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 (Case No. 76981)
Eighth Judicial District Court, Dept. XI
The Honorable Elizabeth G. Gonzalez

APPELLANT'S OPENING 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under NRAP 3A(b)(1), which allows an appeal to be taken from a "final judgment entered in an action . . . commenced in the court in which the judgment is rendered." Cotter Jr. commenced this case on June 12, 2015 in the Eighth Judicial District Court. I JA1-29.[1] On December 28, 2017, the district court entered summary judgment in favor of five of the eight defendants, which portion it certified as final under NRCP 54(b) by order dated January 4, 2018. XXV JA6065-6071, JA6179-6188. Cotter Jr. appealed from that order on February 2, 2018. XXV JA6295-6297. *See* Case No. 75305.

On August 14, 2018, the district court entered its findings of fact and conclusions of law ("FFCL), granting summary judgment in favor of the three remaining defendants. XXXIV JA8401-8410. Notice of entry of the FFCL was served on August 16, 2018. XXXIV JA8412-8425. Cotter Jr. timely filed his notice of appeal from the FFCL on September 13, 2018. XXXVII JA9108-9110.

[1] "JA" refers to Joint Appendix. The Roman numeral preceding "JA" refers to the volume(s) of the appendix in which the cited page(s) can be found.

II. ROUTING STATEMENT

The Court has jurisdiction over this appeal under NRAP 17(a)(9) because this case originated in business court. I JA1.

III. ISSUES PRESENTED

In 2015 a majority of interested and non-independent RDI directors voted in favor of two principal decisions on which Cotter Jr.'s fiduciary duty claims were based. In 2017—more than two years later and on the eve of trial of these claims against the interested directors—RDI's conflicted counsel advised a Special Independent Committee ("SIC") to recommend ratification of the 2015 decisions by the five directors who had been recently dismissed. Under these circumstances,

1. Did the district court err in concluding that the ratification vote was entitled to protection under the business judgment rule and disposed of Cotter Jr.'s claims for breach of fiduciary duty, when the SIC was advised by the same counsel who advised RDI and the interested directors?

2. Did the district court err in finding that the directors had met all the requirements for ratification under NRS 78.140 and were immune from suit when: (a) the directors did not ratify a "contract or

transaction"; (b) the ratification was admittedly a litigation tactic; and (c) there were genuine issues of material fact as to whether the five voting directors voted independently or at the direction of conflicted counsel for nominal defendant RDI to further the interests of the remaining three interested directors represented by other counsel?

IV. STATEMENT OF THE CASE

A. Nature of the Case.

This is a shareholder derivative action for breach of fiduciary duty owed to nominal defendant Reading International, Inc. ("RDI"), a publicly traded corporation, and its shareholders by all directors. III JA519-575. Appellant Cotter Jr. is a substantial shareholder and a former director, President, and CEO of RDI. I JA79; III JA526 (¶ 17). His sisters, respondents Ellen Cotter and Margaret Cotter, are members of the RDI board of directors (the "Board") and at all times relevant hereto the controlling shareholder(s) of RDI. III JA526-27 (¶¶ 18–19). The remaining individual respondents are or were members of the Board, as well as members of certain Board committees. III JA527-30 (¶¶ 20–25); XX JA5053-5054 (¶¶ 20-25).[2]

[2] Director Gould passed away on or about August 6, 2018. LII JA12894-95.

B. Course of the proceedings and disposition below.

Cotter Jr. filed this lawsuit on June 12, 2015. I JA1. After discovery and two rounds of (partial) summary judgment motions that were denied, the district court on December 28, 2017, shortly before trial was set to commence, granted summary judgment in favor of five of the eight director defendants on the grounds that there were no genuine issues of material fact related to their interestedness and/or independence. XXV JA6065-6071. The order dismissing the five directors is the subject of Case No. 75053.

On August 14, 2018, the district court also granted summary judgment in favor of the remaining three defendants on the grounds that an independent majority of directors had ratified the decisions challenged by Cotter Jr. and that their ratification vote was protected from challenge by the business judgment rule. XXXIV JA8401-8410. The district court entered its findings of fact and conclusions of law ("FFCL") on August 14, 2018. Notice of entry of the FFCL was given on August 16, 2018. XXXIV JA8412. Cotter Jr. timely appealed from the FFCL on September 13, 2018. XXXXVII JA9108-9110.

V. STATEMENT OF RELEVANT FACTS.

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

RDI is a publicly traded Nevada corporation engaged in the development, ownership, and operation of multiplex cinemas and retail and commercial real estate in the United States, Australia, and New Zealand. I JA74, JA78-79, JA207.[3]

Appellant Cotter Jr. became a director of RDI in 2002. I JA78. In 2005, he became involved in RDI's management. XVII JA4148. In 2007, Cotter Jr. was appointed Vice Chairman of the RDI board of directors, and in 2013, he was appointed President of RDI. I JA78. In August 2014, when his father, Cotter Sr., resigned as CEO for health reasons, the Board unanimously appointed Cotter Jr. CEO. I JA78; XX JA5025 (¶ 17).

B. After their father's death, the Cotter sisters obtain control over RDI.

Cotter Sr. passed away in September 2014. I JA180. Thereafter, Cotter Jr.'s two sisters Ellen and Margaret Cotter, who were also directors of the Board (the "Cotter sisters"), refused to accept Cotter Jr.'s authority as

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[3] 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, in particular those leading up to the June 12, 2015, complaint.

CEO and refused to report to him. XVII 4151A-C; XIV JA3405; XXI JA5055 (¶ 41). To increase their control at RDI and decrease Cotter Jr.'s, the Cotter sisters took a number of actions, including, but not limited to: (1) increasing the influence of RDI's theretofore dormant executive committee of which they were the controlling members, XIV JA3407, JA3409-10; XVII JA 4151A-C; (2) proposing they have management power within their respective "operational areas," XIV JA3408-09, JA3418-3421; XVII JA 4151A-C; (3) initiating trust and estate litigation against Cotter Jr. in the California probate court to obtain control of RDI Class B voting stock sufficient to elect all of RDI's directors, I JA98; and (4) proposing to terminate Cotter Jr. as CEO. XIV JA3466.

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 criteria that the CEO search committee, endorsed by the Cotter sisters, had earlier found crucial. XVII JA4510; XXI JA5146, JA5155, JA5169-70, JA5180, JA5189-90. Cotter Jr.'s other sister, Margaret Cotter, was then granted her wish to become RDI's Executive Vice President of Real Estate Management and Development-NYC despite lacking any

experience or qualifications for this position. XXI JA5067 (¶¶ 149-151); XXI JA5118-5119.

C. Cotter Jr. files a derivative lawsuit on RDI's behalf.

Cotter Jr. filed suit upon his termination in June 2015, and twice amended his complaint. I JA1-29, II JA263-312, III JA519-575. All his claims were made against only the individual directors and damages and injunctive relief were sought *on behalf* of RDI—not against it. *Id*.

D. RDI actively defends against the lawsuit and sides with the directors accused of breaching their fiduciary duty.

Nevertheless, nominal defendant RDI—through its outside counsel, Greenberg Traurig—treated RDI as a party adverse to its own interests and actively defended *against* Cotter Jr.'s derivative complaint throughout the entire litigation. For example, RDI filed a motion to compel arbitration and stay the action, arguing that the derivative case Cotter Jr. had filed on its behalf was merely an effort to get his job back. I JA127-148. The district court denied that motion. II JA257-259. RDI filed answers to Cotter Jr.'s complaints and asked that the claims filed against the directors be dismissed. II JA397-418, XX JA4891-4916. RDI filed joinders to all six partial motions for summary judgment filed by the individual directors and to director Gould's separate motion for summary judgment on the

merits of the case. XV JA3707-3808; XVI JA3806-3814; XIX JA4568-4609. RDI's counsel made arguments in court on the merits of Cotter Jr.'s claims over the objection of Cotter Jr.'s counsel, which the district court did not act on. XIX JA4805. RDI also joined in the directors' motion for an evidentiary hearing regarding Plaintiff's adequacy as a derivative plaintiff. XX JA4978-4980.

RDI's outside counsel, Greenberg Traurig, also spent several days in Los Angeles in December 2017 to prepare both Cotter sisters for trial. XXXVII JA9206.

E. Two years into the litigation, a Special Independent Committee is formed.

At no time during the litigation did RDI's board of directors establish a special litigation committee to investigate Cotter Jr.'s claims. Only in August 2017—more than two years into the litigation—RDI's board created a "special independent committee" ("SIC"). XXVII JA6745; XXXI JA7652, JA7659-7665. The Charter of the SIC was prepared in whole or in part by RDI's outside counsel, Greenberg Traurig. XXVII JA6747. The Charter describes the SIC's task as "consideration of matters related to the" various "Cotter Related Proceedings" because of the stated "material impact" of these Proceedings on RDI. XXXI JA7661. The "Cotter Related

Proceedings" included not only this derivative case but also the arbitration that RDI had initiated in California against Cotter Jr. and the trust and estate litigation between the Cotter sisters and Cotter Jr. in California. XXXI JA7659-7661.

"To fulfill its responsibilities and duties," the SIC was "authorized," among other things, to:

> i. . . . . investigate . . . evaluate, monitor and exercise general oversight of any and all activities of the Company directly or indirectly involving, responding to or relating to the Purpose . . .
>
> ii. … Meet, confer and receive advice of legal counsel . . . and/or third parties in connection with the Purpose, and, instruct legal counsel representing the Company to . . . file pleadings or other papers, appear in any proceedings… and otherwise take such steps as the [SIC] deemed to be in the best interest of the Company in any Cotter Related Proceedings or
>
> iii. Participate in and direct legal counsel representing the Company to conduct negotiations and take actions to resolve matters related to the Cotter Related Proceedings…
>
> iv. Report to the Board, as it determines to be appropriate . . ., its recommendations and conclusions with respect to the determinations delegated to it by this Charter; and
>
> v. Take all such other actions as the [SIC] may deem to be necessary or appropriate in connection with the above.
>
> **********
>
> The [SIC] shall have the authority to enter into or bind the Company in connection with a Cotter Related Proceedings . . . [except] to …approve any merger, consolidation or liquidation of the Company.

XXXI JA7663-7765.

Although the SIC had authority "to retain" its own "legal counsel," XXXI JA7665, it did not do so. The SIC was represented by Greenberg Traurig—the same counsel already representing nominal defendant RDI. XXVII JA6745, JA6748-6749, JA6761-6765.

F. The Cotter directors supplement their previously denied Partial MSJs.

On November 9, 2017, the Cotter directors filed a Supplement to five motions for partial summary judgment ("Partial MSJs") they had initially filed in 2016. VI-XVV JA1486-3336; XIX-XX JA4736-4890, XX JA4981-5024. In October 2016, the district court had denied outright the Cotter directors' Partial MSJ No. 1, which sought dismissal of Cotter Jr.'s fiduciary duty claims pertaining to his termination, and denied four other Partial MSJs with leave to renew after Rule 56(f) discovery. XX JA4919.

In response to the Cotter directors' 2017 Supplement, Cotter Jr. filed supplemental oppositions to Partial MSJs Nos. 1, 2, 5, and 6 and to Gould's MSJ. XXI-XXII JA5094-JA5509.

G. The district court dismisses five of the eight director defendants.

On December 11, 2017, the district court held a hearing on the Cotter directors' Partial MSJs. XXIII JA5718-5792. Following argument from counsel, the district court granted Partial MSJ No. 1 (related to Cotter Jr.'s termination) and Partial MSJ No. 2 (related to the directors' independence) as to director defendants McEachern, Kane, Gould, Codding, and Wrotniak and dismissed all Cotter Jr.'s claims against these five directors on the grounds that he had failed to raise a genuine issue of material fact regarding their disinterestedness and independence. XXIII JA5758, JA5761-5762; XXV JA6068-6069.[4]

However, the district court did not dismiss the Cotter sisters and director Adams, and denied Partial MSJ Nos. 1, 2, 5, and 6 as to them, finding there were genuine issues of material fact as to their disinterestedness and independence. *Id.* But the dismissal of all claims against five directors narrowed down Cotter Jr.'s derivative claims against the three remaining directors to two principal decisions in which they had

[4] The Partial MSJs and the specific rulings on them are set out more fully in Cotter Jr.'s Opening Brief in Case No. 75053, which concerns his appeal from the district court's December 28, 2017 order dismissing the five director defendants.

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 directors 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 Stock to pay for the exercise of the option to assure the Cotter sisters voting control at the 2015 annual shareholders meeting (the "Share Option Decision"). XXIII JA5691 (B.2, B.3).

H. RDI's counsel prepares the Cotter sisters for trial and informs them about a possible way to avoid it.

On December 13, 2017, two days after the five directors were dismissed, RDI's litigation attorney Mark Ferrario traveled to Los Angeles and spent several days there for "trial preparation" with Margaret Cotter. XXXVII JA9138 (at *Il.* 6-12), JA9206. That same day and again on December 15, 2017, Mr. Ferrario and his partner, Greenberg Traurig attorney Michael Bonner, exchanged emails with RDI's general counsel about the SIC and "ratification process" on which emails the Cotter sisters were copied. XXIX JA7290 (entries ending in 60907 & 60911). Mr. Ferrario also personally discussed "ratification" with Margaret Cotter "on or about December 15, 2017." XXX JA7554. Mr. Ferrario again traveled to Los Angeles on

December 20, for "Trial preparation with Ellen Cotter" and "Trial prep with co-counsel and client." XXXVII JA9206.

I. RDI's counsel advises the Special Independent Committee on ratification of the Share Option and Termination Decisions.

On December 21, 2017—the same day nominal defendant RDI's attorney Ferrario was preparing the Cotter sisters for trial and just ten days after the dismissal of five directors—Mr. Ferrario and Mr. Bonner telephonically met with SIC members Gould, McEachern, and Codding and discussed ratification of the Share Option and Termination Decisions with them. XXVI JA6513B, XXVII JA6761-6762. Mr. Bonner admitted that ratification was discussed with the SIC. XXVII JA6761. SIC member and Chairman Gould testified that the SIC formally took action to advance the ratifications by making a request that the subject be put on the agenda of the next board meeting, and admitted that "**ratification might be a litigation strategy**." XXX JA7505, JA7508 (emphasis added).

RDI's corporate counsel Michael Bonner did not prepare minutes of the December 21 SIC meeting until late January 2018. XXVII JA6750-6751 (at 24:22-25:6). Cotter Jr. and his counsel (and the district court) were not made aware of the December 21, 2017 SIC meeting until months later. XXVI JA 6441 (¶ 16); XXVII JA6705.

However, days after the SIC meeting, an email was drafted wherein SIC Chairman Gould requested, on behalf of the five directors who had been recently dismissed, that ratification of the Share Option and Termination Decisions be put on the agenda for a special board meeting scheduled on December 29, 2017—just ten days before trial against the Cotter sisters and Adams was to start. XXX JA7506; XXV JA6281. But Gould did not draft or edit that email, and none of the other four directors saw it until months later, during their depositions. XXX JA7506 (at 530:18-19), JA7514 (at 683:14-19), JA7522 (at 544:3-8), JA7530, JA7487. It was drafted by Greenberg Traurig with input from RDI's general counsel, who reported to defendant Ellen Cotter and passed the draft by her for input. XXX JA7506 (530:18-25); XXVI JA6375 (entries 60450, 60452, 60464), JA6385 (entry 60846); XXVI JA6350A.

J. RDI's counsel advises the Board on ratification of the Termination and Share Option decisions.

At the December 29, 2017 special board meeting, the recently dismissed five directors—three of whom SIC members who had previously discussed ratification with RDI's counsel, Greenberg Traurig—voted to "ratify" the Termination Decision and the Share Option Decision that were made in 2015. XXV JA6156-6161.

While delaying to draft the December 21, 2017 SIC meeting minutes, XXVII JA6750-6751, Michael Bonner immediately prepared the minutes of the December 29, 2017 special board meeting. *Id.*; XXVII JA6768-6770. Days later, RDI and the three remaining director defendants used the minutes of the December 29, 2017 meeting in motion papers aimed at obtaining a final judgment on all claims, as discussed next.

K. RDI and the Cotter sisters use the ratification to avoid the imminent trial.

1. RDI advises the district court that a judgment is forthcoming based on the ratification.

On December 29, 2017, Cotter Jr. filed a motion for Rule 54(b) certification of the order dismissing the five directors and a stay to allow Cotter Jr. to file an appeal. XXV JA6092-6106. Four days later, the three Cotter directors filed an opposition to Cotter Jr.'s motion but opposed only the stay. XXV JA6132-6139. They took "no position on [Cotter Jr.'s] request for certification under Nevada Rule of Civil Procedure 54(b)." XXV JA6132-6133 (*ll.* 23-24), 6139 (*ll.* 3-4). RDI filed a Joinder to the directors' opposition, but argued *against* Rule 54(b) certification, because RDI "anticipated that there will be only a short time before there is a final judgment in this matter, mooting any need for a Rule 54(b) certification."

XXV JA6140. RDI anticipated a forthcoming judgment based on the recent dismissal of the five directors and the ratification of the Share Option and Termination Decisions. XXV JA6141, JA6146-51. RDI relied on and cited to the draft minutes of the December 29, 2017 special board meeting, XXV JA6146, which it attached to Errata filed the same day. XXV JA6153-6161.

Although Greenberg Traurig did not represent the Cotter sisters and Adams, the Joinder it filed on behalf of its client, nominal defendant RDI, argued that the "Ratification by a Majority of Disinterested Directors of Decisions Challenged By Cotter, Jr. Entitles the Purported Interested Directors to the Protections of the Business Judgment Rule as to Such Decisions." XXV JA6148-6149. RDI's counsel also argued that Cotter Jr. failed to show that any loss to their client was caused by the remaining director defendants Greenberg Traurig did not represent. XXV JA6150. Finally, RDI's Joinder argued that "Cotter, Jr. is unable to satisfy the elements for a claim of aiding and abetting a breach of fiduciary duty against Ellen or Margaret Cotter, as he cannot establish that any other Defendant is liable for a breach of fiduciary duty." *Id*.

RDI's January 3, 2018, Joinder did not say a word about the December 21 SIC meeting and the role its counsel played at that meeting which led to the December 29, 2017, ratification.

2. The non-independent Cotter directors file a Motion for Judgment as a Matter of Law based on ratification on the eve of trial.

On January 4, 2018, just four days before trial was to start, the remaining director defendants filed a "Motion for Judgment as a Matter of Law." XXV JA6192-6224. That Motion, much like the Joinder RDI filed the day before, relied on and attached the minutes of the December 29, 2017 special board meeting, argued that the recent ratification vote had made trial unnecessary, and that judgment in their favor should be rendered. *Id.*; XXV JA6224A-F. The Motion did not mention the December 21, 2017 SIC meeting either, and instead argued that "the full RDI Board convened a Special Meeting on December 29, 2017 at the request of the five disinterested, independent directors," XXV JA6198—when in fact some of these directors were not even aware that such request had been made on their behalf. XXX JA7514, JA7530.

3. RDI renews its Demand Futility Motion on the eve of trial.

Also on January 4, 2018—days before the scheduled trial, XXV JA6281—RDI filed a "Motion to Dismiss for Failure to Show Demand Futility" ("Demand Futility Motion"), based on the recent dismissal of five directors for their independence and disinterestedness. XXV JA6162-6170.

L. The district court denies the belated motions and allows discovery on ratification.

The district court denied both RDI's Demand Futility Motion and the director defendants' Motion for Judgment as a Matter of Law because they were not timely filed by the November 9, 2017 deadline for dispositive motions. XXV JA6266 (at 3:13-17), JA6273-6274.

After the trial was continued for unrelated reasons, the district allowed Cotter Jr. 75 days to conduct discovery with respect to the ratification that occurred on December 29, 2018. XXV JA6284, 6290-6291. Cotter Jr. promptly served document requests and subpoenas on the former and current director defendants and RDI. XXVI JA6321-6334, JA6459-6512. However, the directors and RDI were slow to produce the requested documents, which resulted in a series of discovery motions filed by Cotter Jr. XXV-XXVI JA6298-6561, XXIX-XXXI JA7222-7607.

Although Cotter Jr. had asked, among other requests, for all documents relating to "the decision to call the [special board] Meeting to ratify the prior decisions" and any "advice requested or given by counsel" in connection with it (*e.g.*, XXVI JA6332, JA6468), the defendants and RDI failed for months to produce or make reference on a privilege log to the minutes of the December 21, 2017 SIC meeting during which RDI's counsel, Greenberg Traurig, had advised the SIC to recommend ratification of the Termination and Share Option Decisions. XXVI JA6440-6441.

Cotter Jr.'s counsel only learned of the December 21 SIC meeting when he deposed the SIC members. XXVI JA6441 (¶16). SIC Chairman 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. XXVI JA6441 (¶ 15). Mr. Gould and his counsel thereafter claimed he accidentally deleted his entire email inbox. XXVII JA6570, JA6733-6734.

It was not until April 12, 2018 that Greenberg Traurig produced heavily redacted minutes from the December 21, 2017 SIC meeting. XXVI JA6442 (¶ 17), JA6513-6513C (filed under seal). Cotter Jr. filed a Motion to Compel and a Motion for Omnibus Relief based on the defendants'

discovery failures, asking, among other relief, for an evidentiary hearing to determine whether the defendants' failure to produce or log the SIC December 21 meeting minutes was intentional. XXV JA6298-6301; XXVI JA6302-6431, JA6433-34.

M. The district court holds an evidentiary hearing and orders the directors to timely produce all ratification documents.

Based on defendants' belated production of the minutes of the December 21 SIC meeting and their failure to inform the district court and Cotter Jr. about it before trial was initially set to start, the district court ordered an evidentiary hearing. XXVII JA6717-6718. At the evidentiary hearing, Greenberg Traurig attorney Michael Bonner testified that he had quickly prepared the minutes of the December 29 special board meeting due to the "legal consequence" of the Ratification decisions. XXVII JA6767 (at 41:22-25). But Mark Ferrario, RDI's litigation counsel, admitted and the district court understood that the minutes were prepared so quickly because they were needed to support the directors' Motion for Judgment as a Matter of Law filed several days later. XXVII JA6769-70 (at 43:5-44:16) (THE COURT: "That was why you required them so quickly, Mr. Ferrario." MR. FERRARIO: "Who cares?" THE COURT: "So you could come and wave it and say, hey, Judge, I win now.").

Following the evidentiary hearing, the district court granted Cotter Jr.'s discovery motion for omnibus relief, in part, ordering all (former) defendants and RDI to produce, *inter alia*, all documents relating to the December 21, 2017 SIC meeting and all documents related to ratification, regardless of the time period. XXXIV JA8398-8399. The district court also granted the directors' motion for leave to file a dispositive motion based on the ratification. XXVII JA6806-6807 (at 80:23-81:16). But the district court specifically ordered them not to "slow play" Cotter Jr.'s counsel and to timely produce the ratification documents so that he would be "ready to file his opposition" and not require additional Rule 56(f) discovery. XXVII JA6807 (at 81:6-16).

But RDI and the directors did not timely produce the ratification documents. XXXI JA7575-7576 (¶¶ 10-16). RDI had still not completed its production on June 1, 2018, when the Cotter sisters and Adams renewed their motion for summary judgment based on the December 29 ratification ("Ratification MSJ"). XXIX JA7173-7221, XXXI JA7576 (¶¶13-15). Cotter Jr. therefore filed a Motion for Relief based on the non-compliance with the May 2, 2018 production order, and a Motion to

Compel based on documents improperly withheld as privileged. XXIX-XXXI JA7222-7607.

N. The district court grants the Ratification MSJ despite the presumption that the ratification was a sham or a fraud.

On June 19, 2018, the district court heard the Ratification MSJ, Cotter Jr.'s Motion for Relief, and his Motion to Compel. XXXIV JA8343-8394. The district court granted, in part, Cotter Jr.'s Motion for Relief and Motion to Compel, announcing it would do an *in camera* review of documents withheld as privileged. XXXIV JA8377.

Because the documents were untimely produced, the district court imposed as an evidentiary sanction for purposes of the pretrial motions "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." XXXIV JA8377 (at 35:16-25).

Next, the district court questioned whether NRS 78.140, which talks about a "contract or transaction," could apply to the ratification of the Termination and Share Option Decisions at issue. XXXIV JA8369-8372 (at 27:22-30:5). But after hearing further argument from the parties' counsel, the district court found that the Cotter sisters and Adams had overcome the rebuttable presumption, and that the ratification the Termination and

Share Option Decisions was protected by the business judgment rule. XXXIV JA8389. With respect to the legal advice of Greenberg Traurig, the district court reasoned:

> The typical practice is to have independent advisers provide information to the board and/or special committees under NRS 78.138. While that is certainly a cleaner practice, it is uncontested here that Greenberg Traurig, qualified and experienced counsel, under 78.138(2)(b) gave legal advice . . . related to the ratification to the directors that the Court had previously determined to be independent. The advice given was protected by the attorney-client privilege based upon the Wynn case . . . and the Court must honor the ratification by those independent directors and respect their business judgment after their reliance upon Greenberg Traurig under NRS 78.138(2)(b).

XXXIV JA8389 (at 47:3-18).

O. The district court enters its findings of fact and conclusions of law.

On August 14, 2018, the district court entered its findings of fact and conclusions of law, entering final judgment in favor of the three remaining defendants ("FFCL"). XXXIV JA8401-8411. In addition to the findings made during the June 19, 2018 hearing, the district court found that "all of the requirements for the application of NRS 78.140" were met, [without mentioning "contract or transaction"] including that the "December 29, 2017 ratification vote was 'in good faith,' as required by NRS 78.140(2(a)." XXXIV JA8408 (¶¶ 30-31). The district court found, in

relevant part, that directors Wrotniak and Codding, who were "not present at the time these matters were initially decided . . . reasonably informed themselves of the relative merits of the decisions"; that no director voting on ratification was interested in the ratified transaction; and that "corporate counsel was present and advised the entire Board of its fiduciary duties under Nevada law, as well as the history of each decision." *Id.* (¶ 32). The district court further found that "all of the preconditions necessary for a 'valid interested director transaction' under NRS 78.140(2)(a) [we]re present" and that there was a "rational business purpose" for the voting in favor of ratification of the Termination and Share Option Decisions. *Id.* (¶¶ 33-34).

In its conclusions of law, the district court relied on and quoted, *inter alia*, parts of NRS 78.140 and *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006). XXXIV JA8409 (¶ 39) (quoting NRS 78.140); *id.* (¶ 40) ("Citing NRS 78.140, the Nevada Supreme Court has made it clear that the business judgment rule applies 'in the context of valid interested director action, or the valid exercise of business judgment by disinterested directors in light of their fiduciary duties' "); XXXIV JA8409 (¶ 40) (citing

Shoen, 122 Nev. at 636, 137 P.3d at 1181).[5] The district court held that the directors were entitled to rely on the legal advice of Greenberg Traurig, that the substance of Greenberg Traurig's legal advice was protected by the attorney-client privilege, and that the remaining three director defendants are entitled to summary judgment based on the ratifications of the two Decisions by a majority of independent, disinterested directors. XXXIV JA8410 (¶¶ 41-43).

VI. SUMMARY OF ARGUMENT

The Court should reverse the summary judgment entered in favor of the Cotter sisters and Adams. If the ratification that formed the basis for their judgment proves anything, it is that the five directors whom the district court dismissed earlier were anything but independent. The entire ratification process was tainted by the doubly-conflicted role that counsel for RDI, Greenberg Traurig, played in the process. Instead of respecting the wholly independent position its nominal defendant client was required to take in the derivative case, RDI's counsel Greenberg Traurig was actively and simultaneously: (1) advising and preparing for

[5] The citation to NRS 78.140 appears in footnote 34 of the *Shoen* opinion. *See Shoen*, 122 Nev. at 636 n.34, 137 P.3d at 1181 n.34.

trial the Cotter sisters, who were not the firm's clients and, for derivative purposes, were adverse to RDI; (2) advising the Special Independent Committee to recommend ratification of the Termination and Share Option Decisions on which Cotter Jr.'s fiduciary duty claims against the Cotter sisters and Adams were based, to benefit the sisters; and (3) advising the board of directors to ratify the Decisions desired by the Cotter sisters to maintain their absolute control of RDI and selection of its directors. This conflict raised a genuine issue of material fact as to the independence of the five directors voting for ratification and thereby the application of the business judgment rule to insulate their ratification votes. *See, e.g., Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1147 (Del. Ch. 2006); *In re Par Pharm., Inc. Deriv. Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990).

The district court also erred in concluding as a matter of law that the directors had met all requirements of ratification under NRS 78.140. The Share Option and Termination Decisions by the three interested directors are not "contracts or transactions" capable of being ratified under NRS 78.140. There were genuine issues of material fact as to whether the ratification was in good faith for the benefit of RDI, as NRS 78.140 requires. The timing of ratification on the eve of trial, the role

played by RDI's conflicted counsel, Greenberg Traurig's discussions with the Cotter sisters about ratification before the Special Independent Committee had even met, and the admission by RDI and Gould that the ratification of the Termination and Share Option Decisions was, among other things, a "litigation strategy," all showed that the ratification process was a sham and a fraud. No subsequent "informed" vote could change that conclusion.

For these reasons and those set out below, the summary judgment should be reversed, and the matter remanded for proceeding to trial against all directors, not for the benefit of the Cotter sisters, but for the benefit of RDI.

VII. ARGUMENT

A. Standard of review.

"This court reviews a district court's grant of summary judgment *de novo*, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party," *id.*, here, appellant Cotter Jr.

B. The district court erred in concluding that the Termination and Share Option Decisions could be "ratified" under NRS 78.140.

"It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act." *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). "The meaning of the words used may be determined by examining the context and the spirit of the law . . ." *Id.* "No part of a statute should be rendered meaningless and its language should not be read to produce absurd or unreasonable results." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (internal quotation marks and quotations omitted).

1. NRS 78.140 only applies to "a contract or transaction" between two or more parties.

NRS 78.140 provides, in relevant part, that a "***contract or other transaction*** is not void or voidable solely because:

(a) The contract or transaction is between a corporation and:

(1) One or more of its directors or officers . . . . or

(2) Another corporation, firm or association in which one or more of its directors or officers are directors or officers or are financially interested

(b) A common or interested director or officer:

(1) Is present at the meeting of the board of directors . . . which authorizes or approves the contract or transaction; or

> (2) Joins in the signing of a written consent which authorizes . . . the contract. . . .; or
>
> (c) The . . . votes of a common or interested director are counted for the purpose of authorizing or approving the contract or transaction,
>
> if . . . .
>
> 2. (a) The fact of the common directorship, office or financial interest is known to the board of directors or committee, and the directors or members of the committee, other than any common or interested directors or members of the committee, approve or ratify the contract or transaction in good faith.

NRS 78.140(1)-(2) (emphasis added).

When reading NRS 78.140 as a whole and its subsections in context, it is apparent that NRS 78.140 applies only to: (1) a "contract or transaction" between a corporation and "[o]ne or more of its directors or officers"; or (2) a "contract or transaction" between a corporation and "[a]nother corporation . . . in which one or more of its directors or officers are directors or officers or are financially interested." NRS 78.140(1)(a)(1)-(2). This is the reason why the remaining subsections of NRS 78.140 speak of "*common or interested*" directors. NRS 78.140(b)-(c), NRS 78.140(2)-(4). (emphasis added). There would be no need to use the term "common director" in each of these subsections unless two contracting corporations share a "common director." Similarly, there would be no "interested

director," NRS 78.140(1)(b), (c), unless the director has an interest in the contract or transaction.

Thus, although NRS 78.140(1)(a), (b), and (c) are written as three *alternative* scenarios that do not render a "contract or transaction" void or voidable solely on those bases, NRS 78.140(1)(a) must be read together with subsections (b) and (c) to give them full meaning. Put another way, NRS 78.140(1)(a) qualifies the terms "contract or transaction" that permeate NRS 78.140 and thereby defines the statute's scope. *See* NRS 78.140(1)-(4) (using the terms "common or interested director or officer" or "common directorship, office, or financial interest," in each subsection).

This qualification is supported by, and better articulated in, Delaware's "Safe Harbor" provision, which is substantially similar to NRS 78.140 and provides, in relevant part:

> No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation . . . in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable [1] solely for this reason, or [2] solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction. . . . [if it meets the enumerated requirements of § 144].

8 Del. C. § 144.

Here, the five so-called independent directors did not ratify any "contract or transaction" between RDI and an interested director, such as Ellen Cotter and Guy Adams, that was capable of being ratified under NRS 78.140. Cotter Jr. challenged, and the directors purportedly ratified, two *decisions* made by a majority of interested directors of RDI's board: (1) the June 12, 2015 Termination Decision; and (2) the September 2015 Share Option Decision.

The directors' claim, along with RDI, that NRS 78.140 protects their "ratification" vote, is another way of saying that the statute authorizes and immunizes their breach of fiduciary duty.

The district court's judgment and the directors' Ratification MSJ do not consider and give meaning to the plain terms of NRS 78.140. Both incorrectly paraphrase NRS 78.140—replacing the term "common director" by "non-independent director," thereby depriving NRS 78.140 of its meaning. XXXIV JA8409 (¶ 39); XXIX JA7188 (at 8:3-6). The directors paraphrased NRS 78.140 in an effort to suggest that *any* decision made by a majority of interested or "non-independent" directors in breach of their fiduciary duty is a "transaction[]" that can be blessed and ratified under NRS 78.140. The district court adopted this misguided argument, XXXIV

JA8409 (¶ 39), to conclude that NRS 78.140 validated those duty-breaching decisions. That application of the business judgment rule was clearly erroneous and should be set right by this Court. The directors were not entitled to judgment on that basis to avoid trial of this derivative action, as a matter of law.

2. The case law supports that NRS 78.140 is limited to contracts and business transactions.

The relatively few cases discussing or citing NRS 78.140 all involved contracts or business transactions—not board decisions made by a majority of directors who lacked independence. *See, e.g., Shoen*, 122 Nev. at 628,636 n.34, 137 P.3d at 1175-76, 1181 n. 34 (involving business dealings and transactions between AMERCO and the "SAC entities" in which certain directors had an interest); *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 86, 734 P.2d 1221, 1224 (1987) (holding that "a corporate officer or director may contract directly with the corporation" and that such contracts "are valid, if at the time of their making, they are fair to the corporation") (citing NRS 78.140 and *Pederson v. Owen*, 92 Nev. 648, 650, 556 P.2d 542, 543 (1976)); *Pederson*, 92 Nev. at 650, 556 P.2d at 534 and holding that the construction contract between the corporation and a concrete mix company owned by a director of the corporation was fair).

The cases on which the directors relied below for their argument that their decisions could be ratified under NRS 78.140 also involved contracts and business transactions. For example, *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 252 P.3d 681 (2011) involved "**business transactions** with . . . real estate holding companies controlled by AMERCO shareholder and executive officer Mark Shoen," which the respondents alleged had been ratified by the AMERCO shareholders. *Id.* at 205, 217 n.6, 252 P.3d at 689, 697 n.6 (emphasis added). In *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150 (Del. Ch. 2005) ("*Benihana*"), at issue was the ratification of an agreement between **two corporations**—Benihana Inc. and BFC Financial Corporation—to issue $20 million of Benihana preferred stock to BFC. *Id.* at 155-56. John Abdo was a "common director" in both companies and substantial shareholder of BFC. *Id.* at 157.

3. NRS 78.140 does not permit ratification of actionable conduct.

By its terms, NRS 78.140 protects only against invalidation of contracts and transactions "*solely*" based on the director's interest in the contract or transaction. NRS 78.140(1) (emphasis added). It "deals with . . . conditions under which a corporate contract can be rendered 'un-voidable' solely by reason of a director interest." *Cinerama, Inc. v. Technicolor, Inc.*,

663 A.2d 1156, 1169 (1995) (discussing 8 Del. C. § 144) (internal citation and quotation marks omitted).

As this Court has held, "if a pre-incorporation contract made by a promoter is within the corporate powers, the corporation may, when organized, expressly or impliedly ratify the contract and, thus, make it a valid obligation of the corporation." *Jacobson v. Stern*, 96 Nev. 56, 61-62, 605 P.2d 198, 201 (1980). A corporation may impliedly ratify a contract by accepting the benefits of a contract, even if the contract was entered into without full knowledge of the directors, as in *Fed. Mining & Eng'g Co. v. Pollak*, 59 Nev. 145, 158, 85 P.2d 1008, 1012 (1939), or authorized by less than a quorum, as in *Foster v. Arata*, 74 Nev. 143, 151, 325 P.2d 759, 763 (1958).

These cases illustrate the limited purpose of NRS 78.140 of providing certainty for parties to contracts in which the corporation's director may have an interest. It prevents, for example, a corporation from avoiding its contractual obligations without a legal basis to do so. *See Foster*, 74 Nev. at 152, 325 P.2d at 763 ("a corporation cannot avail itself of the benefits of moneys loaned to it for its corporate purposes, and disavow a mortgage given without authority by its agents to secure the loan");

accord, Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 745 (Del. Ch. 2007) ("Before the 1967 enactment of 8 Del. C. § 144, a corporation's stockholders had the right to nullify an interested transaction," leading to a "potentially harsh result . . . ."). Nothing more is intended.

4. Ratification was employed in bad faith as a litigation tactic to help the Cotter sisters and Adams avoid trial.

Even assuming NRS 78.140 applied to the Termination and Share Option Decisions, the *defendants* had the burden to prove that ratification was employed in "in good faith." NRS 78.140(2)(a); *Benihana*, 891 A.2d at 173 ("Defendants have the burden to demonstrate that one of the safe harbors of § 144 applies"); *see also In Re AMERCO Deriv. Litig.*, 127 Nev. at 217 n.6, 252 P.3d at 697 n.6 ("The district court did not again consider this ratification defense"). More to the point, the Cotter sisters and Adams had the burden of proving that "that there is no genuine dispute as to any material fact" when viewing the evidence in a light most favorable to Cotter Jr., the nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

Here, at the very least, Cotter Jr. raised multiple, genuine issues of material fact as to whether the ratification was in good faith, which should also have precluded summary judgment.

First, the timing of the ratification demonstrated a lack of good faith. RDI's board did not establish the special independent committee ("SIC") in charge with supervising this litigation until August 2017, even though the Termination and Share Option Decisions were made two years earlier, in 2015. XXXVII JA6745; XXXI JA7652, JA7659-7665. Not a single director called for approval or ratification of these Decisions until trial against the Cotter sisters and Adams was imminent in December 2017. On its face, ratification was not prompted by an epiphany to do what's best for nominal defendant RDI but by lawyers wishing to serve the best interest of the company's interested directors, Ellen and Margaret Cotter.

Second, director Gould admitted that ratification was a litigation strategy. XXX JA7508. Even without his admission, the purpose of the ratification was clear: just days after the five recently dismissed directors voted to ratify the Termination and Share Option Decisions, and on the eve of trial, the Cotter sisters and Adams filed a Motion for Judgment in their Favor, arguing that ratification of these Decisions made

years earlier disposed of Cotter Jr.'s derivative claims against them that were about to be tried before a jury. XXV JA6192-6224. While stalling for more than a month to draft minutes of the SIC meeting that preceded the ratification vote, RDI's corporate counsel, Greenberg Traurig, immediately prepared minutes of the special board meeting, which the Cotter sisters used in support of their Motion to avoid trial on the merits of Cotter Jr.'s derivative claims. XXV JA6156-6161, JA6224A-F; XXVII JA6750-6751, JA6768-6770.

Third, the written email request to put ratification on the special board meeting agenda did not even come from the five recently dismissed directors. The request came from RDI's lawyers with input from Ellen Cotter. XXVI JA6350A, JA6375 (entries 60450, 60452, 60464), JA6385 (entry 60846); XXX JA7506 (530:18-25). Although the email request was purportedly made on behalf of all five directors, only director Gould saw the request before it was circulated. XXX JA7506 (at 530:18-19), JA7514 (at 683:14-19), JA7522 (at 544:3-8), JA7530, JA7487. The four other so-called independent directors admitted months later in deposition that they knew nothing about the origin and transmission of the request, and two of them

were not even aware such request had been made. XXX JA7506 (at 530:18-19), JA7514 (at 683:14-19), JA7522 (at 544:3-8), JA7530, JA7487.

Fourth, the ratification was orchestrated by RDI's conflicted counsel, Greenberg Traurig ("GT"), with the input and approval of the Cotter sisters. Two days after the five directors were dismissed, GT's attorneys informed the Cotter sisters about the "ratification process." XXIX JA7290 (entries ending in 60907 & 60911). Two days thereafter, GT attorney Mark Ferrario personally discussed ratification with Margaret Cotter. XXX JA7554. These discussions with the two interested directors started a week before GT's attorneys discussed ratification with the Special Independent Committee on December 21, 2017. XXVII JA6746, JA6761. And all the while, GT attorney Mark Ferrario was actively preparing both Cotter sisters for trial, XXXVII JA9206—even though Cotter Jr.'s complaint was brought on behalf of GT's client, RDI, *against* the Cotter sisters. III JA519-575.

Fifth, the directors, particularly Gould, and RDI withheld for months directly relevant ratification documents from Cotter Jr. XXVI JA6440-6442, JA6513. They did not produce or log as privileged any documents relative to the SIC meeting until long after the 75 days allotted

for discovery lapsed. *Id*. Gould supposedly "accidentally" deleted, without explanation, his entire email inbox. XXVII JA6570, JA6733-6734. RDI was still producing and logging documents to withhold at the time the Cotter sisters and Adams renewed their Ratification MSJ. XXIX JA7173-7221, XXXI JA7576 (¶¶ 13-15). The district court recognized this slow-playing for what it was and, for good reason, imposed as an evidentiary sanction a presumption that the ratification process was a sham and a fraud. XXXIV JA8377.

Despite all the evidence demonstrating that the ratification was an opportunistic sham and litigation tactic, the district court later concluded, as a matter of law, that the directors had overcome the presumption because a majority of independent directors made an informed decision to ratify the Termination and Share Option Decisions at the special board meeting that was scheduled on the eve of trial. XXXIV JA8409-8410.

While it is true that the five directors seemingly evaluated a number of sources, documents and other information, including consultation with RDI's conflicted attorneys, before casting their ratification vote on December 29, 2017, XXV JA6224A-F, such evidence

could not overcome the taint of acting on the advice on conflicted counsel. The district court acknowledged GT's role in this process and remarked that it would have been "the cleaner practice" for the voting directors to have consulted independent legal counsel. XXXIV JA8389. She went no further because, as she also remarked, she had earlier determined that the directors were independent, implying that once found independent, the directors were free to deal with RDI's conflicted counsel and take their advice because "Greenberg Traurig, [was] qualified and experienced counsel. . . ." XXXIV JA8389.

This view of director independence is not supported by the law. It raises the issue of the directors' "good faith" in voting to ratify two board decisions in 2015 that Cotter Jr. alleges enabled the "Director Defendants [to] Commence Looting the Company." III JA560. *See Natomas Gardens Inv. Grp. LLC v. Sinadinos,* 2009 WL 3055213, at *6 (E.D. Cal. 2009) ("In the specific context of shareholder derivative actions, courts have consistently recognized that the 'law clearly forbids dual representation of a corporation and directors in a shareholder derivative suit'. . ."') (internal citations omitted); NRS 78.140(2)(a) (requiring directors to ratify the contract or transaction "in good faith"); *Wynn Resorts, Ltd. v.*

Eighth Jud. Dist. Court, 133 Nev. Adv. Op. 52, 399 P.3d 334, 343 (2017) (the "inquiry into the procedural indicia of whether the directors resorted in good faith to an informed decision making process" includes "the identity and qualifications of any sources of information or advice sought . . . the circumstances surrounding selection of the sources . . . .") (internal quotation marks omitted); *see also In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1092 (2017) (explaining that questions of good faith may be raised if there are indicia that the investigation by a special litigation committee is "a pretext or sham") (citing and quoting *Auerbach v. Bennett*, 393 N.E.2d 994, 1003 (N.Y. 1979)).

Moreover, as discussed below, the directors did not prove the independence of the five directors at the time they voted, and the evidence discussed above belies independence.

C. The ratification process belied the independence of the five directors.

1. The Cotter sisters and Adams had the burden of proof on the independence of the five voting directors.

Ratification is a "defense," *In re AMERCO Deriv. Litig.*, 127 Nev. at 217 n.6, 252 P.3d at 697 n.6, on which the directors bear the burden of proof. *See* NRS 78.140(2)(a). Moreover, if a corporation empowers a special litigation committee (SLC) to determine "whether pursuing a

derivative suit is in the best interest of a company," courts "should not presume an SLC to be independent nor require the derivative plaintiff to bear the burden of proof" with respect to the issue of independence. *In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d at 1090. The SLC voting to dismiss a derivative suit has "the burden of establishing its independence by a yardstick that must be like Caesar's wife—above reproach." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1055 (Del. 2004) (internal quotation marks omitted) (cited in *In re DISH Network*, 133 Nev. Adv. Op. 61, 401 P.3d at 1090).

Here, all the evidence—construed in the light most favorable to Cotter Jr.—showed that the December 29, 2017 ratification was a litigation tactic to obtain the dismissal of Cotter Jr.'s case against the Cotter sisters and Adams in advance of the January 8, 2018, trial through the use of RDI's so-called "Special Independent Committee" that functioned as an SLC. Like an SLC, the "Special Independent Committee" was created to evaluate Cotter's derivative lawsuit and other Cotter litigation. XXXI JA7663-7765. The SIC's imaginative name swap—"Independent" for "Litigation"—could not mask the fact that it was advised on ratification by RDI's counsel on December 21, 2017, and following that telephonic meeting took the formal

action to request that ratification be put on the board agenda for the special board meeting. XXX JA7505 (at 528:10-13). The SIC's members and two other directors thereafter voted to ratify the Termination and Share Option Decisions with the goal of obtaining dismissal of Cotter Jr.'s derivative case. XXV JA6192-6224, JA6140-41, JA6146-51; XXVII JA6768-6770.

Thus, the Cotter sisters and Adams had "the burden of establishing [the SIC and voting directors'] independence by a yardstick that must be like Caesar's wife—above reproach." *Stewart*, 845 A.2d at 1055. They could not rely on the presumption of independence that would otherwise apply to regular business decisions by a board of directors. They could not merely point, as they did here, to *Cotter Jr.'s failure* to raise genuine issues of material fact regarding their independence, which led to the five directors' dismissal. XXIII JA5758, JA5761-5762; XXV JA6068-6069.

Nevertheless, the district court adopted the directors' argument and analysis in its summary judgment order, finding that the "five affirmative [ratification] votes" were from "those directors *whose disinterestedness and independence the Court had previously determined* in its *December 11, 2017 ruling and December 28, 2017 order*." XXXIV JA8408 (¶ 31) (emphasis added). But, as the record shows, the district court

made no such determination. It merely found that Cotter Jr. failed to raise genuine issues of material fact regarding the directors' independence and disinterestedness. XXV JA6068-6069. In fact, the district court corrected RDI's counsel on January 8, 2018, when he argued that the district court had determined the five directors were "now disinterested" by saying she had "determined there were no genuine issues of material fact . . . without [sic] the interestedness of those directors. ***Different.***" XXV JA6267 (at 4:11-17) (emphasis added).

2. The Cotter sisters and Adams did not meet their burden of proving the directors who voted for ratification were acting independently.

Courts have repeatedly held that the use of company counsel—whether by special committees or other directors supposedly acting independently—raises questions about the independence of the advisors and, thereby, the committee and the individual directors. *See, e.g., Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130, 1147 (Del. Ch. 2006) ("a special committee's decision to use the legal and financial advisors already advising the parent alone rais[ed] questions regarding the quality and independence of the counsel and advice received") (internal quotation marks and quotation omitted); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304,

1307 (3d. Cir. 1993) ("allegations of directors" fraud, intentional misconduct, or self-dealing require separate counsel" for the corporation and its directors); *In re Par Pharm., Inc. Deriv. Litig.*, 750 F. Supp. 641, 647 (S.D.N.Y. 1990) ("*In re Par Pharmaceutical*"). Thus, courts reject determinations made by directors based on the advice of counsel where the advice may be tainted by a conflict of interest. *In re Oracle Sec. Litig.*, 820 F. Supp. 1176, 1189 (N.D. Cal. 1993) (a board committee's reliance on the inherently biased advice of in-house counsel made the committee's determination "worthless").[6]

In re Par Pharmaceutical is particularly instructive. There, the nominal defendant moved to dismiss after a special litigation committee conducted an investigation and recommended dismissal, and the supposedly independent members of the company's board of directors accepted that recommendation and voted to dismiss. 750 F. Supp. at 645. The court denied the motion to dismiss, in part "because the Committee failed to retain independent counsel," and "instead relied upon the firm [that represented] the Company and its board in th[at] litigation." *Id.* at

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[6] *See generally* William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 Bus. Law. 2055 (1989).

644, 647. The court described that counsel as having a "conflict of interest." *Id*. at 647. The court further observed: "Both New York and Delaware law contemplate that a special litigation committee be represented by independent counsel." *Id*. (citing *Spiegel v. Buntrock*, 571 A.2d 767, 772 (Del. 1990); *Kaplan v. Wyatt*, 484 A.2d 501, 511 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985); *Byers v. Baxter*, 69 A.D. 2d 343, 348, 419 N.Y.S. 2d 497, 500 (App. Div. 1979)).

Here, ratification was conceived of and discussed by GT lawyers with the Cotter sisters and several other directors as a litigation tactic to further the sisters' personal interest in avoiding trial on the merits of the derivative claims against them brought by Cotter Jr. on behalf of nominal defendant RDI, which was at all material times represented by GT. Although GT may not have been expressly retained as counsel by the Cotter sisters or the other directors, GT nevertheless simultaneously advised: the SIC; the RDI board; *and* the Cotter sisters in preparation for trial on claims made *on behalf* of its client *against* them. XXV JA6156; XXVII JA6746, JA6761; XXXVII JA9138, JA9206. GT worked with them as if the firm was counsel to all of them. *Id*.

This, Cotter Jr. submits, presents a genuine issue of material fact as to the independence and good faith of the directors voting for ratification of the 2015 Decisions that could not be and was not disposed of by the district court's statement that "Greenberg Traurig, [was] qualified and experienced counsel, under 78.138(2)(b) [that] gave legal advice . . . related to the ratification to the directors that the Court had previously determined to be independent." XXXIV JA8389 (at 47:3-18). To put it gently, with the advice and encouragement of RDI's counsel who originated the ratification idea for litigation purposes, the directors voted against their own company to terminate this lawsuit to the benefit of the Cotter sisters—and themselves who were dependent on the sisters to continue their employment as directors of RDI.

This utterly conflicted role of GT, which was paid by the company controlled by the Cotter sisters, permeated the entire proceedings below—starting with RDI's contrived motion to compel arbitration, followed by RDI's inappropriate answers to Cotter Jr.'s derivative complaints, and joinders in Partial MSJs asserting positions available only to individual directors. I JA127-148, II JA397-418, XV-VI JA3707-3808; XX JA5025-5027; XXIX JA4589-4603; XX JA4891-4916, JA4978-4980. All of these

filings clearly show that under Greenberg Traurig's guidance, RDI stepped out of its neutral position as the nominal defendant and into the shoes of a partisan litigant, which demonstrated its lack of impartiality that the district court accepted.

In fact, RDI argued for judgment in favor of the Cotter sisters and Adams based on the ratification before they did so themselves, XXV JA6140, JA6149-6150, JA6192, confirming that ratification was nothing more than a litigation tactic to gain dismissal of the case while avoiding the heightened burden of proof under *In re DISH Network*. And, it worked.

It bears repeating that *none* of the five directors who were ultimately dismissed came to ratification on their own or with the advice of independent counsel between 2015 and December 2017. Some of them did not even know ratification was being considered (let alone requested on their behalf) until after Greenberg's attorneys had discussed it with the Cotter sisters and obtained their blessing to use it. XXX JA7506 (at 530:18-19), JA7514 (at 683:14-19), JA7522 (at 544:3-8), JA7530, JA7554, JA7487; XXIX JA7290 (entries ending in 60907 & 60911). Greenberg's sponsorship of the ratification process and its implementation on the eve of trial and the involvement of the Cotter sisters in the process constituted new and

sufficient evidence manifesting "a direction of corporate conduct in such a way as to comport with the wishes or interests of the [person] doing the controlling." *Shoen*, 122 Nev. at 639, 137 P.3d at 1183; *see also In re Oracle Sec. Litig.*, 820 F. Supp. at 1186 ("Since 'independent' directors are often beholden to the defendant directors who appointed them, the retention of independent counsel by these directors provides one of the few safeguards to ensure the legitimacy of their acts and to aid the court in assessing the reasonableness of a derivative settlement or termination").

The district court therefore erred in overlooking and condoning Greenberg's debilitating conflict of interest and granting summary judgment in favor of the Cotter sisters and Adams. In the absence of proof *by them* that the SIC and voting directors were free from the Cotter sisters' influence (they were directors, officers, and controlling shareholders), the ratification votes were not entitled to the business judgment rule's presumption that they voted in good faith and that all directors—interested and disinterested—are immune from liability to the nominal defendant. Cotter Jr. should have been allowed to proceed to trial on his claims.

D. The district court erred by concluding that the ratification disposed of Cotter Jr.'s breach of fiduciary duty claims.

Even assuming NRS 78.140 applied and the directors had met their burden of proving that its requirements were met, NRS 78.140(2)(a) does not necessarily protect the directors from a breach of fiduciary duty claim. As discussed above, all that NRS 78.140 says is that an interested transaction is not void "solely" on that basis if it has been ratified by a majority of disinterested directors.

Thus, the 2015 Decisions "ratified" on December 29, 2017, are still subject to claims of breach of fiduciary duty, as Delaware courts have held. In *Benihana*, Benihana of Tokyo ("BOT") alleged, among other things, that the directors of BOT breached their fiduciary duties of loyalty and care in approving a stock transaction between Benihana Inc. and BFC in which one of the directors had an interest. 891 A. 2d at 154-55, 173. The court first looked at whether the defendants satisfied 8 Del. C. § 144(a)(1)—Delaware's counterpart to NRS 78.140. *Benihana*, 891 A.2d at 174. The court noted that even if the requirements of 8 Del. C. § 144(a)(1) were met, "that section merely protects against invalidation of a transaction 'solely' because it is an interested one." *Benihana*, 891 A.2d at 174 (emphasis added). "Because BOT also contend[ed] that the Director Defendants

breached their fiduciary duties of loyalty and care," the court's analysis "d[id] not end with the "safe harbor" provisions of § 144(a)." *Benihana*, 891 A.2d at 185.

In *Cumming v. Edens*, C.A. No. 13007-VCS, 2018 WL 992877 (Del. Ch. Feb. 20, 2018) the Delaware Chancery Court took a narrow view of Delaware's Safe Harbor statute, holding that "the satisfaction of §§ 144(a)(1) or (a)(2) alone does not always have the opposite effect of invoking the business judgment rule review." *Id*. at * 20-21. "Rather, satisfaction of §§ 144(a)(1) or (a)(2) simply protects against invalidation of the transaction 'solely' because it is an interested one." *Cumming*, 2018 WL 992877, at * 21. "As such, § 144 is best seen as establishing a floor for board conduct but not a ceiling." *Cumming*, 2018 WL 992877, at * 21. Other cases confirm this view of board conduct. *See, e.g., Valeant Pharm. Int'l*, 921 A.2d at 745 ("section 144 . . . provides three safe harbors to prevent nullification of potentially beneficial transactions simply because of director self-interest" . . . and, *at least potentially*, bring it within the scope of the business judgment rule") (emphasis added).

Here, by contrast, the district court held that ratification of the 2015 Termination and Share Option Decisions was entitled to the

protection of the business judgment rule. This was error for all the reasons discussed above. Consider just the Share Option Decision: the exchange of one class of stock for another was of no value to RDI, but it clearly (and solely) served the Cotter sisters' interest in cementing their control of the corporation to the exclusion of Cotter Jr. and anyone else, including the subservient board. Thus, in submitting to and serving the sisters' self-interest, the Board clearly preferred the sisters' interests over the interest of RDI. The directors' claim, along with RDI, that NRS 78.140 protects their "ratification" vote is another way of saying that the statute authorizes and immunizes their breach of fiduciary duty.

There were thus genuine issues of material fact as to the independence of all eight directors and the good faith execution of the ratification strategy that should not have been determined on a motion for summary judgment.

VIII. CONCLUSION

The Court could and should reverse the summary judgment under review for any or all of the reasons presented in the preceding pages. Affirming the judgment would endorse what courts elsewhere have condemned: In a derivative case, a board of directors cannot be, as a matter

of law, presumed to have acted independently when the directors have acted on the advice of counsel that is not their chosen, independent counsel but counsel who is serving the personal interests of disqualified control directors while professing to represent the company. This dual conflicting representation should not be excused, as the district court did here, by observing that conflicted counsel is "experienced."

Affirming the judgment of the district court would set an undesirable and aberrant precedent. The ratification scheme was conceived of and implemented by RDI's counsel—conflicted by their own financial interest of continuing to represent the board—and executed by five directors, all of whom were acting not in the company's best interest but in the interest of the Cotter sisters who controlled the corporation and on whom the board (and RDI's counsel) were financially dependent.

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1. I hereby certify that I have read this OPENING 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 11,041 words.

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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 **APPELLANT'S OPENING BRIEF IN CASE NO. 77648** was served by the following method(s):

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