard, as in *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993), *superseded on other grounds by statute as stated in In Re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1093 (2017). There is also no evidence that the district court failed to address RDI's argument that Cotter Jr. brought or maintained his claims without reasonable grounds or to harass the defendants. OB at 28. Rather, the district court's ruling shows that the court considered but rejected that argument based on the record evidence, which RDI's Fee Motion by and large ignored. VIII RDI-A10564-10568, RDI-A10570-10573.

RDI cited no case law to support its argument that a "liberal construction" of NRS 18.010(2)(b) required the district court to take into account Cotter Jr.'s fiduciary duties as derivative plaintiff, nor did RDI

establish that the district court ignored such duties, assuming there were such requirement. OB at 30-33. Nor did RDI cite case law for its imaginative argument advocating a "heightened analysis" when a claim is brought derivatively, or that the district court ignored such "heightened analysis." OB at 32-33. Notably, RDI did not make this "heightened analysis" argument or its "heightened proof" arguments to support fees below. The same is true for its novel argument advocating for a "reverse application" of the "common fund" and "substantial benefit" exceptions to the American Rule. OB at 35-37. The Court should not consider arguments first raised on appeal. *See Washington v. Bagley*, 114 Nev. 788, 792, 963 P.2d 498, 501 (1998) ("Since those appellants did not present this argument below, they are precluded from raising it on appeal").

Even if the Court were to consider these new arguments, RDI did not point to anything suggesting that the district court in denying attorneys' fees failed to take into account the nature of Cotter Jr.'s derivative claims and his burden of proof. In fact, the district court denied each motion to dismiss based on demand futility that the Cotter directors and RDI filed over the course of this case. RA1-61, RA195-197, RA469-477, RA548 (at 10:22), RA552-553; RDI-A10552. In doing so, the district court

did find that Cotter Jr. had met the heightened pleading standards of NRCP 23.1. *E.g.*, RA551-552 (at 13:23-14:11).

Thus, there is no basis whatsoever for RDI's argument that the district court applied the wrong analysis under NRS 18.010(2)(b).

3. RDI did not meet its burden under NRS 18.020(2)(b) to prove that any attorneys' fees were warranted.

While courts "must liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations," there must be "evidence in the record"—not mere argument—that the claim was brought or maintained without reasonable basis or to harass the defendants. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993); *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995).

But RDI's Fee Motion by and large relied on argument and ignored the record evidence. For example, the Fee Motion's 4-page "Summary of Relevant Facts" is suffused with gratuitous *ad hominem* attacks and arguments unsupported by authority. VIII RDI-A10563-10567 (alleging that Cotter Jr. used the complaint "to attack" his sisters; that his performance as CEO was "abysmal"; and dismissing Plaintiff's "purported medical condition" as a reason to continue trial). These attacks—many of

which are repeated on appeal—are so personal and hostile that they *support* (rather than disprove) Cotter Jr.'s breach of fiduciary duty claims. RDI provided no support below for its conclusory arguments that Plaintiff's claims were "unquestionably without merit" and "clearly" lacking evidence. VIII RDI-A10568-10670. RDI's Fee Motion went on for pages without providing or citing any evidence to support its arguments that Plaintiff brought baseless claims to harass the defendants. VIII RDI-A10570-10577 (*e.g.*, at 12:14-20; 12:24-13:16; 13:18-15:5; 18:15-19:5).

Without record evidence to back up RDI's claims, the district court properly denied RDI's Fee Motion. In fact, it would have been an abuse of discretion if the district court had awarded discretionary attorneys' fees in the absence of evidence to support them. *See Pub. Employees' Ret. Sys. Of Nev. v. Gitter*, 133 Nev. Adv. Op. 18, 393 P.3d 673, 682 (2013) (directing clerk to vacate award for attorneys' fees for lack of evidence in the record that the defense was frivolous).

4. RDI's Opening Brief underscores the lack of record evidence to support attorneys' fees.

RDI's attempt to "fix" on appeal what it failed to prove below is unavailing. RDI's Opening Brief purports to cite to the record, but most of the record pages it cites do not support its arguments.

For example, to support its contention that Cotter Jr. was unanimously appointed CEO because the directors were faced with an "emergency" and hoped he would "grow" into the job, RDI merely cited to *argument* made in Partial MSJ No. 1—*not* evidence. OB at 9 (citing I RDI-A00555-556). The argument does not appear on the cited pages but elsewhere and says nothing about directors hoping he would "grow" into the job when they appointed him CEO. I RDI-A551 (at 4:18-19). The only "support" for the first part of the argument is the declaration of Quinn Emanuel attorney Noah Helpern. I RDI-A00551. Mr. Helpern, in turn, cites to August 7, 2014, board minutes. I RDI-A00595 (¶ 28). When consulting the board minutes, it becomes clear why RDI (and the directors) did not cite the minutes directly: they do not mention or suggest an "emergency" (let alone a rush) decision, nor do the minutes say a word about the directors expressing a hope that Cotter Jr. would "grow" into the job when appointing him. II RDI-A01124-01125.

RDI dedicated two pages of its statement of facts to describing and arguing cherry-picked facts pertaining to trust and estate litigation initiated by the Cotter sisters in California. OB at 10-11. These facts are not only meaningless as to whether *this* case was brought in good faith, but they are not record evidence—let alone found in Cotter Jr.'s Opposition to

the Fee Motion to which RDI incredibly cites. *Id.* (citing VIII RDI-A10658-16859 [sic]).

To "prove" its argument that Cotter Jr.'s claims of wrongful motives merely "depended on his own speculation, opinions, and even blatantly false statements," RDI simply cited to all **2200 pages** of Plaintiffs' oppositions and exhibits without giving any examples, let alone record page citations. OB at 19 (citing IV RDI-A06197-08308). Neither Cotter Jr., nor this Court, should be required to do RDI's work and disprove what RDI did not prove by way of its Fee Motion and Opening Brief.

Critically, RDI's argument that the district court granted the Cotter directors' Ratification MSJ because it "found that there was an absence of evidence sufficient to support Cotter Jr.'s claims," OB at 23, is also belied by the record. The findings of fact and conclusions of law ("FFCL")—of which RDI only cites the first page, OB at 24—confirm the opposite: they say that Cotter Jr. *did* raise "genuine issues of material fact related to the disinterestedness and/or independence of Guy Adams, Ellen Cotter, and Margaret Cotter" and that the district court "*denied* summary judgment" in December 2017 on that basis. VIII RDI-A10544. The district even imposed a rebuttable evidentiary presumption that the ratification was a sham and a fraudulent exercise because the defendants for months

withheld key evidence about the December 21 meeting of the Special Independent Committee that led to the ratification. VIII RDI-A-10548 (¶ 27).[7] These three directors escaped liability only because the district court found that they had overcome the rebuttable presumption and held that all the requirements of NRS 78.140 had been met, VIII RDI-A10550-10551, which Cotter Jr. contests on the merits in his Opening Brief in Case 76891.

Even the December 28, 2017, order granting summary judgment in favor of the five defendants does not say that Cotter Jr. provided "no evidence" to support his claims, as RDI argues; rather, the district court found that "there does not appear to be *sufficient* evidence presented to the Court to proceed with a claim of lack of disinterestedness." II RA438 (at 45:1-4); VII RDI-A09598.[8]

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[7] The sanction was not "imposed due to a *claimed* failure," OB at 23 (emphasis added), but an *actual* failure to timely produce all relevant and responsive ratification documents, as the district court found. IV RA834, RA853; III RA665.

[8] These are not isolated examples; many other examples exist. For example, RDI suggested that the defendants had timely produced documents in "September and October 2015," and accused Cotter Jr. of "crying wolf," OB at 15, but the transcript on which it relies shows that as of October 29, 2015, Ellen Cotter had not produced a single document. I RDI A00158 (at 5:1-3). The other Cotter directors first produced documents on October 11, I RDI-A00157 (at 4:4-6)—a month after the preliminary injunction hearing that the district court had set "the first week of September." I RDI-A00159 (at 6:13-15). The other defendants did not start

5. The record evidence disproves that Cotter Jr. brought or maintained his claims without reasonable grounds.

The mere fact that claims "do not survive summary judgment based on the merits" is not evidence that the claim lacked a reasonable basis. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494, 215 P.3d 709, 726 (2009), *modified on other grounds by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 21, 293 P.3d 869, 873 (2013). A claim is only groundless if the allegations made by the plaintiff are "not supported by *any* credible evidence." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998) (internal quotation marks and citations omitted) (emphasis added). In *Bower*, this Court held that the district court abused its discretion in awarding Harrah's attorneys' fees under NRS 18.010(2)(b) even though Harrah's prevailed on summary judgment based on claim preclusion and the plaintiffs might have known that "other factually similar cases were decided in favor of Harrah's."

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producing documents until late September, also after the date set for the preliminary injunction hearing. I RDI-A00157. This, of course, is what caused the delay of the injunction hearing, which Cotter Jr. had initially proposed to take place on November 9, 2015. I RDI-A00033-00034, RDI-A00038 (at 6:1-2). RDI also provided no support for its argument that the only "relief" Cotter Jr. could obtain was his reinstatement, OB at 22; for its speculation that the district court failed to consider a number of issues, *id.* at 23, and for its representation that RDI was omitted from the FFCL "due to oversight." *Id.* at 24.

Bower, 125 Nev. at 494, 215 P.3d at 726. The existence of "other factually similar cases" decided in Harrah's favor" did not "necessarily support issue preclusion." *Id.* Moreover, the fact that district court judge Mark Denton had denied Harrah's summary judgment motion against Bower illustrated that "reasonable minds could disagree as to whether issue preclusion barred [plaintiffs]' claims." *Id*.

Similarly, here, the district court's rulings and the record of this case belie RDI's argument that Cotter Jr. lacked a reasonable basis to bring or maintain his claims.

First, the district court **twice** denied the Cotter directors' Partial MSJ No. 1 on Cotter Jr.'s termination, which formed the basis of his initial derivative complaint filed in June 2015: In October 2016, the district court denied Partial MSJ No. 1 as to ***all directors*** on the grounds that there were "genuine issues of material fact and issues related to the directors participating in the process." V RDI-A08507 (at 117:9-12). In December 2017, the district court again denied Partial MSJ No. 1 as to the Cotter sisters and Guy Adams, on the grounds that there were genuine issues of material fact related to their disinterestedness and independence. VII RDI-A09595-09598. The district court thus did not ignore, as RDI argues, but simply *disagreed* with, the directors' arguments that "Cotter Jr.'s claims

were groundless at the time they were originally raised" and that there was "clearly" no evidence to support or maintain Cotter Jr.'s initial complaint. OB at 28. As in *Bower*, the district court's MSJ rulings illustrate that "reasonable minds could disagree" as to whether the directors who participated in Cotter Jr.'s termination were protected by the business judgment rule. These rulings alone deserve affirming the order denying attorneys' fees: they prove that Cotter Jr. had a reasonable basis to both bring *and* maintain his claims.

Second, the district court consistently denied the directors' Partial MSJ No. 2 on "Independence" as to the Cotter Sisters and Guy Adams. VII RDI-A09595-09598. The district court also denied Partial MSJ Nos. 1, 4 (in part), 5, and 6 (on the Share Option) against them. *Id*. In fact, the district court denied Partial MSJ No. 4 in part as to *all* defendants. VI RDI-A08630-08633. But for the ratification vote in late December 29, 2017, **all** Cotter Jr.'s claims against the Cotter Sisters and Adams—including those based on the Termination Decision and the Share Option Decision that were part of the initial two complaints—would have proceeded to trial in July 2018. VII RDI-A09595-09599. These three directors were not entitled to invoke the business judgment rule as to these Decisions because Cotter Jr. had raised genuine issues of material fact as to their

disinterestedness and independence. *Id.*; RDI-A10544 (¶ 6). Thus, these rulings, too, refute any notion that "it became clear during the course of the litigation" that Cotter Jr.'s claims "were groundless," as RDI argues. OB at 28.

Third, the district court also did not ignore, but rejected RDI's argument that Cotter Jr.'s complaint was merely filed for personal reasons. II RDI-A00336 (at 9:16-19). The Cotter sisters made it personal by repeatedly injecting the California Trust and Estate litigation (which *they* had initiated against Cotter Jr.) into this derivative case, and they do so again on appeal. II RDI-A00336; OB at 10-11; 25. The district court did not fall for this distraction and the Cotter sisters' attempts to vilify Cotter Jr. in an effort to disqualify him as derivative plaintiff, and neither should this Court. II RDI-A00333, A00336-337. To suggest, as RDI does, that Cotter Jr. only filed this case to get "his job back" overlooks that Cotter Jr. was and remains a significant shareholder seeking to protect his and his children's investment in RDI just as any other shareholder would. I RA31-32. His three children are the beneficiaries of the majority—60%— of the voting stock held by the Voting Trust, as RDI knows. I RA50-51.

Fourth, RDI's argument that Cotter Jr. should have dismissed his claims when the T2 Plaintiffs dismissed their claims and issued a

statement expressing their belief that the directors acted in RDI's best interest, OB at 17-18, ignores that: (1) the T2 Plaintiffs withdrew their complaint and issued that statement just weeks after the director defendants accused them of insider trading; (2) Cotter Jr.'s claims against three director defendants survived two rounds of partial summary judgment motions; and (3) Cotter Jr. thereafter filed a SAC that included new allegations and claims that were not in the T2 Plaintiffs' complaints. I RA217-241; I RDI-A00482-538; VII RDI-A09595-09601.

Last, but not least, RDI's argument that Cotter Jr. had "no evidence" to support his claims is not only belied by the district court's orders discussed above, but by the directors' answer: all directors admitted to key conduct alleged by Cotter Jr. For example, they admitted that the Cotter sisters refused to report to Cotter Jr. when he was CEO, VI RDI-A08800-08829 (¶ 18); they admitted to aborting the search for an independent CEO, VI RDI-A08803 (¶ 14); they admitted to not re-nominating a director who had voted against Cotter Jr.'s termination and to appointing two new directors hand-picked by the Cotter sisters. VI RDI-A08812, RDI-A08815-08816 (¶¶ 94,123-133). Moreover, Cotter Jr. opposed the Partial MSJs with hundreds of pages of exhibits. IV RDI-A06166-08308. These exhibits—deposition transcript excerpts, corporate documents,

minutes, and other evidence—confirmed these already admitted facts, and in addition evidenced: the Cotter sisters' motives to obtain control over RDI's management and displace Cotter Jr. as CEO, IV RDI-A06243-06267; the take-it-or-leave-it offer to Cotter Jr. to either settle the trust and estate litigation on the Cotter sisters' terms or be fired, IV RDI-A06238-A06240, A06247-06254; director Kane's belief that director Gould was not independent, IV RDI-A6502-6504; Kane's refusal to hear out the non-Cotter directors before voting to terminate Cotter Jr., *id.*; director Adams' dependence on income from Cotter companies controlled by the Cotter sisters, IV RDI-A06662-06676; and Ellen Cotter's refusal to correct a public filing that erroneously stated Cotter Jr. was required to resign from the board, to name a few facts. II RDI-A1070; RA82-83.

Cotter Jr. also had evidence—including an admission from director Gould— showing that the ratification vote on the eve of trial was a "litigation strategy" aimed at obtaining a dismissal for the Cotter sisters, and that RDI's counsel, who orchestrated ratification and counseled directors, was hopelessly conflicted. VI RDI-A09969-10158; III RA485-517; III RA644; IV RA752-754. Thus, RDI's bald assertion that Cotter Jr.'s claims "depended on his own speculation, opinions, and even blatantly false statements," OB at 19, does not hold up on the record evidence. The

record evidence contradicts good faith ratification on the advice of independent counsel.

All that can be said here is that Cotter Jr. ultimately did not prevail on his claims. But NRS 18.010(2)(b) does not allow attorneys' fees any time a plaintiff loses, as RDI is left to argue. OB at 31. Such standard would eviscerate the American Rule. The district court therefore correctly held that "this case" did not meet the standards of NRS 18.010(2)(b).

6. The complexity and novelty of the legal issues further supported denying defendants' motion for attorneys' fees.

This Court has consistently held that it is an abuse of discretion to award attorneys' fees if the claims are based on complex or "novel and arguable, if not ultimately successful, issues of law." *Gitter*, 393 P.3d at 682; *Frederic and Barbara Rosenburg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. Adv. Op. 69, 427 P.3d 104, 113 (2018); *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 588, 216 P.3d 793, 801 (2009) (holding that the district court "properly denied" attorneys' fees where the plaintiff's "civil action presented a novel issue in Nevada law concerning the potential expansion of common law liability to hotel proprietors for injuries sustained by an intoxicated minor guest after he is evicted from the premises"); *Key Bank v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990)

(holding that it is an abuse of discretion to award attorneys' fees where the law is not clear and the complaint presented complex legal questions concerning statutory interpretation and legislative intent); *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 106-07 (2008) (affirming district court's order denying Wynn's request for attorneys' fees because of the complexity and unsettled nature of the labor laws under which the plaintiffs sued).

Just last year, the Court reversed an order awarding attorneys' fees because the case presented a novel issue of state law, even though "the evidence produced and Nevada's current jurisprudence [did] not fully support the Trust's suit." *Frederic and Barbara Rosenburg Living Tr.*, 427 P.3d at 113. Specifically, the Court remarked:

> Though we agree that the evidence produced and Nevada's current jurisprudence does not fully support the Trust's suit, we disagree that the Trust lacked reasonable grounds to maintain the suit, as it presented a novel issue in state law, which, if successful, could have resulted in the expansion of Nevada's case law regarding restrictive covenants. [] Though we understand the Legislature's desire to deter frivolous lawsuits, this must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law.

Id. (internal citation omitted).

Here, it is undisputed that Cotter Jr.'s derivative case presented complex and novel issues of law. The director defendants recognized as

much when justifying the hefty hourly rates of Quinn Emanuel's attorneys based on the "*complexity and sophistication of the legal matters involved*". VIII RDI-A10591 (¶ 17) (emphasis added).

One of these issues was whether a lack of director independence can be shown based on a pattern of decision-making conduct that consistently benefitted the Cotter sisters personally—as distinguished from benefitting all shareholders. IV RDI-A06555-06582; II RA428-29. Another issue was whether a lack of independence or disinterestedness is the only way to rebut the business judgment rule's presumption, and, if not, what showing a derivative plaintiff must make to overcome it. II RA430-431. Complex legal issues that arose late in the litigation were whether the Termination and Share Option Decisions are "transactions" that can be ratified under NRS 78.140 and whether the SIC can be deemed independent if it relied on the advice of conflicted counsel. IV RA800-851. The district court itself questioned whether NRS 78.140 applied to the Termination and Share Option Decisions. IV RA826-829 (at 27:22-28:9; 28:21-29:2; 29:21-30:20). There is no Nevada precedent holding that NRS 78.140 applies to board *decisions* like the Termination and Share Option Decisions that were ratified by a board under a litigation strategy conceived of and implemented on the advice of conflicted counsel. *In re*

AMERCO Deriv. Litig, for example, involved "business transactions" between AMERCO and "real estate holding companies controlled by AMERCO shareholder and executive officer Mark Shoen," 127 Nev. at 205, 252 P.3d at 689, and the Court did not reach the directors' ratification defense in that case. *Id*. at 217 n.6, 252 P.3d at 697 n.6.

Notably, this case was filed two years before the Nevada Legislature amended NRS 78.138 to "clarify" what the director must prove to hold a director individually liable, NRS 78.138(3), NRS 78.138(7)(a)-(b), and the Court decided *Wynn Resorts, Ltd. v. Dist. Ct.*, 133 Nev. Adv. Op. 52, 399 P.3d 334 (Nev. 2017) ("*Wynn*"). *Wynn* further defined the scope of the directors' duty of care and the business judgment rule. 399 P.3d at 343-344. Cotter Jr.'s claims against directors Gould and McEachern were based on alleged breaches of their duty of care. I RDI-A00001-00032 (*e.g.*, ¶¶ 2, 112, 115); I RDI-A00482-00538 (*e.g.*, ¶¶ 3, 9, 150, 160, 174, 181); VI RDI-A08800-08829 (¶¶ 12, 15, 94, 126, 137) (admitting key factual allegations pertaining to fiduciary duty claims). Before the *Wynn* decision, the district court had ordered the defendants to produce to Cotter Jr. documents concerning the legal advice provided to the directors who made the Share Option Decision (which was the subject of Partial MSJ No. 6), which

resulted in several writs filed with this Court.[9] It wasn't until 2017 that this Court held that a derivative plaintiff may not (and need not) discover the substance of legal advice obtained by the Board. *Wynn*, 399 P.3d at 343-44.

Although Cotter Jr. was ultimately unsuccessful on his breach of fiduciary duty claims, these complex and novel issues properly precluded a fee award as a matter of law, *Gitter*, 393 P.3d at 682, and provided a separate basis on which to deny RDI's Fee Motion.

7. RDI admits there was no evidence that Cotter Jr. filed the lawsuit to harass the prevailing parties.

Attorneys' fees on the basis of harassment must also be supported by "evidence in the record"; it would be an abuse of discretion to award fees on this basis without such record evidence. *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486-87, 851 P.2d 459, 464 (1993) (reversing award of attorneys' fees because the Court's "review of the record reveal[ed] no support for the conclusion reached by the district judge concerning unreasonableness and motivation to harass"); *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 605, 606, 729 P.2d 1352, 1355 (1986) (reversing award of attorneys' fees under NRS 18.010(2)(b) because "AEI's conduct in filing suit was not unreasonable").

[9] *See* Case Nos. 71267, 72261, and 74759.

In *Chowdhry*, a doctor received a reprimand after he refused to return to the North Las Vegas hospital to treat his patient there and insisted on having her transported to another hospital. *Chowdhry*, 109 Nev. at 480, 851 P.2d at 460-61. The doctor unsuccessfully sued the emergency doctor and nurse who prepared the incident reports, the hospital, and others for negligence and a number of other tort claims. *Id*. at 481, 851 P.2d at 461. There, the district court found that the doctor's lawsuit "was made in a vindictive and unjustified effort and it was nothing more than his chance to grill his enemies and it became that, a little feud within this circle." *Id*. at 486-87, 851 P.2d at 464. This Court disagreed, finding "no support for the conclusion reached by the district judge concerning . . . [a] motivation to harass." *Id*. at 487, 851 P.2d at 464 (also pointing to the jury's finding that the doctor had not abandoned his patient and that others were also negligent, albeit only to a much lesser extent than the doctor).

Harassment must be "objectively tested" based on record evidence of a party's litigation conduct, rather than on how the lawsuit is "subjectively" perceived by the opponent. *See id.* (finding no support in the record for the district court's finding and belief that the plaintiff's lawsuit was "nothing more than his chance to grill his enemies"); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986), *abrogated on*

other grounds, Cooter & Gell, v. Hartmarx Corp., 496 U.S. 384 (1990)) ("Harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent"). Without such standard, every complaint could be deemed to "harass" the other side.

"Without question, successive complaints based upon propositions of law previously rejected may constitute harassment []." *Zaldivar,* 780 F.2d at 832 (discussing FRCP 11); *accord Sargeant v. Henderson Taxi*, Case No. 70837, 2017 WL 10242277, at *1 (Nev. Dec. 1, 2017) (unpublished opinion) (affirming district court's order awarding a portion of Henderson Taxi's attorneys' fees where "Sargeant embarked on a series of filings that sought to revisit the court's denial of class certification, prolonging the litigation without advancing or redefining his remaining claims").

Here, by contrast, there is no such objective evidence, as RDI's Opening Brief tacitly concedes. In fact, RDI's Opening Brief barely touches on the harassment basis to support attorneys' fees under NRS 18.010(2)(b) and provides no analysis of this factor. Its argument that Cotter Jr.'s claims were brought "for purposes of harassment" and that the district court ignored the defendants' evidence to support it, OB at 23-25, is wholly

conclusory: RDI did not identify any objective evidence of harassment the district court allegedly ignored, and there is none.[10]

Indeed, unlike the plaintiff in *Sargeant*, Cotter Jr. did not "embark[] on a series of filings" to revisit the district court's adverse rulings and thereby needlessly prolong the case. Cotter Jr.'s Second Amended Complaint was based on new events that further supported his initial claims rather than on previously rejected legal propositions. I RDI-A00482-00538. Until December 28, 2017, Cotter Jr. had *prevailed* on most dispositive motions. VI RDI-A08630-08633; VII RDI-A09595-09601; I RA192-197. The few motions for reconsideration Cotter Jr. filed involved entirely different issues, were promptly filed and decided, and not renewed. VII RDI-A09595-09601; III RA518-524; VIII RDI-A10774-10774; IV RA894-900. By contrast, the directors and RDI filed **three** motions to

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[10] Ironically, in the California trust and estate litigation RDI keeps bringing up in an effort to disparage Cotter Jr. and impugn his motive for filing this derivative action, the guardian *ad litem* this month filed a petition to appoint an independent trustee to negotiate with Patton Vision LLC, which the Cotter sisters and the Board to date had refused to do. II RDI-A02809-02815. Their refusal to negotiate with Patton Vision was the subject of Partial MSJ No. 3. *See* II RDI-A02809-03039. The fact that an independent fiduciary agrees with Cotter Jr. disproves any notion that his claims in this case were filed merely to harass his sisters and other Board members.

dismiss based on demand futility, even though the first had already been denied in 2015. I RA195-197; III RA469-477; VII RDI-A10552 D-10552 M.

Cotter Jr. also did not needlessly prolong the case or abuse the discovery process. As RDI admits, he sought expedited discovery at the outset to which the defendants were slow to respond. I RDA-A00033-00064, RDI-A000154-000182. He filed several discovery motions based on the *defendants'* failure to timely produce documents, all of which the district court granted in full or in part. II RA270-272; IV RA852-854, RA855-857. If the discovery on ratification prolonged the case, it was only because the *defendants* (1) did not take a ratification vote until December 29, 2017, on the eve of trial; (2) filed an untimely Motion for Judgment as a Matter of Law based on the ratification on the eve of trial; and (3) did not timely produce all relevant ratification documents and privilege logs to Cotter Jr.'s counsel after the district court allowed discovery on the subject. II RA270-272; III RA539-555; IV RA852-857. The district court even imposed an evidentiary sanction against the defendants for their belated and incomplete production of the ratification documents. IV RA834. Cotter Jr. was never sanctioned by the district court.

Moreover, where, as here, a plaintiff makes non-frivolous claims, it is irrelevant that his "motives for asserting those claims are not

entirely pure." *Townsend v. Holman Consulting Corp.*, 929 F. 2d 1358, 1362 (9th Cir. 1990) (citing *Zaldivar*, 780 F.2d at 834). A "nonfrivolous complaint cannot be said to be filed for an improper purpose." *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir. 1987). It is thus irrelevant if Cotter Jr. or his counsel threatened the RDI board with litigation, as RDI maintains, because he had an objectively reasonable basis to file and pursue his litigation.[11] As set out above, the record of the district court's many rulings in Cotter Jr.'s favor refutes any notion that his claims on behalf of RDI were brought for an improper purpose.

B. RDI and director Gould were not entitled to attorneys' fees in any event.

Even assuming RDI and the Cotter directors had established that the district court abused its discretion in denying attorneys' fees—they have not—the district court's order should be affirmed as to RDI and Gould on the alternative grounds that the first was not a "prevailing party" and the second was too late in moving for fees, as set out below.

[11] Again, if harassment could be proven merely on a party's utterances before a lawsuit is filed, then all plaintiffs warning their opponents they will "see them in court" unless their demands are met could subject themselves to attorneys' fees for "harassment" and the American Rule would become the exception rather than the Rule.

1. RDI is not a prevailing party.

To be entitled to attorneys' fees, one must be "a prevailing party . . . ." NRS 18.010(2)(b). A party "prevail[s] under NRS 18.010 if it succeeds on any *significant* issue in litigation which achieves some of the benefit it sought in bringing suit." *MB America, Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) (internal quotation marks and citation omitted) (emphasis added). "A party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not proceeded to judgment." *N. Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev. Adv. Op. 60, 422 P.3d 1234, 1237 (2018) (quotation omitted).

Here, RDI is not a "prevailing party." First, it was a mere nominal defendant. I RDI-A00001. A nominal defendant is the "real party in interest" on whose behalf the derivative case is brought. *Ross v. Bernhard*, 396 U.S. 531, 538-39 (1970). Cotter Jr. did not bring any claims against RDI and did not seek damages or injunctive relief *against* RDI but *on behalf of* RDI. I RDI-A00029 (¶¶ 133-134), RDI-A00131 (¶¶ 192-193) ("the Company . . . ha[s] suffered . . . injury . . . ."); I RDI-A00526; RDI-A00534 (¶ 202), RDI-A00535 (¶ 5) (seeking "damages incurred *by RDI*. . . .") (emphasis added).

Second, RDI did not prevail on any issue, let alone a "significant issue" in the case. RDI ***lost*** all its "demand futility" motions. I RA188 (at 16:2-30); I RA195-197; III RA539-555; VIII RDI-A10779-10782. RDI could not unilaterally (and artificially) transform itself into a "prevailing party" by joining in the individual defendants' Partial MSJs and Gould's MSJ, when Cotter Jr. made no claims against it, as RDI now admits. OB at 6.[12]

Third, RDI did not obtain a judgment against Cotter Jr. The district court only entered judgment in favor of the individual defendants. VII RDI-A10542-10552. This was not an oversight, as RDI argues, OB at 24; it was deliberate: the district court correctly denied RDI a judgment in its favor because it was a nominal defendant. VIII RDI-A10780. Thus, there was no legal basis—*none*—on which to award RDI attorneys' fees even assuming RDI had met its burden under NRS 18.010.

2. Gould's request for attorneys' fees was untimely.

Rule 54(d)(2)(B) provides, in relevant part, that a motion for attorneys' fees "must be filed no later than 20 days after notice of entry of

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[12] RDI abandoned the frivolous argument it made below that "Defendants" encompassed RDI, even though Cotter Jr. made claims for breaches of fiduciary duty, which clearly addressed the "individual defendants."

judgment is served" and that the "time for filing the motion may not be extended by the court after it has expired." NRCP 54(d)(2)(B).

Post-judgment motions to amend move the filing deadline to "20 days after the resolution of the last post-judgment tolling motion." *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 591, 356 P.3d 1085, 1091 (2015). But once that 20-day period expires, the last sentence of NRCP 54(d)(2)(B) prohibits courts from further extending the deadline. *Shack*, 131 Nev. at 591, 356 P.3d at 1091.

Here, the district court's December 28, 2017 order granted summary judgment in favor of Gould on all Cotter Jr.'s claims. VII RDI-A09595-09601. This portion of the order was certified as final under Nev. R. Civ. P. 54(b) on January 4, 2018. VII RDI-A09611-09615; III RA478-484. Cotter Jr.'s motion for reconsideration was denied by order dated January 4, 2018. VII RDI-A09610-09612. Notice of entry of that order was given on January 5, 2018. III RA518-524. Thus, Gould had 20 days from January 5, 2018, to file his motion for attorneys' fees. Because the time to do so had already "expired" on January 25, 2018, it no longer could "be extended by the court . . . ." Nev. R. Civ. P. 54(d)(2)(B). RDI's September 7, 2018 Fee Motion—purportedly filed on behalf of Gould as well—was therefore months too late.

RDI's Opening Brief does not raise the (un)timeliness of Gould's request for attorneys' fees. " 'Issues not raised in an appellant's opening brief are [generally] deemed waived.' " *Bertsch v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 33, 396 P.3d 769, 772 (2017) (quoting *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011)) (internal quotation marks omitted). Although the Court recently granted Gould's counsel more time to move for substitution in this case, Mr. Gould's rights expired before his death on August 6, 2018, IV RA866-868, and cannot be revived on appeal. Gould would therefore not be entitled to attorneys' fees in any event.

C. The sheer size of RDI's attorneys' fees also warranted an outright denial of fees.

Where, as here, courts have discretion to award attorney's fees under a fee-shifting statute, "such discretion includes the ability to deny a fee altogether when, under the circumstances, the amount requested is outrageously excessive." *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, 903 F.3d 396, 398 (3d Cir. 2018) (citing *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980); *Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258–60 (D.C. Cir. 1993); *Fair Hous. Council of Greater Wash. v. Landow*, 999 F.2d 92, 97 (4th Cir. 1993); *Lewis v. Kendrick*, 944 F.2d 949, 956–58 (1st Cir. 1991)).

In *Clemens*, counsel for the prevailing plaintiff—who was awarded $100,000 in punitive damages under Pennsylvania's bad faith statute—filed a request for $946,526.43 in fees and costs. *Clemens*, 903 F.3d at 398. The district court awarded $0 because it found, *inter alia*, that: (1) most billed hours were not adequately described or supported; (2) the motion did not explain which one of the many attorneys working on the case performed which task; and (3) the 562 hours spent to prepare for trial were "outrageous" given the straightforward nature of the case. *Id*. at 399, 401.

Here, the **$15.9 million dollars** in legal fees incurred by the directors and RDI were equally "outrageous" and justify affirming the district court's order denying attorneys' fees on this alternative ground, as in *Clemens*. RDI alone incurred almost **$3 million** in attorneys' fees. As a mere nominal defendant, it should have limited its legal fees to those related to Cotter Jr.'s standing to bring suit. *See Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1005, 84 Cal. Rptr. 3d 642, 652 (2008) ("a nominal defendant corporation generally may not defend a derivative action filed

on its behalf"). Yet, RDI had **23 timekeepers** working on the case, and, as in *Clemens*, RDI did not identify the roles of any of them. VIII RDI-A10585.[13]

The Cotter directors spent **$11.7 million** in legal fees—$1.7 million more than the $10 million D&O policy limit of which they were well aware—and this before trial on the merits had even begun. VIII RDI-A10586-10608. They were represented by more than eight Quinn Emanuel attorneys who billed between $365 and $1,147 per hour. VIII RDI-A10588-10591.

Director Gould was represented by a total of **nine** attorneys: six Bird Marella attorneys and three Nevada attorneys. VIII RDI-A10602-10604, RDI-A10607-10608. He incurred **$1.4 million** in attorneys' fees before trial. *Id.*

The RDI directors' failure to monitor their attorneys' fees, allowing them to exceed the D&O policy, is a testament of reckless and irresponsible corporate governance. Just the $11.7 million in legal fees incurred by the Cotter directors translates into $325,000 per month. VIII

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[13] The parties' stipulation that RDI was not required to submit billing records with its Fee Motion until further order of the district court did not relieve RDI from its obligation to list the attorneys who worked on the case and their billable hour. IV RA858-865. RDI only provided the "hourly rate ranges" of the 23 timekeepers without saying what hourly rate was charged to RDI and who worked when on this case. VIII RDI-A1-585.

RDI-A10593 (¶ 21). In the first month of litigation alone, Quinn Emanuel billed more than $120,000. VIII RDI-A10592-10593 (¶ 20). By November 2015—months before depositions were taken or scheduled—Quinn Emanuel's monthly bill was almost half a million dollars. *Id.* Quinn Emanuel billed the Cotter directors more than $3 million between February and August 2016—*i.e.*, $500,000 per month. *Id.*

RDI will likely argue in its Reply that this case is unlike *Clemens*, because RDI's legal bills and those of the directors were not submitted to the court and found to be inadequately described. But that argument would miss the point: no amount of detail in the billing entries could excuse the astonishing amount of legal fees incurred by the directors and RDI on a monthly basis. The sheer excessiveness of the defendants' attorneys' fees therefore provides an alternative ground to affirm the order denying attorney's fees.

D. RDI's appeal from the order denying judgment in its favor is procedurally and substantively defective.

RDI's cursory argument to support overturning the district court's order denying its Motion for Judgment in its Favor, OB at 50-52, betrays its weakness and patently fails to show an abuse of discretion.

1. The order denying RDI's Motion for Judgment in its Favor is not appealable.

As this Court has held, "not all post-judgment orders are appealable" under NRAP 3A(b)(8). *Burton v. Burton*, 99 Nev. 698, 700, 669 P.2d 703, 705 (1983). The post-judgment order must be "an order affecting the rights of some party to the action, growing out of the judgment previously entered." *Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002) (internal quotation marks omitted). "It must be an order affecting rights incorporated in the judgment." *Id*. Thus, for example, a post-judgment order awarding costs is appealable because it grows out of the judgment to the prevailing party that forms the basis for costs. *See id*. at 917, 59 P.3d at 1124 (an order retaxing costs is "clearly . . . a special order after final judgment"). An order denying a party's motion to enforce a divorce decree is appealable because the spouse's "right to receive these funds was established by the [judgment] decree." *Davidson v. Davidson*, 132 Nev. 709, 713, 382 P.3d 880, 883 (2016).

Here, the order denying RDI judgment in its favor did not grow out of the final August 14, 2018 judgment. That judgment did not incorporate or grant RDI any rights or relief: it decided only Cotter Jr.'s claims against the directors. VII RDI-A10542-10552. Thus, the judgment

did not provide RDI with a basis for post-judgment relief to begin with. As a result, the order denying RDI a judgment is not appealable and RDI's appeal from this order should be dismissed.

2. The district court correctly denied RDI's Motion for Judgment in its Favor.

Even assuming the Court has jurisdiction over RDI's appeal, there is no basis to reverse the district court's sound ruling that RDI, as a nominal defendant, was not entitled to judgment in its favor.

As RDI admits, no claims were made against it or decided in its favor that could entitle RDI to a judgment in its favor. OB at 6. As a result, RDI did not, and could not, prevail on a "significant issue" in the case—no matter how many answers RDI filed to Cotter Jr.'s complaints asking that his complaints be dismissed. OB at 51. RDI lost each motion to dismiss based on demand futility. I RA188 (at 16:2-30); I RA195-197; III RA539-555; VIII RDI-A10779-10782. In fact, as the nominal defendant and "real party in interest" on whose behalf Cotter Jr.'s derivative case was brought, *Ross*, 396 U.S. at 538-39, RDI was arguably a *non*-prevailing party when the derivative case was dismissed.

RDI's cursory argument that it was required to defend itself against Cotter Jr.'s lawsuit is also baseless. As the case law on which RDI

relies makes clear, a nominal defendant must "take and maintain a wholly neutral position taking sides neither with the complainant nor with the defending director." *Swenson v. Thibaut*, 250 S.E. 2d 279, 293-94 (N.C. App. 1978) (internal quotation marks and citation omitted). The only exception to this rule is when the lawsuit poses a threat to the corporation, such as when the action seeks to "enjoin the performance of a contract by the corporation, to appoint a receiver, to interfere with a corporate reorganization or to interfere with internal management where there is no allegation of fraud or bad faith." *Swenson*, 250 S.E.2d at 294. None of these exceptions applied here.

RDI's argument that if Cotter Jr. had prevailed, RDI would have been required to "take certain actions" is purportedly based on five subsections of paragraph 3 of Cotter Jr.'s prayer for relief in the SAC, OB at 51, but only one subsection is directed at RDI and asks RDI—"*and the individual defendants*"—to make certain corrective disclosures. I RDI-A00535 ¶ 3(c) (emphasis added). But Cotter Jr.'s request to correct public filings—such as the false statement in RDI's June 12, 2015 Form 8-K that Cotter's employment agreement required him to resign "as a director" when he was terminated as a CEO, II RDI-A01070—anything *but* threatened RDI and provided no basis whatsoever for RDI to take on an

adversarial position. The relief sought by Cotter in the remaining subsections of paragraph 3 did not concern RDI but its directors. I RDI-A00534 (¶ 3(a)) (asking for an order declaring that the directors lacked independence and disinterestedness when voting to remove him); I RDI-A00535 (¶ 3(d)) (asking for an order enjoining the directors to manipulate the 2017 annual shareholders meeting). This single request for corrective disclosures was hardly a "significant issue" in the case on which RDI prevailed.

For all these reasons, the Court should affirm the order denying RDI's Motion for Judgment in its Favor.

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VI. CONCLUSION

The district court's order denying RDI's extravagant request for $15.9 million in discretionary attorneys' fees was more than sound; so was the district court's order denying RDI a judgment in its favor when RDI was a mere nominal defendant that did not prevail. The Court should affirm the Order Denying Defendants' Motion for Attorneys' Fees, and dismiss RDI's appeal from the Order Denying RDI's Motion for Judgment in its Favor or, in the alternative, affirm the Order Denying RDI's Motion for Judgment in its Favor.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that I have read this **ANSWERING 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 13,589 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 on is to be found.

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CERTIFICATE OF SERVICE

I certify that I am an employee of MORRIS LAW GROUP; I am familiar with the firm's practice of collection and processing documents for mailing; that, in accordance therewith, I caused the following document to be e-served via the Supreme Court's electronic service process. I hereby certify that on the 29th day of August, 2019, a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF IN CASE NO. 77733** was served by the following method(s):

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